No. 19-648

In The
Supreme Court of the United States

CACI PREMIER TECHNOLOGY, INC.,

Petitioner,

v.

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of approximately 20,000 attorneys who defend the interests of businesses and individuals in civil litigation.

The organization's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury.

To help foster these objectives, DRI, in conjunction with its Center for Law and Public Policy, participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Apropos of the present case, DRI filed a petition-stage *amicus* brief in *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817 (U.S. Feb. 10, 2014) (discussing immunities from suit that should be

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[1] Petitioner's and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI–The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

afforded to the U.S. military's war-zone support contractors), and a merits-stage *amicus* brief in *Campbell-Ewald v. Gomez*, No. 14-857 (U.S. July 21, 2015) (discussing the circumstances under which derivative sovereign immunity should be afforded to federal government contractors).

* * * * *

DRI is filing this brief because the ability of defendants and their counsel to obtain meaningful appellate review of key pretrial rulings, such as where a federal district court denies a motion to dismiss based on lack of subject-matter jurisdiction, is fundamental to a fair and efficient civil justice system. The right to pursue a timely appeal is particularly important where a defendant in a civil action not only disputes liability, but also asserts that it is immune from suit. And where, as here, the defendant is a government contractor that contends it is derivatively immune from tort litigation involving war-zone support services provided to the U.S. military, the need for immediate appellate review of a district court order denying an immunity-based motion to dismiss is critical.

The scarce and unpredictable availability of discretionary interlocutory review under 28 U.S.C. § 1292(b), however, often subjects defendants to the burdens and distractions of discovery, and to the costs and risks of trial—or compels pretrial settlement—even where an action should have been dismissed. The same is true for defendants' typically futile efforts to obtain interlocutory review by means of a writ of mandamus under 28 U.S.C. § 1651, and in the class-

action context, under Federal Rule of Civil Procedure 23(f).

The uncertain nature of discretionary interlocutory review is a major reason why the question presented here—whether a district court order denying a federal contractor's immunity-from-suit claim is immediately appealable, as-of-right, under the collateral order doctrine—is so important. It is an issue intertwined with one of the fundamental principles underlying that doctrine: "When a district court has denied a defendant's claim of right not to stand trial," this Court has "consistently held the [district] court's decision appealable" where "such a right cannot be effectively vindicated after the trial has occurred." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). The question presented falls squarely within this precept.

Equally important, the question presented implicates significant federal interests relating to domestic and overseas services performed by federal contractors—here, the U.S. military's extensive reliance on private contractors for essential war-zone logistical, technology, and other support services. The federal government's fundamental interest in national defense is the type of "particular value of a high order," *Will v. Hallock*, 546 U.S. 345, 352 (2006), that warrants immediate appeal where a district court rejects a military support contractor's contention that it is constitutionally or statutorily immune from suit.

The Court should grant certiorari, and consistent with its collateral-order jurisprudence, establish a rule authorizing immediate appeal of district court orders that deny federal contractors' derivative sovereign immunity and other immunity-from-suit

claims. As this brief explains, such a rule not only will provide much-needed guidance to litigants and lower courts, but also will promote and protect national defense and other vital federal interests.

SUMMARY OF ARGUMENT

Although the collateral order doctrine applies only to a "small class" of district court decisions, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court repeatedly has recognized that interlocutory orders rejecting constitutionally or statutorily-based immunities from suit fall into this category. Deferring a defendant's ability to appeal such an order until after trial and final judgment not only utterly defeats the purpose of an immunity from suit, but also undermines the substantial public interests that the immunity embodies.

The question presented here is whether the collateral order doctrine should be extended to district court orders denying federal contractors' claims of immunity from suit—specifically, a claim of derivative sovereign immunity in connection with Alien Tort Statute litigation arising out of national security-related war-zone support services that a private contractor provided to the U.S. military in Iraq during Operation Iraqi Freedom. In light of the Court's existing collateral-order jurisprudence, it should be a small step to hold that district court denials of federal contractors' immunity-from-suit claims are immediately appealable. Yet, as CACI Premier Technology's certiorari petition discusses, federal courts of appeals are divided on the question. *See* Pet. at 12-15.

