No. 15-1831

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Najim Abdullah AL SHIMARI, Taha Yaseen Arraq RASHID, Salah Hasan Nusaif AL-EJAILI, Asa'ad Hamza Hanfoosh AL-ZUBA'E,

Plaintiffs-Appellants,

-and-

Sa'ad Hamza Hantoosh Al-Zuba'e,

Plaintiff,

v.

CACI PREMIER TECHNOLOGY, INC.

Defendant-Appellee,

-and-

Timothy Dugan, CACI International, Inc., L-3 Services, Inc.

Defendants.

On Appeal from the United States District Court
for the Eastern District of Virginia, Alexandria Division
Case No. 1:08-cv-00827

BRIEF OF PROFESSIONAL SERVICES COUNCIL—THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY & COALITION FOR GOVERNMENT PROCUREMENT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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Amici curiae are non-profit trade associations. Neither of the *amici* has a parent corporation, and no publicly held corporation owns 10% or more of either *amicus* party's stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The Professional Services Council—The Voice of the Government Services Industry ("PSC") is the national trade association for the government professional and technology services industry. PSC's more than 380 member companies represent small, medium, and large businesses that provide federal departments and agencies with a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Many PSC member companies directly support the U.S. Government through contracts with the Department of Defense and other national security or humanitarian-related federal agencies, both domestically and abroad.

The Coalition for Government Procurement is a non-profit association of small, medium, and large companies that sell commercial services and products to the Federal Government, including to the U.S. military on a worldwide basis. As the single most effective voice for commercial services and product companies

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or part, and no party, party's counsel, or other person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

selling in the federal market, the Coalition's members collectively account for a significant percentage of the sales generated through the General Services Administration and Department of Veterans Affairs Multiple Award Schedules programs. Coalition members also are responsible for many of the commercial item solutions purchased directly by numerous federal departments and agencies. The Coalition is proud to have worked with government officials for more than 35 years towards the mutual goal of common-sense acquisition.

Amici are filing this brief in order to emphasize that the federal government's ability to rely upon their members for many types of essential military and non-military-related services would be seriously impaired if the political question doctrine and other dispositive pretrial defenses, such as "combatant activities" preemption and derivative sovereign immunity, were unavailable to protect contractors from private-party liability suits in connection with their performance of government-authorized work.

INTRODUCTION

Three threshold, carefully circumscribed, "battlefield contractor" tort defenses already embraced by this Court—the political question doctrine, combatant activities preemption, and derivative sovereign immunity—each reflects significant, national security-related interests, and needs to continue to be available to any contractor that is subjected to a private-party damages suit arising out of the

combat-related support services that it performs for the U.S. military. Indeed, two of these defenses, the political question doctrine and derivative sovereign immunity, also can apply to damages suits arising out of a great variety of services that government contractors provide within the United States for various federal departments and agencies.

SUMMARY OF ARGUMENT

In its Order dismissing this suit, the district court faithfully adhered to the two-alternate-part political question test that this Court has established and refined in other post-9/11 battlefield contractor cases, and that this Court, in an earlier phase of this litigation, instructed the district court to follow. Based on the jurisdictional evidence, the district court found that both parts of this Court's political question test apply: The first part of the test applies because Defendant-Appellee CACI Premier Technology, Inc. carried out its contractual duties under the plenary and direct control of the U.S. military. The second, alternate part of the test applies because this case cannot be adjudicated without second-guessing actual, sensitive military judgments. In addition, the district court found that there are no judicial standards for assessing the reasonableness of those military decisions. Because the district court's analysis tracks this Court's political question analytical framework for military contractor cases, there is nothing about

the court's ruling that represents any sort of novel expansion of the scope of the political question doctrine.

This Court may want to consider combatant activities preemption and/or derivative sovereign immunity as additional grounds for affirmance. Although each of those doctrines, like the political question doctrine, operates independently, they all reflect judicial forbearance from interference with, or evaluation of, military judgments—including military decisions relating to how civilian support contractors are utilized during active combat operations in a foreign war zone.

