Case No. 15-1831

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Nazim Abdulllah AL SHIMARI,
Taha Yaseen Arraq RASHID, Salah Hasan Nusaif Jasim AL-EJAILI,
Asa'ad Hamza Hanfoosh AL-ZUBA'E,
Plaintiffs-Appellants,
and
Sa'ad Hamza Hantoos 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

BRIEF OF KBR, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

Raymond B. Biagini
Daniel L. Russell Jr.
Herbert L. Fenster
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Amicus Curiae

DISCLOSURE STATEMENT

Amicus curiae KBR, Inc. is a publicly held corporation. No parent corporation or publicly held corporation has a 10% or greater ownership interest in KBR, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amicus KBR, Inc. is one of the world's preeminent engineering, construction, and services companies, employing approximately 27,000 people in more than 70 countries. KBR, through its subsidiary Kellogg Brown & Root Services, Inc., has a long history of delivering effective solutions to defense and government agencies worldwide. Many of the services KBR provides are indistinguishable from services traditionally performed by the government itself. For example, KBR provides government and military organizations with base operations, facilities management, border security, logistics support, humanitarian assistance, disaster response, and engineering, procurement, and construction services. KBR has completed projects and performed services for the U.S. Army and the U.S. Departments of Energy, State, and Homeland Security, among many other government entities.

[1] Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

KBR often provides those services under challenging circumstances in remote locations throughout the Middle East, Asia, and Africa. For example, in connection with a contract issued by the U.S. Army through the Logistics Civil Augmentation Program ("LOGCAP"), KBR provided numerous mission-critical services to support the Army's war efforts in Iraq and Afghanistan. In that role, KBR personnel served in-theater alongside uniformed military personnel, and provided combat support services including, *inter alia*, transportation, waste management, food and water supply, building and equipment maintenance, and numerous other delegated functions.

Because KBR routinely operates in difficult or challenging circumstances where injuries are all but inevitable, it has also faced litigation arising out of the services it provides to the government. For example, even though KBR was performing combat support services at the direction of the military in multiple active war zones—and even though the Army consistently gave KBR the highest possible ratings for its unprecedented performance—KBR has been sued by numerous plaintiffs who seek to hold the company liable for alleged injuries incurred on foreign battlefields.

KBR has invoked the political question doctrine, and related federal-law-based doctrines, in response to many of these claims. Indeed, KBR successfully asserted the political question doctrine in the leading Fourth Circuit contractor-on-the-battlefield decision, *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011). In addition, the political question doctrine is one of KBR's core defenses in a massive, multidistrict litigation pending in this Circuit that concerns the operation of "burn pits" in Iraq and Afghanistan. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 337-38 (4th Cir. 2014).[2]

KBR thus has considerable experience litigating these issues and a direct and substantial interest in ensuring that this and other courts properly interpret and apply the political question doctrine to battlefield contract tort suits. KBR submits this brief to provide its unique perspective of the legal and factual landscape relevant to battlefield contractors.

---

[2] KBR has been a party to numerous lawsuits outside this circuit involving application of the political question doctrine to battlefield contract scenarios. *See*, *e.g.*, *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *Carmichael v. Kellogg Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009); *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013).

SUMMARY OF ARGUMENT

Over the past thirty years, the U.S. military has chosen to delegate an increasing number of essential support functions to private contractors. Today, contractors routinely augment our nation's forces inside overseas war zones, and they are vital to our national defense. Simply put, this country's modern, all-volunteer military cannot fight and sustain a war without contractors.

When a contractor performs a delegated battlefield support function—*e.g.*, serving food in a dining hall, performing facilities maintenance, driving convoys, interrogating prisoners—there are two inevitable results: (i) the military will *always* exercise some degree of control over the contractor; and (ii) the military will *always* give the contractor some degree of discretion in carrying out its mission. Much of the last decade's jurisprudence surrounding battlefield contractor tort suits, including the district court's decision here, has grappled with—and often placed an undue emphasis on—these related and somewhat dueling concepts of "control" and "discretion."