Immunities from tort suits that explicitly or implicitly challenge the nature and/or implementation of federal contractors' duties are founded upon fundamental federal interests. These include the federal government's ability to perform its multifarious activities with the support of contractors and free from the burdens, risks, and costs of such "private" tort litigation, which if allowed to proceed, necessarily implicates federal policies and decisions, and entangles federal personnel in discovery and trial proceedings.

Private-party tort litigation against war-zone support contractors in connection with the services they perform at the behest of the U.S. military is particularly troubling. In a number of so-called battlefield contractor cases during the past 15 years, the Solicitor General has filed petition-stage *amicus curiae* briefs expressing separation-of-powers and practical concerns about allowing such suits to proceed *because* they directly threaten national defense interests. These interests include avoiding (i) the distractions, burdens, and costs of massive discovery against the U.S. military and Department of Defense, (ii) haling active or former military officers and federal procurement personnel into court to testify on direct and cross-examination about their decisions and actions, and (iii) the prospect of the federal government (i.e., the nation's taxpayers) ultimately footing the bill in whole or part for contractors' litigation defense costs and any adverse judgments.

Allowing such litigation to proceed also impairs national defense interests by chilling the vital working

relationships between the military and its support contractors. The threat of such litigation potentially serves as a disincentive for contractors to make their employees available to assist the military where support is needed the most—in active combat zones and other treacherous places. *See generally Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (today's all-volunteer "military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission").

Contractors provide the military with a wide range of professional, technological, logistical, and other types of services that support 21st-Century contingency operations, and also post-conflict reconstruction efforts and stability operations, throughout the world. As Judge Wilkinson explained earlier in this litigation, "[a]part from being necessary, the military's partnership with private enterprise . . . allow[s] the military and its contractors to pool their respective expertise [and] will become only more necessary as warfare becomes more technologically demanding." Pet. App. 159a, 160a (*Al Shimari v. CACI International, Inc.* ("*Al Shimari I*"), 679 F.3d 205, 240 (4th Cir. 2012) (en banc)) (Wilkinson, J. dissenting).

These and other compelling federal interests underlying federal contractors' immunities from tort suits like the present action—the type of litigation that can drive a wedge between the military and its contractors—will be impaired if orders denying contractors' immunity-from-suit claims must await final judgment before they can be appealed.

ARGUMENT

The Question Presented Implicates Important Federal Interests As Well As Civil Litigation Fairness

A. Enabling government contractors to immediately appeal district court orders that reject immunity from suit promotes civil justice and serves national defense interests

1. Civil justice requires immediate appellate review of immunity-from-suit rulings

This Court repeatedly has recognized that the collateral order doctrine applies to district court orders denying constitutionally or statutorily-based claims for immunity from suit.

For example, in *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), the Court reaffirmed earlier decisions holding that "orders denying claims of absolute immunity are appealable" under the collateral-order criteria first articulated in *Cohen*. *See generally Coopers Lybrand v. Livesay*, 437 U.S. 463, 468 ("To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."); *see, e.g.*, *Osborn v. Haley*, 549 U.S. 225, 238 (2007) (holding that the collateral order doctrine authorizes immediate appeal of a district court order denying a federal employee absolute immunity under the Westfall Act, 28 U.S.C. § 2679(b)(1), "a measure designed to immunize

covered federal employees not simply from liability, but from suit").

A few years after *Nixon v. Fitzgerald*, the Court held in *Mitchell v. Forsyth*, 472 U.S. at 524-30, that the collateral order doctrine also encompasses claims for qualified immunity. The Court explained that "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526.

And in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the Court extended the collateral order doctrine to Eleventh Amendment immunity claims. In so doing, the Court further explained that *Mitchell v. Forsyth* "found that, absent immediate appeal, the central benefits of qualified immunity — avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial — would be forfeited." *Id.* at 143-44.

