No. 17-1960

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: KBR, INC., Burn Pit Litigation

ALAN METZGAR, *et al.*,

Plaintiffs-Appellants,

v.

KBR, INC., *et al.*,

Defendants-Appellees.

On Appeal From The United States District Court
For The District of Maryland, Greenbelt Division

BRIEF OF PROFESSIONAL SERVICES COUNCIL-THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY & NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF APPELLEES & AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Professional Services Council & National Defense Industrial Association
(name of party/amicus)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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Signature: /s/ Lawrence S. Ebner Date: November 21, 2017

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

****

I certify that on November 21, 2017 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:

/s/ Lawrence S. Ebner
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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Professional Services Council and National Defense Industrial Association are national defense-related trade associations. Their members include federal government contractors that serve the nation by providing a broad range of critical services for the U.S. military and Department of Defense, Department of Homeland Security, and other federal departments and agencies in foreign war zones and other high-risk environments. Those contractors have a strong interest in being able to accept hazardous work, and perform it at the direction of and in conjunction with U.S. military and Federal Government civilian personnel, without interference from mass tort litigation—more specifically, the types of personal injury litigation that this Court, and other federal courts of appeals, have held is barred by the political question doctrine and/or combatant activities preemption.

* * * * *

[1] All parties have consented to the filing of this *amicus curiae* 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.

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. Many of PSC's more than 400 small, medium, and large member companies directly support the U.S. Government through contracts with the Department of Defense and other national security and humanitarian-related federal departments and agencies, both domestically and abroad. Overseas contractor work in support of U.S. military operations includes, but is not limited to, foreign war zones. PSC's members provide a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, and scientific, social, and environmental services. Collectively, the association's members employ hundreds of thousands of Americans in all 50 States and abroad.

The National Defense Industrial Association ("NDIA") is a non-partisan and non-profit organization comprised of more than 1,650 corporations and 75,000 individuals spanning the entire spectrum of the defense industry. NDIA's corporate members include not only some of

the nation's largest military equipment contractors, but also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individuals who are members of NDIA come from Government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

INTRODUCTION

The district court's highly detailed Memorandum Opinion faithfully applies the Fourth Circuit's well-developed battlefield contractor jurisprudence to a comprehensive set of precisely focused findings of fact. Those findings result from this Court's March 2014 remand for additional jurisdictional discovery. *See In re KBR, Inc.*, *Burn Pit Litigation* ("*In re KBR*"), 744 F.3d 326, 350-51 (4th Cir. 2014). The jurisdictional discovery was "massive" and "voluminous," encompassing "over 5.8 million pages of documents" and "thirty-four depositions of various witnesses on the jurisdictional questions, including military personnel in both the operational and contracting commands." JA5062. When Appellees ("KBR") subsequently renewed

their motions to dismiss and for summary judgment, "the parties presented the Court with thousands of pages of documents attached to their briefs." JA5083. In addition, the district court "held an extensive evidentiary hearing during which KBR and the Plaintiffs presented arguments and evidence in the form of live witnesses, deposition testimony, and documents." JA5068; *see also* JA5069-5083 (summarizing evidentiary hearing).

With the benefit of the now-robust record of jurisdictional evidence, the district court issued a Memorandum Opinion containing findings of fact that not only are unequivocal, but also remarkably emphatic. Those findings fit squarely within this Court's analytical framework for application of both the political question doctrine and combatant activities preemption in battlefield contractor personal injury suits.

For example—

- The district court found "as a fact that the military *made all of the key decisions* at issue in this case and exercised *direct and plenary control* over KBR's use and operation of burn pits and provision of water services." JA5089 (italics in original). This finding fully satisfies the

first of the Fourth Circuit's alternate "*Taylor* tests"—"whether the government contractor was under the plenary or direct control of the military"—for application of the political question doctrine in battlefield contractor litigation. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 155 (4th Cir. 2016) (internal quotation marks omitted) (discussing *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011)); *see also In re KBR*, 744 F.3d at 334 (same).