In *Taylor*, this Court held that even substantial contractor discretion, coupled with something far less than "plenary" or "direct"

military control, does not foreclose application of the political question doctrine. On the contrary, this Court held the political question doctrine barred a tort suit notwithstanding that the contractor was "nearly insulated" from direct government control, 658 F. 3d at 411; the contractor had "exclusive supervisory authority" over its own employees, *id.*; and the contractor allegedly exercised its broad discretion in a negligent manner that was within the scope of the contract but *directly contrary* to an express directive from the military, *id.* at 404. *Taylor* did not center the political-question-doctrine inquiry around the issue of contractor discretion, but instead ultimately focused—much more broadly—on the nature of the military decisions governing and impacting the conduct. *Taylor* made clear that application of the doctrine does not hinge on whether a contractor acted negligently or failed to comply with a military directive while acting within the scope of the contract.

The *Taylor* court's analysis was sound and should be reaffirmed and expounded upon by this Court, for numerous reasons. First, by crafting a test that embraces, rather than deters, contractor discretion, *Taylor* echoed the Supreme Court's seminal decision regarding

government contractor tort liability, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle* considered but rejected a formulation of the government contractor defense that would have shielded contractors from liability only when the contractor had virtually no discretion. As the Supreme Court recognized, penalizing contractor discretion undermines vital federal interests.

Second, *Taylor* created a broad, bright line rule of law that, when properly applied, should produce consistent and predictable jurisprudence surrounding battlefield contractor tort suits. Indeed, the *Taylor* test presents an opportunity for streamlining and simplifying this area of law because it can be viewed as the functional equivalent of a related federal defense: preemption based on the Federal Tort Claims Act's "combatant activities" exception. The *Taylor* political-question-doctrine test is effectively identical to the battlefield preemption tests endorsed by the D.C. Circuit and the United States. *See*, *e.g.*, *Al Shimari v. CACI Int'l Inc.*, 679 F.3d 205, 225-227 (Wilkinson, dissenting) ("these state tort claims have no passport that allows their travel in foreign battlefields, and we have no authority to issue one").

Third, the broad rule created by *Taylor* reflects an appreciation for the many *inherent* governmental controls that exist inside a battlespace—*i.e.*, the robust regulatory scheme applicable through contract law, and the day-to-day realities that accompany the performance of all mission-critical services inside a war zone. These elements collectively *force* contractors to accept, adapt to, and act within an operational sphere that is overwhelmingly dictated and controlled by the military. These overarching controls are part of the bigger picture that must be taken into consideration even if, as in *Taylor*, on a granular level the contractor does not appear subject to "direct" or "plenary" control.

Over the past four years, litigants and courts citing *Taylor* have frequently engaged in an overly subjective and granular examination of concepts of "control" and "discretion," rather than an analysis of more critical and broader separation-of-powers concerns. What is now emerging—as evidenced in Appellants' opening brief and the briefs of the various *amici* supporting Appellants—is a proposed rule of law that would turn *Taylor* on its head. Specifically, Appellants seek to confine application of the political question doctrine only to situations in which

the contractor had virtually no discretion, and situations in which the contractor acted in total conformance with military directives. This proposed narrowing of the political question doctrine is not rooted in fundamental separation-of-powers principles. Rather, it appears to be borne of a misguided sense that, unless a contractor is literally a government automaton—physically compelled to carry out a specific act—the contractor should not be shielded from liability. For many reasons, *Taylor* and many other precedents have emphatically rejected that notion.

This case presents an opportunity for this Court to clarify, consistent with *Taylor* and other precedents, that tort suits against battlefield contractors can offend separation of powers and will be barred even where contractors are vested with substantial discretion, and even where contractors allegedly acted in a negligent manner, contrary to military directives but within the scope of the contract. Likewise, this case presents the Court with an opportunity to acknowledge the functional convergence of the political-question-doctrine test from *Taylor* and the proper test for "combatant activities" battlefield preemption.

ARGUMENT

I. *Taylor* Correctly Recognized That Substantial Contractor Discretion Does Not Foreclose Application of the Political Question Doctrine or Related Federal-Law-Based Defenses

A. *Taylor* Held the Political Question Doctrine Barred a Battlefield Tort Suit Despite Substantial Contractor Discretion and Alleged Failure to Conform With Military Directives While Acting Within the Contract's Scope

The parties and various *amici* agree that *Taylor* is the seminal Fourth Circuit decision on point, but they disagree how *Taylor* should be applied here. It is important to recount, therefore, the pertinent facts and legal analysis set forth in *Taylor*. A fair reading of *Taylor* demonstrates that this Court rejected the narrow political-question-doctrine test proposed here by Appellants and supporting *amici*.