These precedents establish that authorizing immediate appeal of orders rejecting immunity-from-suit claims is a matter of fundamental fairness. If a district court *grants* an immunity-based motion to dismiss, the plaintiffs, of course, have the right to an immediate appeal under 28 U.S.C. § 1291. Similarly, as this Court has recognized, immediate appeal also should be available as-of-right if a district court *denies* such a motion, and thereby, absent appellate review, subjects a defendant to the burdens, costs, and risks of litigation from which it may be immune. "[F]or the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a

civil damages action." *Mitchell*, 472 U.S. at 525; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) ("Provided it turns on an issue of law . . . a district-court order denying qualified immunity conclusively determines that the defendant must bear the burdens of discovery . . . and would prove effectively unreviewable on appeal from a final judgment.") (internal quotation marks omitted); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 (11th Cir. 2007) ("Because immunity from suit entails a right to be free from the burdens of litigation, an erroneous denial cannot be redressed through review of the final judgment, and therefore must be reviewed on interlocutory appeal.").

To be sure, "only some orders denying an asserted right to avoid the burdens of trial qualify . . . as orders that cannot be reviewed 'effectively' after a conventional final judgment." *Hallock*, 546 at 351; *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) ("The justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes.").

For this reason, the "further characteristic that merits appealability under *Cohen* . . . boils down to a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Hallock*, 546 U.S. at 351-52 (internal quotation marks omitted). "That is, it is not mere avoidance of a trial, but avoidance of a trial that would *imperil a substantial public interest*, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at

353 (emphasis added). One such "particular value of a high order" is "honoring the separation of powers." *Id.* at 352. Another is "the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened." *Id.*; *cf. Filarsky v. Delia*, 566 U.S. 377, 390-91 (2012).

District court orders denying case-dispositive pretrial motions that are based on constitutional or statutory immunity-from-suit principles qualify for immediate appeal under the collateral order doctrine because they implicate these or other substantial public interests. *See Hallock*, 546 U.S. at 351-53; *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) ("When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'").

2. Subjecting military support contractors to tort litigation from which they may be immune impairs national defense interests

Several federal courts of appeals, and the United States as *amicus curiae*, previously have addressed the many reasons why national defense interests would be harmed or compromised if nominally private tort litigation arising from military contractors' performance of war-zone support services is allowed to proceed through discovery and trial. These same reasons—which are grounded in the separation of powers and focus on judicial interference with U.S. military judgments, operations, personnel, and

contractual relationships—compel the conclusion that district court denials of war-zone contractors' immunity-from-suit claims should be immediately appealable under the collateral order doctrine. At the least, since "it is difficult to conceive of an area of governmental activity in which the courts have less competence [than] professional military judgments," *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), this Court should grant certiorari and decide whether the collateral order doctrine applies.

In its petition for a writ of certiorari, CACI briefly quotes from the comprehensive and emphatic dissenting opinions authored by Judges Wilkinson and Niemeyer, and joined by Judge Shedd, when the en banc Fourth Circuit held in *Al Shimari I* that it lacked appellate jurisdiction to review the district court's denial of CACI's first motion to dismiss. *See* Pet. at 5-6. Judge Wilkinson discussed "the utter unsuitability of tort actions such as these in the context of an international theatre of war." Pet. App. 129a. He explained that "[b]y allowing such claims to go forward against contractors integrated into wartime combatant activities under the control of the U.S. military, the majority raises thorny questions of whose law should apply, compromises the military's ability to utilize contractors in the future, and nudges foreign policy and war powers away from the political branches of the federal government and into the hands of federal courts." *Id.* 130a. Judge Wilkinson feared that "the majority's facilitation of tort remedies chills the willingness of both military contractors and the government to contract." *Id.* 166a.