ARGUMENT

I. The Political Question Doctrine And Other Threshold "Battlefield Contractor" Tort Defenses Serve Vital Federal Interests

This is one of many battlefield contractor damages suits arising out of the U.S. military's heavy reliance on civilian contractors for a broad range of in-theater support services in connection with post-9/11 combat operations in Iraq and Afghanistan. As the Fifth Circuit explained, today's all-volunteer U.S. "military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008); *see also* 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) (indicating that contractor personnel accounted for at least half of the U.S. total force in Iraq and

Afghanistan).[2] Barred from suing the United States directly due to the political question doctrine, sovereign immunity, the *Feres* doctrine, and other principles, plaintiffs ranging from U.S. service members and civilians to foreign nationals have sought monetary compensation from military support contractors for real or alleged injuries that they have sustained in active theaters of combat.

The Fourth Circuit is no stranger to these types of suits, or to this particular litigation. *See In re KBR, Inc., Burn Pit Litig.* ("*Burn Pit*"), 744 F.3d 326, 334 (4th Cir. 2014), *cert. denied sub nom. KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015); *Al Shimari v. CACI Premier Tech., Inc.* ("*Al Shimari III*"), 758 F.3d 516, 531 (4th Cir. 2014); *Al Shimari v. CACI Int'l, Inc.* ("*Al Shimari II*"), 679 F.3d 205 (4th Cir. 2012) (en banc); *Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 408 (4th Cir. 2011). Other circuits too have addressed the unique issues raised by damages suits that seek to impose liability on civilian contractors for performing contractual duties at the direction and/or under the supervision of the U.S. military in foreign war zones. *See, e.g.*, *Harris v. Kellogg, Brown & Root Servs., Inc.*, 724

[2] The Defense Department's prevalent use of cost-reimbursement contracts, which generally require the government to reimburse a contractor for third-party liabilities not compensated by insurance, further conjoins the interests of the U.S. military and its war-zone contractors. *See* Br. of the Professional Services Council as *Amicus Curiae* In Support of Petitioner, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 (U.S. Feb. 10, 2014) (discussing procurement regulations requiring the United States to indemnify cost-reimbursement contractors for third-party liability costs).

F.3d 458 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015); *McManaway v. KBR, Inc.*, No. 12-20763, 2013 WL 8359992 (5th Cir. Nov. 7, 2013) (unpublished), *cert. denied*, 135 S. Ct. 1153 (2015); *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009); *Lane v. Halliburton*, *supra*; *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007).

The common theme that binds this expanding body of case law is the recognition that these are not ordinary, private-party tort suits. Instead, even though the United States is not a named party, vital federal interests are at stake. Those interests are so significant, they directly implicate not only constitutional principles such as separation of powers, sovereign immunity, and federal supremacy, but also critical national security concerns. As the Solicitor General explained to the Supreme Court in two recent *amicus* briefs, "[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." Br. for the United States as Amicus Curiae at 13-14, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 (U.S. Dec. 16, 2014); Br. for the United States as Amicus Curiae at 14, *KBR, Inc. v. Metzgar* ("*Burn Pit*"), No. 13-1241 (U.S. Dec. 16, 2014).

Along the same lines, in an earlier *amicus* brief filed in the Supreme Court, the Solicitor General explained 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). Another Solicitor General *amicus* brief described the federal interest in battlefield contractor tort suits as "avoiding unwarranted judicial second-guessing of sensitive judgments by military personnel and contractors with which they interact in combat-related activities, and ensuring that there are appropriate limits on private tort suits based on such activities." Br. for the United States as Amicus Curiae at 11-12, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011). And in an *amicus* brief filed at the en banc invitation of this Circuit during an earlier chapter of this litigation, the United States discussed the "significant federal interests at stake" in this suit, including "ensuring that state-law tort litigation does not lead to second-guessing military judgments." Br. for the United States as Amicus Curiae at 2, *Al Shimari v. CACI Int'l, Inc.* ("*Al Shimari II*"), Nos. 09-1335, 10-1891, 10-1921 (4th Cir. Jan. 14, 2012).