- The district court found that "[t]here is a mountain of evidence in this case showing that the claims here would require the [court] to question actual, sensitive judgments made by the military that were being carried out by KBR . . . it cannot reasonably be disputed that national defense interests were closely intertwined with the military's decisions governing KBR's conduct." JA5115 (internal quotation marks omitted). This finding fully satisfies the second of *Taylor*'s alternate political question tests—"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*, 840 F.3d at 155 (internal question

marks omitted) (discussing *Taylor*, 658 F.3d at 411); *see also In re KBR*, 744 F.3d at 334-35 (same).

- The district court found "[t]he overwhelming weight of evidence shows that KBR was highly integrated into the military's mission . . . KBR has presented extensive evidence showing that in this case the military and the contract documents dictated both the 'what' and the 'how' of KBR's performance." JA5122-5123. This finding fulfills the combatant activities preemption test articulated by the D.C. Circuit in *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009). The *Saleh* test, which is based on the exclusively federal interests underlying the Federal Tort Claims Act combatant activities exception, 28 U.S.C. § 2680(j), states that "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh*, 580 F.3d at 9. This conflict preemption principle—described as "battle-field preemption" in *Saleh*, *id.* at 7—was adopted by the Fourth Circuit during an earlier phase of this litigation. *See In re KBR*, 744 F.3d at 349; *see also Taylor*, 658 F.3d at 413 (Shedd, J., concurring in the

judgment & Niemeyer, J., concurring) (endorsing *Saleh* preemption); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3rd Cir. 2013) (adopting the *Saleh* "combatant-activities, command-authority test").

In short, the district court found that "a review of the major allegations in Plaintiffs' Master Complaint . . . in light of the evidence uncovered during discovery and at the evidentiary hearing, now shows that *all of the decisions Plaintiffs challenge were in fact made by the military—not KBR*." JA5115 (italics in original). For this reason, the district court correctly concluded that both the political question doctrine and combatant activities preemption bar Appellants' suits.

Because the district court's thorough and meticulously supported decision speaks for itself, this *amicus* brief provides the Court with a broader, industry-wide perspective on the practical, real-world reasons why this litigation should not be allowed to proceed.

SUMMARY OF ARGUMENT

National defense interests are undermined by mass personal injury litigation where, as here, potentially thousands of plaintiffs in dozens of putative class-action suits target a U.S. military logistical

support contractor with "sweeping, generalized decade-long multi-war zone claims [that are] not specific to a particular time, date or place [and are] anything but discrete." JA5127-5128. The national defense interests at stake in this type of litigation include the U.S. military's ability to attract and manage the performance of the many contractors on which it relies to provide mission-critical support services in some the world's most perilous locations.

Subjecting the U.S. military's support contractors to the substantial burdens, expense, and risks of litigating (or settling) state tort suits for combat-zone injuries allegedly attributable to their contractual performance would discourage or deter them from bidding on high-risk work and/or interfere with their implementation of military directives. *See In re KBR*, 744 F.3d at 333 (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).

Allowing such litigation to proceed would be particularly unjust where, as here, it purports to be founded upon third-party allegations that a U.S. military battlefield contractor failed to adhere to the

Defense Department's (or any other federal agency's) contractual requirements. Those requirements were for war-zone logistical support services that not only were requested, authorized, directed, accepted, paid for, and rewarded by the Department of Defense, but also, if performed by the military, would be insulated from judicial review by sovereign immunity and related doctrines. Neither the political question doctrine nor combatant activities preemption is dependent upon whether a contractor complied with contractual requirements.