Along the same lines, Judge Niemeyer indicated in his own dissenting opinion that the question of immunity from this type of suit is an "issue of greatest importance to the public interest." *Id.* 177a. He discussed why the Fourth Circuit majority's refusal to exercise immediate, collateral-order review of immunity-from-suit claims "subjects the defendants to litigation procedures, to discovery, and perhaps even to trial, contrary to the deep-rooted policies inherent in these immunities." *Id.* 179a. They "protect the defendants from judicial intervention into battlefield operations, a protection which would necessarily be breached by subjecting battlefield operatives to suit." *Id.* 217a. "[T]hese immunities can only be vindicated and protected by allowing interlocutory appellate review." *Id.*

More recently, in the *Burn Pit* multidistrict tort litigation, which sought to hold a war-zone contractor liable for implementing the U.S. military's waste disposal and water treatment practices at numerous forward operating bases in Iraq and Afghanistan, the Fourth Circuit held that the political question doctrine rendered the litigation nonjusticiable. *In re KBR, Inc.*, *Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018), *cert. denied sub nom. Metzgar v. KBR, Inc.*, No. 18-317 (Jan. 19, 2019). Acknowledging "the unprecedented levels at which today's military relies on contractors to support its mission," the court of appeals explained that "when we are asked to review a military contractor's actions, we inquire whether such a review would lead to scrutinizing military decisions for which we lack the constitutional warrant and judicial competence." *Id.* at 259-60; *see also In re KBR, Inc.*,

Burn Pit Litig., 744 F.3d 326, 333 (4th Cir. 2014) (noting the district court's "concern about unleashing 'the full fury of unlimited discovery' on 'government contractors operating in war zones.'").

For more than a decade, other circuits have expressed similar separation-of-powers and practical concerns about private-party tort litigation relating to the performance of war-zone contractors' support services for the U.S. military.

For example, in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), another suit filed on behalf of Iraqi detainees, Judge Silberman, joined by then-Judge Kavanaugh, 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." *Id.* at 7. Further, as *Saleh* indicates, the threat of tort litigation arising out of war-zone support services can harm or disrupt the U.S. military's ability to attract, manage, and rely upon military contractors:

> [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 where, as here, contract employees are so inextricably embedded in the military structure. 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. Allowance 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; *see also Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282-83 (11th Cir. 2009) (war-zone accident involving contractor-operated military supply convoy was "so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [the contractor's] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny").

The burdens that such litigation imposes upon the U.S. military, as well as upon support contractors, are far from theoretical. For example, the *Burn Pit* multidistrict litigation encompassed 63 separate complaints, many of which were putative class actions on behalf of hundreds of thousands of military and civilian personnel. *See In re KBR, Inc.*, *Burn Pit Litig.,* 893 F.3d at 254 & n.1. Prior to affirming dismissal of the litigation on political question grounds, the Fourth Circuit required the parties to conduct jurisdictional discovery. *Id.* at 254. This "herculean discovery process . . . yielded over 5.8 million pages of documents, including almost a million pages of contract documents, and 34 witness depositions." *Id.* at 253, 254; *see also In re KBR, Inc., Burn Pit Litig.*, 268 F. Supp. 3d 778, 787-88 (D. Md. 2017) (discussing "the enormous task of conducting even limited discovery," which was "massive" and required

production of "more than 3 million pages of emails and other electronic data, 102,000 pages of award fee evaluation documents, and 640,000 pages of contract directives"). There also were depositions "including military personnel in both the operational and contractual commands," and "an extensive evidentiary hearing" that included, *inter alia*, live testimony from two retired Commanding Generals. *Id.* at 788, 791.

As the *Burn Pit* litigation illustrates, the fact that a support contractor's alleged tortious conduct occurs in an active war zone greatly exacerbates litigation burdens on both the contractor and the military. For example, the "legitimate need for the contractor's lawyers, engineers and/or investigators to inspect the condition of the scene of the allegedly tortious act and interview witnesses, including military personnel . . . would pose a significant risk of interfering with the military's combat mission." *Aiello v. Kellogg Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 711 (S.D.N.Y. 2011). Referring to the combatant activities exception to the Federal Tort Claims Act's general waiver of sovereign immunity, 28 U.S.C. § 2680(j), *Saleh* explains that the policy underlying that exception "is simply the elimination of tort from the battle-field," in part "to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." 530 F.3d at 7. This policy is "equally implicated whether the alleged tortfeasor is a soldier or a contractor." *Id.*

3. The United States agrees that tort litigation against military support contractors has deleterious effects on national defense interests

The United States, in several petition-stage *amicus* briefs submitted to this Court, has emphasized the "significant national interests at stake" in tort suits brought by private parties against the U.S. military's 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).