Allowing contractors to be sued "for actions taken within the scope of their contractual relationship supporting the military's combat operations" also would have detrimental *practical* consequences for the federal government. U.S. Br. at 19 (*Harris*); U.S. Br. at 21 (*Burn Pit*). Such suits "can impose enormous litigation burdens on the armed forces," U.S. Br. at 20 (*Harris*) & U.S. Br. at 21 (*Burn Pit*), including "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" that can "devolve into an exercise in finger-pointing." *Saleh*, 580 F.3d at 8. In addition, the costs of allowing such litigation to proceed "would ultimately be passed on to the United States" because "contractors would demand greater compensation in light of their increased liability risks," and "many military contracts performed on the battlefield contain indemnification or cost-reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States in certain circumstances." U.S. Br. at 20 (*Harris*); *see also* U.S. Br. at 21 (*Burn Pit*).

Many courts have emphasized the important federal interests that are inextricable from tort suits filed against the U.S. military's battlefield contractors. For example, in the frequently cited opinion rendered in *Saleh*, a different battlefield-contract or damages suit that alleged abuse of Iraqi nationals at Abu Ghraib prison, Judge Silberman of the D.C. Circuit explained "that all of the traditional rationales for *tort* law—deterrence of risk-taking behavior,

compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule. . . . The very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7. He expressed concern 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." *Id.* at 8. Along the same lines, Judge Wilkinson, dissenting from the Court's en banc denial of collateral order interlocutory review during an earlier phase of the present litigation, discussed the "chilling effect" of tort liability on prospective battlefield contractors, and why "increasing through prospective tort suits the costs of employing contractors on the battlefield . . . interferes with the executive branch's capacity to carry out its constitutional duties." *Al Shimari II*, 679 F.3d at 243 (Wilkinson, J., dissenting). He emphasized "the utter unsuitability of tort actions such as these in the context of an international theatre of war." *Id.* at 226. "Simply put," the Plaintiffs' claims in this litigation "have no passport that allows their travel in foreign battlefields, and [the Court has] no authority to issue one." *Id.* at 227.

Like other battlefield contractor tort litigation, this case is "at the very least in sight of an arena in which the political question doctrine has served one of its most important and traditional functions—precluding judicial review of decisions

made by the Executive during wartime." *Lane*, 529 F.3d at 558. This also is a case where related doctrines, such as combatant activities preemption and derivative sovereign immunity, support dismissal of this suit.

II. The District Court Utilized An Analytical Framework That Is Consistent With *Baker* And This Court's War-Zone Contractor Political Question Jurisprudence

The district court faithfully adhered to the political question analytical framework established by *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny, including this Court's recent political question precedents in the military contractor context. Undeterred by the inflammatory nature of Appellants' allegations, the district court steadfastly followed the analytical framework which this Court established in *Taylor*, and then reaffirmed in *Al Shimari III* and *Burn Pit*, for determining whether the political question doctrine bars a damages suit against a war-zone contractor. Neither the Fourth Circuit's formidable *Taylor* test, nor the district court's utilization of that test, represents an expansion of the political question doctrine, much less portends anything approaching blanket immunity for military contractors.

Earlier in this litigation, the Court reiterated that "[t]he political question doctrine is a 'function of the separation of powers,' and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-equipped to address." *Al Shimari III*, 758 F.3d at 531 (quoting

Baker, 369 U.S. at 217); *see also Burn Pit*, 744 F.3d at 334 ("A claim presents a political question when the responsibility for resolving it belongs to the legislative or executive branches rather than to the judiciary."). Of *Baker*'s six political question formulations (often referred to as factors and sometimes as circumstances, attributes, or tests), any one of which is sufficient to render a suit nonjusticiable, *Baker*, 369 U.S. at 217, the first two—"a textually demonstrable constitutional commitment of the issue to a coordinate political department" (i.e., to the Executive Branch and/or to Congress), and "a lack of judicially discoverable and manageable standards for resolving it," *ibid.*—are usually the most important. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). And these two factors are particularly pertinent where, as here, a court is called up to determine whether the political question doctrine bars a private-party tort suit against a military contractor. *See Taylor*, 658 F.3d at 408.