ARGUMENT

I. VITAL FEDERAL INTERESTS COMPEL PRETRIAL DISMISSAL OF PRIVATE-PARTY PERSONAL INJURY SUITS THAT UNDERMINE THE U.S. MILITARY'S ABILITY TO ATTRACT AND MANAGE WAR-ZONE SUPPORT CONTRACTORS

A. The U.S. military relies heavily upon a wide variety of civilian support contractors to accept and perform work in hazardous locations

The all-volunteer U.S. military's reliance on civilian contractors for a broad range of professional, technological, logistical, and other types of services that support contingency operations throughout the world is a 21st-Century necessity.[2] As the Fifth Circuit observed in

[2] Congress has broadly defined a "contingency operation" as "an operation in which members of the armed forces are or may become

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 KBR personnel, "the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." Indeed, earlier in the *Burn Pit* litigation, this Court observed that the U.S. military's "use of private contractors to support its mission" in Iraq and Afghanistan had "risen to unprecedented levels." *In re KBR*, 744 F.3d at 331 (internal quotation marks omitted); *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), *available at* 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).

In its Memorandum Opinion, the district court found that "one of the first decisions made by the military was that, due to the extremely dangerous conditions in these two war zones, the management of waste

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involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. § 101(a)(13)(A).

[at forward operating bases] would have to be accomplished through the use of open burn pits, some operated by the military, and others operated by contractors." JA5049. Appellants' claims in this litigation are inescapably tethered to the U.S. military's decision to use burn pits, and also to a multitude of military requirements and directives governing KBR's implementation of that decision at numerous forward operating bases in the Iraq and Afghanistan war zones. *See* JA5049, 5090-5098.

It also is important to understand that many contractors provide critical support to the U.S. military in connection with additional types of contingency operations. For example, contractors provide technological and maintenance services needed to operate the aerial drones that increasingly are used in parts of the Middle East and Africa to gather intelligence and fight the War On Terror. *See generally* Army Regulation 715-9 (June 2011), § 2-1, *available at* https://goo.gl/SKgEXQ ("Contractors may support [Army Forces] operating in military contingencies across the range of military operations."); *Contractors On the Battlefield*, Army Field Manual 3-100.21 (Jan. 2003) (Preface), *available at* https://goo.gl/W16YLe ("[T]he increasingly hi-tech nature of

our equipment and rapid deployment requirements have significantly increased the need to properly integrate contractor support into all military operations. . . . the future battlefield will require ever increasing numbers of often critically important employees."). As another example, contractors assist the U.S. military with post-conflict reconstruction efforts and stability operations.

In this Court's first opinion in the *Al Shimari* Iraqi detainee litigation, Judge Wilkinson, who dissented from the en banc majority's denial of collateral order appellate jurisdiction, observed 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.* at 240. Underscoring the extensive integration of support contractors into U.S. military combat-related operations, Judge Wilkinson explained that "[o]nly the clueless believe future battlefields will not prominently feature private contractors." *Id.* at 241.

B. Private-party personal injury suits against battlefield contractors jeopardize the U.S. military's ability to obtain, retain, and direct essential war-zone support services

In view of the U.S. military's substantial and continuing reliance on the services of support contractors in many of the world's most dangerous places, it would be "illusory to pretend" that personal injury suits against battlefield contractors (or against contractors that support other types of U.S. military contingency operations) are "simply ordinary tort actions by one private party against another." *Ibid.*; *see, e.g.*, *Taylor*, 658 F.3d at 409 ("In evaluating whether Taylor's negligence claim against KBR presents a nonjusticiable political question . . . we are obliged to carefully assess the relationship between the military and KBR"); *see also 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."); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1289 (11th Cir. 2009) (internal quotation marks omitted) (personal injury suit involving KBR-driven military supply convoy rollover accident on poorly maintained 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"); *Lane*, 529 F.3d at 558 ("acknowledg[ing] that the Plaintiffs' claims are set against the backdrop of United States military action in Iraq"); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) ("While Plaintiffs' simplistic labeling of this case as a 'garden variety road wreck' is superficially appealing, it ignores the true nature of the circumstances giving rise to this tragedy.").

This Court, and other federal courts of appeals, repeatedly have recognized that the U.S. military's ability to attract, manage, and rely upon battlefield contractors to provide indispensable support services can be impeded or impaired, and even 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, D.C. Circuit Judge Laurence Silberman's frequently cited majority opinion explained 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 and the risk of being held liable under state tort law for carrying out U.S. military contractual directives—often by literally working side-by-side with military personnel—support contractors would be reluctant, and possibly unwilling, to accept work in war-zones and other ultra-hazardous environments.