In *Saleh* the Solicitor General described the federal interest 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). In another battlefield contractor case, the Solicitor General advised the Court that "[t]he United States has significant interests . . . 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).

The Solicitor General also has expressed concern that, as a practical matter, allowing tort suits against military support 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.

Br. for the United States as Amicus Curiae at 21, *KBR, Inc. v. Metzgar*, *supra.*

Further, 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." Br. for the United States as Amicus Curiae, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 at 20 (U.S. Dec. 16, 2014); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Also, "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." Br. for U.S., *Harris*, *supra.* 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, *see* 48 C.F.R. § 52.228-7, fuses the commonality of interests between the U.S. military and its support contractors.

In short, the significant, national defense-related interest against allowing private-party battlefield contractor tort litigation to proceed represents a "particular value of a high order," *Hallock*, 546 U.S. at

352, warranting immediate appellate review where, as here, a district court rejects a contractor's claim of immunity from suit.

B. The Court's precedents recognizing government contractor immunity from suit underscore the need to address the collateral-order question

Federal contractors' immunity from being sued in tort in connection with performance of their contractual duties has its roots in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). As the Court subsequently explained, *Yearsley* "rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government." *Boyle* 487 U.S. at 506. The Court held in *Yearsley*, 309 U.S. at 20-21, that "if [the] authority to carry out the 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."

Although *Yearsley* refers to "liability" rather than "immunity," "[o]ver the years [federal] circuits have recognized the concept of immunity for government contractors based on *Yearsley*." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 646 (6th Cir. 2015) (collecting cases); *see also In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008) ("Derivative immunity was first extended to contractors in *Yearsley,* where the contractor was working pursuant to the authorization and direction of the federal government and the acts of which the plaintiff complained fell within the scope of those

government directives."). In *Boyle*, a wrongful death suit which involved a military helicopter escape hatch that was defectively designed by the government and manufactured by a contractor, the Court indicated "it is plain that the Federal Government's interest . . . is implicated by suits such as the present one — even though the dispute is one between private parties." 487 U.S. at 506. Both the federal government and the contractor shared "the same interest in getting the Government's work done." *Id.* at 505.

More recently, in *Filarsky v. Delia*, *supra*, the Court amplified *Yearsley*'s rationale for government contractor-related immunity, albeit in the context of an independent contractor's qualified-immunity claim at the local government level. *See In re KBR, Inc.*, *Burn Pit Litig.*, 744 F.3d at 344 ("interpret[ing] *Filarsky* as reaffirming the principles undergirding the *Yearsley* rule, albeit in the context of § 1983 qualified immunity rather than derivative sovereign immunity").

> Like *Filarsky*, *Yearsley* recognizes that private employees can perform the same functions as government employees and concludes that they should receive immunity from suit when they perform these functions. . . . 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" . . . . *Id.* Finally . . . the *Yearsley* rule "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.*

744 F.3d at 344; *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (discussing *Yearsley* and *Filarsky*) ("Qualified immunity reduces the risk that contractor will shy away from government work."); Pet. App. 196a (*Al Shimari I*) (Niemeyer, J., dissenting) (In *Filarsky* "the Supreme Court has reaffirmed the need to protect those who perform government *functions* with immunity regardless of whether they are public employees, such as military officers, or private individuals retained to perform the same function."). As Chief Justice Roberts explained in *Filarsky*, a contractor "might think twice before accepting a government assignment" if it "could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." 566 U.S. at 391.

The government contractor immunity-related principles long recognized by this Court inform the collateral order doctrine issue presented by this case. These principles, coupled with the Court's collateral-order precedents and the battlefield contractor case law discussed in the certiorari petition and this brief, provide the rationale for extending the collateral order doctrine to federal contractors' immunity-from-suit claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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