In Supreme Court *amicus* briefs, the United States has acknowledged "[t]he basic principle . . . that where resolving a legal claim would require an evaluation of quintessentially military judgments, such as operational decisionmaking in foreign theaters of war, the claim is nonjusticiable under the political-question doctrine." U.S. Br. at 9 (*Harris*); U.S. Br. at 9 (*Burn Pit*). This Circuit (like other circuits) has repeatedly recognized this principle. *See, e.g.*, *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015), *cert. denied*, No. 14-1510, 2015

WL 3867251 (Oct. 5, 2015) ("This case presents a textbook example of a situation in which courts should not interfere. Resolving this dispute would oblige the district court to wade into sensitive and particularized military matters."); *Burn Pit*, 744 F.3d at 334 ("[C]ases involving military decision making often fall into the political question box . . . ."); *Al Shimari III*, 758 F.3d at 533 ("recognizing that 'most military decisions' are matters 'solely within the purview of the executive branch'") (quoting *Taylor*, 658 F.3d at 406-07 n.9); *Taylor*, 658 F.3d at 411 (political question doctrine applies where a "negligence claim would require the judiciary to question actual, sensitive judgments made by the military") (internal quotation marks omitted); *Tiffany v. United States*, 931 F.2d 271, 278 (4th Cir. 1991) ("'It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches [and] in which the courts have less competence [than] [t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force . . . .'") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

Given the U.S. military's symbiotic reliance on war-zone contractors for providing assistance with a great variety of logistical and other mission-critical tasks, the Court in *Taylor* "adapted the Supreme Court's analysis in *Baker* to a particular subset of lawsuits, namely, those brought against government contractors

who perform services for the military." *Al-Shimari III*, 758 F.3d at 533; *see also Burn Pit*, 744 F.3d at 334 (*Taylor* "adapted *Baker* to the government contractor context through a new two-factor test."). More specifically, the Court

> distilled the six *Baker* factors into two critical components: (1) whether the government contractor was under the "plenary" or "direct" control of the military; and (2) whether national defense interests were "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of the claim "would require the judiciary to question actual, sensitive judgments made by the military."

Al-Shimari III, 758 F.3d at 533-34 (quoting *Taylor*, 658 F.3d at 411); *see also Burn Pit*, 744 F.3d at 334-35 (discussing the "two-factor . . . *Taylor* test"). Importantly, "an affirmative answer to *either* of these questions will signal the presence of a nonjusticiable political question." *Al-Shimari III*, 758 F.3d at 534 (citing *Burn Pit*, 744 F.3d at 335) (emphasis added).

Under the first alternate part of the *Taylor* test, the political question doctrine applies only if the contractor was operating under "the 'plenary' or 'direct' control of the military." *Al Shimari III*, 758 F.3d at 533 (quoting *Taylor*, 658 F.3d at 411). This Court has indicated that to determine whether there was such control, "a court must inquire whether the military clearly chose *how* to carry out [contractual] tasks, rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed." *Id*. at 534 (internal quotation marks omitted). Under those circumstances, the political question doctrine renders the

suit nonjusticiable because "'the contractor's decisions may be considered as de facto military decisions.'" *Ibid.* (quoting *Taylor*, 658 F.3d at 410). In other words, where there is plenary or direct military control, adjudicating a suit that would require second-guessing a contractor's "decisions" in reality would require second-guessing the *military's* decisions. *See, e.g.*, *Carmichael*, 572 F.3d at 1282-83 (political question doctrine barred a soldier's personal injury suit where the circumstances leading to a truck rollover accident involving a military-led, contractor-driven, supply convoy were "thoroughly pervaded by military judgments and decisions"). Applying this first part of the *Taylor* political question test, the district court found, based on the pretrial record, that "the military exercised direct control over CACI and its employees in the execution of all operational mission related activities," and therefore held that this case "presents a nonjusticiable political question" and must be dismissed. A759.