Contractors that are amenable to performing such work under the threat of state tort liability may delay or even prevent the military's accomplishment of mission-critical tasks by stopping to question, or declining to implement, "quintessential military decision[s]" which, like the military's exclusive decision in this case to use burn pits at forward operating bases in Iraq and Afghanistan, "was a decision driven by the exigencies of war." JA5128. Thus, the mere *threat* of judicial imposition of tort liability for war-zone performance of contractual services may achieve indirectly what the political question doctrine and combatant activities preemption bar courts from doing directly: second-guessing the wisdom of actual, sensitive, military judgments. *See In re*

KBR, 744 F.3d at 335 ("[T]he political question doctrine renders a claim nonjusticiable if deciding the issue would require the judiciary to question actual, sensitive judgments made by the military.") (internal quotation marks omitted) (citing *Taylor*, 658 F.3d at 411)).

Along the same lines, Judge Wilkinson's *Al Shimari* dissent, which Judges Niemeyer and Shedd joined, 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. 377, 391 (2012) (explaining that private contractors who "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"). A support contractor may choose to avoid the risk of "holding the bag," especially if the military has alternative ways (such as use of military personnel) to fulfill a particular assignment. That in turn would defeat the key purpose of the military's use of civilian support contractors, which is "'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).

"By increasing through prospective tort suits the costs of employing contractors on the battlefield, the majority interferes with the executive branch's capacity to carry out its constitutional duties." *Al Shimari*, 679 F.3d at 243 (Wilkinson, J., dissenting); *see also 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.").

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 in "private-party" battlefield contractor litigation—where the United States, although not a named defendant, is the real party-in-interest. *See* 48 C.F.R. § 52.228-7 (Federal Acquisition Regulation 228-7) (Insurance – Liability to Third Persons); *cf. Boyle v. United*

Techs. Corp., 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices . . . .").

"[T]hese cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity)." *Saleh*, 580 F.3d at 7. For this reason, "whether 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 where, as here, contract employees are so inextricably embedded in the military structure." *Id.* at 8. "Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring *extensive judicial probing of the government's wartime policies*," *ibid.* (emphasis added)—exactly what this Court repeatedly has held is barred by the political question doctrine.

In short, as this Court and other circuits have recognized, there are numerous reasons why private-party personal injury suits against the U.S. military's war-zone support contractors significantly

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

C. The United States agrees that adjudicating personal injury suits which would require judicial second-guessing of sensitive military judgments would have deleterious effects on national defense interests

In several certiorari-stage *amicus* briefs submitted to the Supreme Court, the United States, through the Office of the Solicitor General, thus far has recommended against review of battlefield contractor cases, but nonetheless has emphasized the deleterious effects of battlefield contractor tort litigation on national defense interests.

For example, when KBR sought certiorari following this Court's earlier *Burn Pit* decision, the Solicitor General, at the Supreme 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). And in his certiorari-stage *amicus* brief in *Saleh*¸ the Solicitor General described the significant 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).

This Court's decisions in *Taylor*, 658 F.3d at 409-11, and *Al Shimari*, 840 F.3d at 155, as well as its prior opinion in this litigation, *In re KBR*¸ 744 F.3d at 334-35, acknowledge the national defense interests implicated by tort suits against U.S. military war-zone support contractors. In its most recent battlefield contractor opinion, *Al Shimari v. CACI Premier Technology, Inc.*, this Court explained that

> when national defense interests are at stake, courts must carefully assess the extent to which these interests may be implicated in any litigation of a plaintiff's claims involving the conduct of a military contractor. . . . We give this question particular attention because courts are ill-equipped to evaluate discretionary operational decisions made by, or at the direction of, the military on the battlefield.