The most critical facts of *Taylor* are frequently glossed over in briefs and court decisions. The plaintiff in *Taylor* alleged that he suffered electrical shock injuries when a contractor (KBR) negligently energized a generator at a time when the plaintiff (a Navy Hospital Corpsman) was in the midst of performing electrical work on the downstream electrical equipment. 658 F. 3d at 404. Importantly, the plaintiff claimed that the contractor had taken this negligent action—turning on the power—only after being directed by military personnel

not to do this very thing. *Id.* ("Although the [contractor] agreed to the Marines' request [not to turn on the generator], one of them nevertheless turned on the main generator while the Marines were working on the wiring box."). Thus, the core factual allegation in *Taylor* was that a contractor performed a *discretionary* act, within the scope of the contract, in a manner that was *directly contrary to a military instruction*.

This Court did not get hung up on these allegations of negligence and failure to comply with military direction; indeed, those allegations were ultimately of no legal consequence in the decision. Specifically, *Taylor* established a two-prong political-question-doctrine test. The test focuses on two alternate issues: "first, the extent to which [the contractor] was under the military's control"; and, "second, whether national defense interests were closely intertwined with the military's decisions governing [the contractor's] conduct." 658 F. 3d at 411. If either prong of the test is met, the suit is non-justiciable. *In re KBR Burn Pit Litig.*, 744 F. 3d at 355.

As to the first prong, the Court held that, in some scenarios, the extent of "direct" military control is facially overwhelming, thus

requiring no further inquiry. The Court cited and endorsed the Eleventh Circuit's decision in *Carmichael* as illustrative of that scenario. *Taylor*, 658 F. 3d at 411. Concluding that no such "direct" control was obvious in *Taylor*, the Court then turned to "whether national defense interests were closely intertwined with the military's decisions governing [the contractor's] conduct." *Id.*

This portion of the Court's analysis is critical. Beyond simply noting a lack of "direct," *Carmichael*-like military control, *Taylor* emphasized the *very minimal* amount of direct military control it perceived, and the *very broad* discretion retained by the contractor. The Court highlighted several key facts:

- the contractor retained "*exclusive* supervisory authority and responsibility over employees,'" *Taylor*, 658 F. 3d at 411 (emphasis added);
- "with respect to generator maintenance at the Camp, [the contractor] was *nearly insulated* from direct military control," *id.* (emphasis added); and
- the contractor "was itself *solely responsible* for the safety of all 'camp residents during all contractor operations,'" *id.* (emphasis added).

Despite this apparently broad discretion and lack of "direct" control, this Court had little difficulty concluding that the case was

barred by the political question doctrine.[3] The Court cited numerous overarching military decisions that would be inappropriately subjected to judicial scrutiny should the case proceed—decisions that were not directly challenged by the plaintiff and were far removed from the specific alleged negligence, such as "how electric power is supplied to a military base in a combat theatre." *Id.* at 411, 412, n.13.[4] In so holding, the Court expressly rejected the argument made by the *Taylor* plaintiff—the same argument made by plaintiffs in virtually all battlefield contractor tort suits—that a court "should evaluate the reasonableness of [the contractor's] acts within the parameters of the military's orders—that is, deeming such orders to be 'external constraints' within which [the contractor's] allegedly negligent acts should be assessed." *Taylor*, 658 F. 3d at 410.

---

[3] Although we do not entirely agree with the Court's conclusion regarding the amount of government control and the breadth of contractor discretion in *Taylor* (*see*, *e.g.*, Section I.C., *infra*), that is of no consequence here; the Court ultimately held—correctly—that the issue of relative "control" versus "discretion" was not the right focal point.

[4] It is axiomatic that "most military decisions lie solely within the purview of the executive branch." *Taylor*, 658 F. 3d at 407, n.9; *see also Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991) ("The strategy and tactics employed on the battlefield are clearly not subject to judicial review.").