The district court also considered the second, alternate part of the *Taylor* test. Under the second part of the test, the political question doctrine bars a suit against a military contractor *even* in the absence of plenary or direct military control, if "national defense interests" were so "'closely intertwined' with military decisions governing a contractor's conduct" that adjudicating the merits of the plaintiffs' claims against the contractor would require a court "'to question actual, sensitive judgments made by the military.'" *Al Shimari III*, 758 F.3d at 533-34

(quoting *Taylor*, 658 F.3d at 411). When considering either part of the *Taylor* test, "a court must look beyond the complaint, and consider how [the plaintiffs] might prove [their] claim[s] *and* how [the contractor] would defend." *Id.* at 534 (alterations in original) (internal quotation marks omitted). Applying the second part of the *Taylor* test, the district court found that "[t]his matter would involve questioning sensitive military judgments and accordingly would run afoul of the political question doctrine." A761. The court noted in this regard that "Defendants would likely defend against [Plaintiffs'] allegations by asserting that their actions were ordered by the military. Accordingly, the Court would have to consider whether military judgments were proper." A763.

In short, the district court's political question analysis tracks the analytical framework required by *Taylor, Al Shimari III*, and *Burn Pit.* The court followed both alternate parts of the *Taylor* test, and after considering the jurisdictional facts, concluded that both parts apply and render this case nonjusticiable. *See* A764, A771.

In addition to applying both parts of the *Taylor* test, the court separately considered *Baker*'s second, stand-alone political question factor, and concluded that "Plaintiffs' claims could not be adjudicated because the case lacks judicially manageable standards." A764. Regarding Appellants' Alien Tort Statute ("ATS") claims, the court indicated that its "lack of expertise in matters of foreign law, in

addition to the difficulty of adducing the boundaries and elements of those foreign laws, further emphasizes the lack of judicially manageable standards in this case." A765. Recognizing that "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch" (i.e., that the first *Baker* factor applies), A764-A765, the court found that "even Plaintiffs' seemingly straightforward ATS war crime claim would force the Court to question sensitive military judgments and further lacks judicially manageable standards." A770. Therefore, as in *Taylor*, the district court's *Baker* second-factor analysis "simply bolstered the decision that the Court already reached using the [*Taylor*] two-factor test." *Burn Pit*, 744 F.3d at 335 (citing *Taylor*, 658 F.3d at 412 n.13).

III. Related Doctrines Provide Additional Grounds For Affirmance

The Court may want to consider combatant activities preemption and/or derivative sovereign immunity as additional grounds for affirming dismissal of this suit.

A. Combatant Activities Preemption

The Federal Tort Claims Act ("FTCA") general waiver of sovereign immunity does "not apply to . . . [a]ny claim arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j). "[M]ultiple circuit courts have held that the federal interests inherent in the combatant activities

exception conflict with, and consequently can preempt, tort suits against government contractors when those suits arise out of what those courts viewed as combatant activities." *Burn Pit*, 744 F.3d at 346. For example, the D.C. Circuit recognized in *Saleh* that "the policies of the combatant activities exception 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." 580 F.3d at 7 (emphasis added). The *Saleh* court established the following preemption formulation: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Id.* at 9.