840 F.3d at 155.

With the benefit of Fourth Circuit battlefield contractor jurisprudence, as well as a substantial body of case law from other

circuits and the Solicitor General's appellate-level *amicus* briefs, *see* JA5054, the district court issued a thoughtful, fact-intensive Memorandum Opinion that is a testament to judicial restraint and respect for U.S. military wartime judgments. Based on this Court's battlefield contractor case law precedents and the district court's extensive jurisdictional fact-finding, there is ample basis for affirming dismissal of this litigation.

II. PRIVATE-PARTY PERSONAL INJURY SUITS AGAINST BATTLEFIELD CONTRACTORS SHOULD NOT BE USED AS A VEHICLE FOR SECOND-GUESSING THE U.S. MILITARY'S MANAGEMENT OR ASSESSMENT OF CONTRACTORS' PERFORMANCE

A. Contractual compliance does not govern application of either the political question doctrine or combatant activities preemption

Appellants are attempting to challenge the district court's dismissal of this litigation—and to circumvent the political question doctrine and combatant activities preemption—by contending that KBR failed to comply with, or violated, burn pit-related contractual duties. *See, e.g.*, Brief for Appellants at 38 ("KBR consistently violated the controlling terms of the Contract"); *id.* at 39 ("KBR burned hazardous materials in direct violation of its contractual obligations"); *id.* at 40 ("KBR's repeated violations of the Contract demonstrate the antithesis

of plenary or direct control"). Appellants' theory, however, conflicts with this Court's battlefield contractor case law, which nowhere makes application of either the political question doctrine or combatant activities preemption dependent upon compliance with contractual requirements.

In fact, in its earlier opinion in this litigation, the Court specifically declined to adopt the Solicitor General's proposed, alternative, contract-related combatant activities preemption test. *See In re KBR*, 744 F.3d at 349. The Court explained that "the purpose of the combatant activities exception is not protecting contractors who adhere to the terms of their contracts; the exception aims to 'foreclose state regulation of the military's battlefield conduct and decisions.'" *Id.* at 350 (quoting *Harris*, 724 F.3d at 480).

In light of that conclusion, the district court correctly found on remand that "[w]hile Plaintiffs here claim to be only challenging KBR's alleged violations of its contracts with the military, their claims directly challenge a number of military decisions—such as the critical decision to use burn pits in the first place, the location of the pits, and various details regarding their operation." JA5111-112. Appellants, therefore,

cannot pursue their tort claims under the guise of alleging contractual violations.

B. The Department of Defense evaluates war-zone support contractors' performance, and when necessary, has the ability to take remedial action in accordance with well-established government procedures

A contractor's alleged noncompliance with the Federal Government's contractual requirements should not be the basis for third-party personal injury litigation. As discussed above, third-party allegations of noncompliance do not enable a plaintiff to circumvent this Court's well-established political question and combatant activities preemption principles. Any question as to whether a battlefield contractor has complied with contractual requirements is a subject encompassed by 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 (Wilkinson, J., dissenting) (emphasis added).

Similarly, the certiorari-stage *amicus* brief filed by the Solicitor General earlier in the *Burn Pit* litigation emphasizes that "[d]etermination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the *responsibility of the United States*, through contractual, criminal, or other remedies—*not private state-law suits by individual service members or contractor employees*." U.S. Br. at 16 (emphasis added); *cf. Saleh*, 580 F.3d at 8 ("allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors);[3] *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 377 (4th Cir. 2008) ("[A]lthough Relators posit that KBR did not properly perform under Task Order 43, the United States

[3] The Fourth Circuit has carved out an exception from the political question doctrine for conduct that "was unlawful when committed." *See* JA5108 (quoting *Al Shimari v. CACI Premier Tech., Inc.,* 840 F.3d at 159). That exception, however, has no applicability here. *See* JA5117 ("Here, there is no allegation that KBR violated criminal statutes or settled international law in following highly detailed military directives regarding waste management and water supply.")

government—the actual party to the contract—has not expressed dissatisfaction with KBR's performance in the form of a breach of contract action.").