B. The *Taylor* Test Is Consistent With *Boyle* and Related Supreme Court Precedents

By focusing on the uniquely federal interests at stake, and by rejecting any legal test that would have created a disincentive for government contractor discretion, *Taylor* mirrored the Supreme Court's analysis in *Boyle*. That case involved the government contractor defense, a federal common law defense that can be invoked by contractors when their design or performance is subjected to reasonably precise specifications that have been reviewed and approved by the government; the contractor meets those specifications; and the contractor warns the government of any risk known to them. *See Boyle*, 487 U.S. at 512.

What is most relevant about *Boyle*, for present purposes, is not the test it adopted; it is the test *Boyle* rejected. The Supreme Court had before it two competing versions of the defense, one developed by this Circuit (the underlying *Boyle* decision, which the Court had granted certiorari to review), and one developed by the Eleventh Circuit (*Shaw v. Grumman*, 778 F. 2d 736, 746 (11th Cir. 1985)). The key distinction between the two tests was the *Shaw* court's insistence that a contractor have virtually zero discretion in order for the defense to apply. Under

Shaw, the defense applied only if "the contractor did not participate, or participated only minimally, in the design of the defective equipment." *See Boyle*, 487 U.S. at 513.

The Supreme Court rejected the *Shaw* rule because, although it "may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest [in the procurement of military products and services]." *Id.* at 513. Further, the Court explained that adopting a rule that penalized contractor discretion would undermine these federal interests. *Id.* ("it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects").

Numerous other judicial decisions, addressing analogous situations involving government contractor liability, have recognized that the elimination of contractor discretion would undermine significant federal interests. *Filarsky v. Delia*, 132 S.Ct. 1657 (2012), is a case in point. Therein, the Supreme Court explained that it is "of vital importance" that private individuals who support government functions do so "with the decisiveness and the judgment required by the public good." *Id.* at 1665 (quoting *Scheuer v. Rhodes,* 416 U. S. 232, 240

(1974)). Enacting a rule of law that inhibits a contractor from acting decisively, by incentivizing the contractor to act *only* in close concert with government direction, undermines this interest.

C. The *Taylor* Test Is Functionally Equivalent To the Combatant Activities Preemption Tests Outlined By the D.C. Circuit and the United States

Viewed with the benefit of time and further development of battlefield contractor jurisprudence, the *Taylor* test is valuable for another reason: It is functionally identical to the proper test for federal preemption of state-tort lawsuits under the Federal Tort Claims Act's "combatant activities" exception, as adopted by the D.C. Circuit and as proposed by the United States.

The D.C. Circuit's deliberately broad preemption test, as set forth in *Saleh v. Titan Corp.*, 580 F. 3d 1, 9 (D.C. Cir. 2009), is as follows: "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." Although rooted in preemption, the D.C. Circuit acknowledged the critical separation-of-powers interests at stake. *See id.* ("Insofar as this lawsuit pursues contractors integrated

within military forces on the battlefield, we believe it similarly interferes with the foreign relations of the United States as well as the President's war making authority.").

The United States endorsed a similar preemption test in briefs submitted to this Court and the Supreme Court. Specifically, the United States' official position is that tort suits against contractors-on-the-battlefield are preempted so long as two conditions are met: (i) similar claims against the United States would be barred; and (ii) the contractor was acting within the scope of its contractual relationship with the government. *See* Br. of United States as Amicus Curiae at 17-20, *Al Shimari v. CACI Int'l*, No. 09-1335, 2012 WL 123570 (4th Cir. Jan. 14, 2012).[5]

In effect, the United States' preemption test parallels the *Taylor* holding. Just as the *Taylor* court disregarded the allegation that the contractor acted negligently and contrary to a military directive, the United States went out of its way to explain that its preemption rule should apply "even if an employee of a contractor allegedly violated the

[5] *Accord* Br. for the United States as Amicus Curiae, *Harris v. Kellogg Brown & Root Servs., Inc.*, No. 13-817 (U.S. Dec. 16, 2014).

terms of the contract or took steps not specifically called for in the contract." *Id.* at 20. Thus, the United States' rule, like the *Taylor* test, carefully avoids a scenario in which the protection against liability would rise and fall depending on whether the contractor acted "negligently" or "violated the terms of the contract." Both rules of law protect contractor discretion.

But more to the point, both rules protect the vital and uniquely federal interests underlying battlefield tort suits. In the case of the political question doctrine, the primary underlying interest is the separation of powers. In the case of preemption, the primary underlying interest is avoiding state law interference with the federal government's exclusive control over national defense. These uniquely federal interests converge in the context of battlefield tort suits.