In *Burn Pit*, this Court adopted the *Saleh* combatant activities preemption test. *See* 744 F.3d at 351; *see also Harris*, 724 F.3d at 480 (adopting the *Saleh* "combatant-activities, command-authority test because it best suits the purposes of § 2680(j)"). Even prior to *Burn Pit*, one of the *Taylor* panel members would have affirmed dismissal of that battlefield contractor damages suit based on the *Saleh* combatant activities preemption formulation, *see* 658 F.3d at 413 (Shedd, J. concurring in the judgment), and another panel member would have affirmed dismissal both on political question and combatant activities preemption grounds, *see ibid.* (Niemeyer, J., concurring).

Moreover, when the en banc Fourth Circuit dismissed the defendant contractors' collateral order interlocutory appeal in *Al Shimari II*, two circuit judges wrote emphatic dissenting opinions arguing that this suit is impliedly preempted by the federal interests underlying the combatant activities exception. *See Al Shimari II*, 679 F.3d at 236 (Wilkinson, J., dissenting) ("Multiple textual clues in this exception indicate that Congress wanted to keep tort law out of the battlefield regardless of a defendant's status as a soldier or a contractor. . . . Given the broad language of the combatant activities exception, it is difficult to believe that Congress wanted the sensibilities of tort to govern the realities of war."); *id.* at 263 (Niemeyer, J., dissenting) ("[T]he unique federal interest embodied in the combatant activities exception to the FTCA is an interest in freeing military actors from the distraction, inhibition, and fear that the imposition of state tort law by means of a *potential* civil suit entails. It makes no difference whether the military actors are low-level soldiers, commanders, or military contractors.").

The *amicus* brief submitted on behalf of the United States to the en banc Court in *Al Shimari II* advocated a combatant activities preemption test that is seemingly broader than the *Saleh* test. *See* U.S. Br. at 17-18 (*Al Shimari II*) (arguing that "claims against a contractor are generally preempted to the extent that a similar claim against the United States would be within the combatant activities exception to the FTCA, and the contractor was acting within the scope of its

contractual relationship with the federal government at the time of the incident out of which the claim arose, particularly in situations where the contractor was integrated with military personnel in the performance of the military's combat-related activities").[3] Although a panel of this Court adopted the *Saleh* test rather than the government's test, *see Burn Pit*, 744 F.3d at 350, the United States continues to argue in Supreme Court *amicus* briefs that the *Saleh* test "does not sufficiently safeguard the significant national interests at stake." U.S. Br. at 7 (*Harris*); U.S. Br. at 7 (*Burn Pit*). More importantly, the United States has continued to emphasize "that the FTCA's combatant activities exception codifies federal interests that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military's auspices." U.S. Br. at 13 (*Harris*); U.S. Br. at 14 (*Burn Pit*). Regardless of which preemption test is more

[3] Noting that "the United States now has at its disposal a variety of tools to punish the perpetrators of acts of torture, and to prevent acts of abuse and mistreatment," the government's brief in *Al Shimari II* argued that "even where torture is alleged, the federal interests in avoiding judicial second-guessing of sensitive military judgments and intrusive discovery are still weighty, and the state interests in providing a tort-law remedy against civilian contractors for enemy aliens in U.S. military prison during wartime remain limited." U.S. Br. at 22, 23 (*Al Shimari II*); *see also Al Shimari II*, 679 F.3d at 233, 237 (Wilkinson, J., dissenting) (observing that the government's *Al Shimari II amicus* brief "does not point to a single expression of congressional intent in support of permitting state law tort claims to apply overseas based solely on the nature of the allegations," and that "[i]n addition to enacting the combatant activities exception, Congress has indicated its desire to keep tort law off the battlefield by subjecting certain military contractors to other forms of discipline for war-zone conduct").

appropriate, the federal government's continued advocacy of a strong combatant activities preemption principle is highly significant and should be given substantial weight by this Court.