More 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 that may arise between the Federal Government and its contractors. *See generally Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 521 (D.C. Cir. 2010) (discussing the "comprehensive framework for resolving contract disputes between executive branch agencies and government contractors."); *see also 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 governing regime of the Federal Acquisition Regulation, including 48 C.F.R. § 33.2 (Disputes and Appeals), establish specific procedures that govern how contractual performance issues are asserted and adjudicated. The Federal Government has at its disposal a variety of remedies to address a contractor's failure, singularly or in combination, to perform in accordance with the terms of a contract. For

example, the Government can assert a monetary claim against a contractor for any breach of contract and pursue such claim through the CDA process. *See, e.g., Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014). The Government can terminate the contractor for default for failure to comply with the provisions of a 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). The Government also can withhold or recoup payments for noncompliant work. *See, e.g., Allied Signal v. United States*, 941 F.2d 1194, 1198 (Fed. Cir. 1991). And where, as here, there is an incentive-based contract, the Government can deny any available award fee payments if it determines that a contractor's performance is unsatisfactory. *See* 48 C.F.R. § 16.401(c)(3)(v).

In addition to contract-based remedies, there are well-established procedures for excluding a particular contractor from receiving future contracts if the Government determines the contractor to be irresponsible. *See* 48 C.F.R. § 9.4 (Debarment, Suspension, and Ineligibility); *see also Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (explaining that the Government's use of these procedures

"reduces the risk of harm to the system by eliminating the source of the risk, that is, the unethical or incompetent contractor").

Here, *amici*'s understanding is that nothing in the record indicates that either the Department of Defense or the U.S. military found any reason to resort to any of the these remedial measures in connection with KBR's performance of its burn pit-related contractual duties. Indeed, *exactly the opposite* is true: *Amici*'s understanding is that the Government not only accepted and paid for Appellees' performance, but also *rewarded* it by repeatedly approving payment of award fees. *See* JA5085 (describing evidence relating to Defense Contract Management Agency review and evaluation of KBR's contractual performance of burn pit-related services); JA5062 (indicating that KBR produced "102,000 pages of award fee evaluation documents"); *see also* JA5092 ("there were no instances in which KBR used burn pits without military authorization, a key allegation in Plaintiffs' Master Complaint").

The district court rejected "Plaintiffs' argument that the Court should put blinders on" and "focus solely on selected portions of the contract documents chosen by them . . . without considering the numerous other contract documents that deal specifically with, for

example, burn pits, or taking into consideration the unrebutted testimony regarding what actually happened on the ground in these two theaters of war." JA5089; *see* JA5062 (indicating that KBR produced "640,000 pages of contract directives, including Administrative Change Letters[,] Letters of Technical Direction[,] and Notices to Proceed)." The court properly declined to "[e]xamin[e] only the broadly applicable generic contract documents" because that "would require the Court to ignore the voluminous evidence regarding the harsh realities of the wartime environment." JA5089. Similarly, the Solicitor General's *Burn Pit amicus* brief emphasized the desirability of giving "effect to the reality of informal interactions between contractors and military personnel in combat and support operations." U.S. Br. at 16.

This Court should apply, and thereby reaffirm, its own relevant and extensive battlefield contractor case law precedents. The Court should not allow personal injury plaintiffs—who are *not* parties to Defense Department contracts—to avoid the political question doctrine and combatant activities preemption, and usurp Executive Branch prerogatives, merely by alleging that battlefield contractors have violated contractual duties. Doing so would not only render those

constitutionally-based principles meaningless, but also interfere with the multi-faceted, often symbiotic, and always vital relationships between the U.S. military and its war-zone support contractors.

CONCLUSION

The judgment of the district court dismissing this multi-district litigation 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 5,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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By: /s/ Lawrence S. Ebner

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Dated: November 21, 2011

CERTIFICATE OF SERVICE

I certify that on November 21, 2017 the foregoing Brief of Professional Services Council—The Voice of the Government Services Industry & National Defense Industrial Association as *Amici Curiae* in Support of Appellees 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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