As a result, the United States' test and the *Taylor* test accomplish the identical, very critical purpose. Both reflect an appropriate refusal on the part of the judicial branch to regulate conduct inside foreign battlefields, and both protect the federal executive branch's exclusive control over the regulation of such battlefield conduct. *See*, *e.g.*, *Al Shimari*, 679 F.3d at 225-227 (Wilkinson, dissenting) ("Tort suits place

the oversight of military operations in an unelected judiciary, contract law in a politically accountable executive . . . these state tort claims have no passport that allows their travel in foreign battlefields, and we have no authority to issue one").

Moreover, the concept of "scope" under the United States' test is akin to the second prong of the *Taylor* test. To the extent a contractor is acting within the scope of a battlefield services contract, it is virtually inevitable that "national defense interests [are] closely intertwined with the military's decisions government [the contractor's] conduct." *See* 658 F. 3d at 411. Despite differences in the precise language used, both defenses apply even where conduct is allegedly "negligent" or allegedly violates the terms of the contract, but neither includes *ultra vires* acts outside the scope of the contract.[6]

Both rules therefore create necessarily broad, but not boundless, defenses. In this respect, both are analogous to the "scope of the contractual relationship" standard under the Westfall Act. *See* 28 U.S.C. § 2679(d)(1),(2) (claims are deemed to arise against the United

[6] It appears very clear that the allegations in this suit concern conduct that was within the scope of the contract.

States where a federal employee is sued even for wrongful or negligent conduct, if employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose").

II. The Military Exercises an Extraordinary Amount of Direct and Indirect Control Over Contractors Performing Essential Support Services Inside War Zones

Although *Taylor* made it clear that something far less than "direct" or "plenary" control sufficed to warrant dismissal based on the political question doctrine, the ultimate holding of that case reflected an understanding of, and appreciation for, the many government "controls" that exist in overseas battlespaces. These controls are markedly different than those found in civilian arenas. Viewed collectively, they provide additional reasons why courts should not overly focus on evidence of "control" at a granular level, but should instead view the actions of a battlefield contractor more broadly as part of a unique, symbiotic relationship between contractor and government actor. *Cf. Dobyns v. E-Systems, Inc.*, 667 F. 2d 1219 (5th Cir. 1982) (characterizing contractor conduct as "state action" because of the close, symbiotic relationship between the contractor and the government); *Flagg Brothers v. Brooks*, 436 U.S. 149, 157 (1978).

A. Battlefield Services Contractors Are Subject to a Multitude of Contractual Methods of Control

Federal government contracts typically incorporate by reference a laundry list of complex federal regulations that, particularly in the context of services performed under cost-reimbursement contracts, provide the government powerful tools by which to control contractor performance.[7] This includes provisions found in the Federal Acquisition Regulation ("FAR"), the Defense Federal Acquisition Supplement ("DFARS"), and the Army Federal Acquisition Regulation Supplement ("AFARS").

Courts addressing battlefield contractor suits have rarely acknowledged the extensive and complex regulatory mechanisms that *require* substantial government involvement with, and control over, the

---

[7] Cost-reimbursement contracts are commonly used for battlefield support services due to the uncertain nature and cost of these services. Cost-reimbursement contracts are a unique breed of government contract. Pursuant to FAR 16.301-2(a), the government has a strong policy preference for fixed-priced contracts over cost-type contracts. That is primarily because cost-type contracts require the government to assume much greater cost risks. In turn, that elevated cost risk compels the government to exercise substantial oversight and evaluation of the contractor's performance, as set forth *infra*. *See generally* Cong. Research Serv. R41168, *Contract Types: An Overview of the Legal Requirements and Issues* 17-21.

day-to-day aspects of a battlefield contractor's performance. Therefore, for the benefit of this Court, we provide below a brief summary of key regulatory provisions that are routinely incorporated into these contracts. These provisions illustrate the power of the contract itself as a mechanism for influencing and controlling battlefield contractor behavior. *See Shimari*, 679 F. 3d at 242 (Wilkinson dissenting) ("What the chain of command does for military officers, contract law does for military contractors.").