B. Derivative Sovereign Immunity

"Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see, e.g.*, 28 U.S.C. §§ 2680(a) & (j) (discretionary function and combatant activities exceptions to FTCA waiver of sovereign immunity); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n.1 (1988) ("[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest."). The federal government's (and the public's) interests also are served by recognizing *derivative* sovereign immunity. Indeed, in view of the government's extensive reliance on private sector contractors for an enormous variety of services both domestically and abroad, derivative sovereign immunity is an essential adjunct to sovereign immunity.[4]

[4] *Amicus curiae* Professional Services Council recently discussed the importance of derivative sovereign immunity to federal government contractors in a Supreme Court merits-stage *amicus* brief filed in *Campbell-Ewald Co. v. Gomez*, No. 14-857. Br. of DRI—The Voice of the Defense Bar & PSC—The Voice of the Government Services Industry as *Amici Curiae* in Support of Petitioner, *Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. July 21, 2015).

As this Court explained in *Burn Pit*, "[t]he concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.* . . . ." *Burn Pit*, 744 F.3d at 342 (citing *Yearsley*, 309 U.S. 18 (1940)). The Supreme Court held in *Yearsley* that "if [the] authority to carry out [a] project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). Although "*Yearsley* does not explicitly mention sovereign immunity," this Circuit, and other circuits, have "recognized, based on *Yearsley*, 'that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity.'" *Burn Pit*, 744 F.3d at 342, 343 (quoting *Butters*, 225 F.3d at 466); *see also Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) ("Extending immunity to private contractors to protect an important government interest is not novel.") (citing *Boyle*, 487 U.S. 500).

The Supreme Court explained in *Boyle* that the "federal interest justifying" *Yearsley* is the "interest in getting the Government's work done." *Boyle*, 487 U.S. at 505, 506. That compelling, federal procurement-related interest "is implicated . . . even though [a] dispute is one between private parties." *Id.* at 506. This is because "[t]he imposition of liability on Government contractors will

directly affect the terms of Government contracts: either the contractor will decline [the government-specified contract] . . . or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507; *see also id.* 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 . . . ."). Thus, "courts have extended derivative immunity to private contractors," because "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466. "If absolute immunity protects a particular governmental function . . . it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold*, 77 F.3d at 1447-48.

The Supreme Court recently "reaffirm[ed] the principles undergirding the *Yearsley* rule, albeit in the context of § 1983 qualified immunity rather than derivative sovereign immunity." *Burn Pit*, 744 F.3d at 344 (discussing *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)). The Court explained in *Burn Pit* that

> *Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*. By rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the "unwarranted timidity" that can arise if employees fear that their actions will result in lawsuits. *Filarsky,* 132 S. Ct. at 1665. Similarly, affording immunity to government contractors "ensur[es] that

> talented candidates are not deterred from public service" by minimizing the likelihood that their government work will expose their employer to litigation. *Id.* Finally, by extending sovereign immunity to government contractors, the *Yearsley* rule "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.*

Burn Pit, 744 F.3d at 344 (alterations in original); *see also Al Shimari II*, 679 F.3d at 263 (Niemeyer, J., dissenting) ("The Supreme Court has made clear that immunity attaches to the *function* being performed, and private actors who are hired by the government to perform public functions are entitled to the same immunities to which public officials performing those duties would be entitled.").

This Court indicated in *Burn Pit* that a contractor "is entitled to derivative sovereign immunity only if it adhered to the terms of its contract with the government." 744 F.3d at 345. Here, as discussed above, the district court found that "the military exercised direct control over CACI and its employees in the execution of all operational mission related activities." A759. The court indicated in this regard that the relevant "contracts show that the military was to have plenary and direct control." A756. It follows that where the military exercises plenary and direct control over the performance of a contractor's duties, as well as accepts and pays for the contractor's services, the contractor necessarily has adhered to the terms of its contract. Derivative sovereign immunity, therefore, is another ground for affirmance.

CONCLUSION

The judgment of the district court dismissing this suit should be affirmed.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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Dated: October 30, 2015

CERTIFICATE OF SERVICE

I certify that on October 30, 2015 the foregoing Brief of Professional Services Council—The Voice of the Government Services Industry & Coalition for Government Procurement as *Amici Curiae* in Support of Defendant-Appellee and Affirmance 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:

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