Broadly speaking, the FAR and other regulatory provisions incorporated into battlefield contracts include mandatory *requirements* for the following:

- extensive government supervision over, and ultimate responsibility for the quality of, the contractor's work;
- frequent and systematic evaluation of the contractor's performance, which is necessary both as a contractual matter and an operational matter because the military has an obvious vested interest in ensuring mission-critical services are performed correctly;
- government review of performance prior to formal acceptance in order to confirm compliance; and
- post-performance government review in order to determine a contractor's award fee.

Examples of commonly-incorporated federal regulatory provisions include the following:

- "Contracting officers are responsible for . . . *ensuring compliance with the terms of the contract*, and safeguarding the interests of the United States in its contractual relationships." FAR 1.602-2 (emphasis added); *see also* FAR 46.502 ("Acceptance of supplies or services is the responsibility of the contracting officer.").
- "The Government has the right to inspect and test all services called for by the contract, to the extent practicable *at all places and times during the term of the contract*." FAR 52.246-5(c) (emphasis added).
- Contracting officers are responsible for "[e]nsur[ing] contractor compliance with contractual quality assurance requirements." FAR 42.302(a)(7), (13), (38), (68);
- "Departments and agencies shall also—(1) Develop and manage a systematic, cost-effective Government contract quality assurance program to ensure that contract performance conforms to specified requirements," and "(2) Conduct quality audits to ensure the quality of products and services meet contractual requirements." DFARS 246.102(1),(2).
- "Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this subpart and subject to other terms and conditions of the contract." FAR 46.501.
- "[C]ontractors should not receive award fee above the base fee for simply meeting contract requirements. Earning an award fee is in accordance with the award fee plan, and should be directly commensurate with the level of performance under the contract." AFARS 5116.405-2(2)(A).

It is not surprising that the government has at its disposal all of these powerful mechanisms for surveillance, evaluation, and real-time

control over in-theater contract performance. Such controls ensure operational success: if the contractor fails, the mission fails. And in a cost-reimbursable contract, these controls allow the government to monitor expenditures and protect the public fisc.

The government also has an interest in protection of the public fisc in any tort suits arising out of performance of a battlefield support contract. That is because, pursuant to basic cost-reimbursement principles, the United States is *the real party in interest* in a typical battlefield tort suit. As the United States itself has explained, "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." *See* Br. for U.S. as *Amicus Curiae* in *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817 (U.S. Dec. 2014) (citing 48 C.F.R. 52.228-7(c)); *see also* 48 C.F.R. §§ 31.205–33 and –47; *Land v. Dollar*, 330 U.S. 731, 738 (1947) (explaining that any suit in which "the judgment sought would expend itself on the public treasury . . . is [a suit] against the sovereign"). The government's status as real party in interest only further illustrates the unique, interdependent, and symbiotic

relationship that exists between the government and a battlefield services contractor.

B. The Military Exerts Significant and Pervasive Control Over All Aspects of Life Inside War Zones

Beyond the contractual mechanisms described above, there are significant operational realities of doing work at a forward operating base in a war zone. The military exerts control and influence over contractor behavior, both directly and indirectly, because the military is solely responsible for a large collection of foundational decisions that establish the unique, and in many ways limited, environmental and operational framework for all contractor performance. For example:

- The military establishes and controls the basic physical footprint of each base, including where to locate offices, dining facilities, entry control points and other gates, billeting structures, hospitals, and other components.
- The military decides where to house personnel within each base.
- The military controls the design of the underlying infrastructure of each base—*e.g.*, power generation and distribution, water services, waste disposal mechanisms, roadways, perimeters.
- The military controls access into and out of each base.
- The military controls which equipment and supplies are allowed into and out of each base.
- The military decides how large a population an individual base will include, for both military and contractor personnel.

- The military is typically exclusively responsible for force protection and protection of the contractor personnel at each base.
- The military has the authority to evacuate contractor personnel in the event deemed necessary for safety.
- The military decides the amount of resources and funding to devote to each activity on the base.
- The military has the authority to seek criminal penalties for a contractor's failure to perform under any contract designated as a "rated order" contract under the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2171, 2071(a) & 2073.

The collective impact of these decisions and authorities is enormous. While not always facially obvious, virtually every activity carried out on a military base inside a foreign war zone is affected by these overarching military decisions. Importantly, this pervasive military presence renders it impossible, in most battlefield contractor tort suits, to isolate contractor conduct in a way that would allow courts to impose tort-law standards *without* interfering with military affairs. Again, that is why the broad rule established by *Taylor* is essential.

III. This Court Should Reject Appellants' Attempts to Rewrite and Undermine the *Taylor* Political Question Doctrine Test

Appellants disregard the core holding of *Taylor* and seek to focus the political-question-doctrine inquiry *not* on the uniquely federal

interests but instead on the alleged conduct of the contractor. The most striking example of this is found in the following passage:

> The Taylor test already incorporates this *Baker* element because if a court finds that the contractor's alleged negligent act *was directed by the military*, there would necessarily be no standards to judge the military's discretionary judgment; conversely, if the contractors' negligence was *independent of military direction*, the court could adjudicate those claims as it would against any private party according to traditional legal standards.

App. Br. at 53-4. In other words, Appellants apparently contend the political question doctrine applies under *Taylor* only if "the contractor's alleged negligent act was directed by the military." *Id.* at 53. But that is precisely the opposite of what *Taylor* held. As explained above, the contractor in *Taylor* allegedly *disregarded* the military's directive (albeit while acting within the scope of the contract). The fact that the contractor's conduct was *not* "directed by the military" was of no consequence to this Court's analysis. If Appellants' position were correct, *Taylor* would have come out the other way.

Indeed, Appellants repeatedly contend the political question doctrine can only apply if the contractor acted in accordance with military directives. *See also* App. Br. at 23 ("The Conduct Alleged by

Plaintiffs Was Never Authorized or Was Expressly Prohibited by the Military"); 45 ("there is no evidence that military commanders ordered or authorized" the contractor to carry out the challenged conduct). Appellants also improperly seek to focus the political-question-doctrine inquiry on their belief that the contractors in this suit had broad discretion. App. Br. at 11 ("CACI maintained significant discretion to plan and execute interrogations"). Appellants even go so far as to suggest that the *only* scenario warranting dismissal is where the contractor is physically forced to act a certain way and becomes a mere puppet in the arms of the military; in Appellants' words, the requisite level of "control" exists only "where there is no daylight between contractor and military action." App. Br. at 43. Again, that position flies in the face of *Taylor* and its broad separation-of-powers underpinnings.

Similarly, Appellants seek to assign importance to facts deemed irrelevant by *Taylor*. For example, they note that the contractor "was contractually obligated to supervise its own employees." App. Br. at 44. But the same was true in *Taylor*, as Appellants themselves acknowledge. *See also* Dkt. 21-1 at 19 (Amicus Br. of Retired Military Officers) ("Commanders do not have direct control over contractors or

their employees"); 17 ("In most circumstances, the contractor will retain a measure of discretion as to how it performs . . .").

This Court should reject such attempts to rewrite *Taylor* in a manner that would undermine, rather than protect, the core separation-of-powers principles upon which that decision rests.

CONCLUSION

For the foregoing reasons, *amicus* KBR, Inc. respectfully urges the Court to affirm the district court's dismissal of this suit on the basis of the political question doctrine. KBR also respectfully urges the Court to clarify and reiterate the fundamental separation-of-power principles underlying this Court's decision in *Taylor*. Those principles require a broad, bright-line rule of law prohibiting judicial regulation of battlefield-contractor conduct that occurs within the scope of the contract. The uniquely federal interests at stake are not protected, and the *Taylor* test is not properly applied, when courts employ an overly subjective evaluation, at a granular level, of the precise level of perceived military "control," nor the amount of contractor "discretion." Finally, KBR respectfully urges the Court to recognize and acknowledge

the functional similarity between the *Taylor* test and federal preemption based on the FTCA's "combatant activities" exception.

Dated: November 2, 2015

Respectfully submitted,

/s/ Daniel L. Russell Jr.
Daniel L. Russell Jr.
Raymond B. Biagini
Herbert L. Fenster
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
Ph: 202.662.6000
Fax: 202.662.6291
drussell@cov.com
rbiagini@cov.com
hfenster@cov.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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).

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 Century.

/s/ Daniel L. Russell Jr.
Daniel L. Russell Jr.
COVINGTON & BURLING LLP

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Daniel L. Russell Jr.
Daniel L. Russell Jr.
COVINGTON & BURLING LLP

Attorney for Amicus Curiae