Case No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,
Defendant and Third-Party Plaintiff – Appellant,
and
Timothy Dugan, CACI International Inc., L-3 Services, Inc.,
Defendants,

v.

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

and

UNITED STATES OF AMERICA; JOHN DOES 1-60,
Third-Party Defendants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Case No. 1:08-cv-00827
The Honorable Leonie M. Brinkema, United States District Judge

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BRIEF OF KELLOGG BROWN & ROOT SERVICES, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

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DISCLOSURE STATEMENT

Amicus curiae Kellogg Brown & Root Services, Inc. is not publicly traded. Kellogg Brown & Root Services, Inc. is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root Services, Inc. has more than 50% ownership in the following non-wholly-owned subsidiaries: KBR Diego Garcia, LLC; KBRwyle Range Services, LLC; Kellogg Brown & Root Engineering Consultancy LLC; Kellogg Brown & Root Services LLC; KSC BOSS ALLIANCE, LLC. Other than Kellogg Brown & Root Services, Inc.'s ultimate parent (KBR, Inc.), Kellogg Brown & Root Services, Inc., does not have any publicly traded affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF INTEREST[1]

Amicus Kellogg Brown & Root Services, Inc. ("KBR") is a government-services-focused subsidiary of KBR, Inc., one of the world's preeminent engineering, construction, and services companies, which has approximately 38,000 employees, customers in more than 80 countries, and operations in 40 countries. KBR has a long history of supporting defense and government agencies worldwide. Today, KBR provides comprehensive consulting and technology solutions for a wide range of markets, from aerospace and defense to energy and chemicals to intelligence.

Many of the services KBR provides are indistinguishable from traditional government functions, including military base operations, facilities management, border security, humanitarian assistance, and disaster response services. KBR has completed projects and performed services for the Army, NASA, and the Departments of Energy, State, and Homeland Security, among other government entities. KBR often

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person contributed money to *amicus* for the purpose of funding the preparation or submission of this brief.

performs under challenging circumstances in remote locations. For example, KBR personnel served as "force multipliers" by providing mission-critical services for the Army during the wars in Iraq and Afghanistan.

KBR has faced litigation arising out of the services it provides as a "contractor on the battlefield." In defending these suits, KBR has invoked federal-law-based doctrines, including derivative sovereign immunity, the political question doctrine, and federal preemption.

KBR was a party in several Fourth Circuit battlefield contractor cases: *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011); *In re KBR Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014) ("*Burn Pit I*"); *In re KBR Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018) ("*Burn Pit II*"). KBR also was a party in numerous battlefield contractor cases involving interlocutory appeals. *See Harris v. Kellogg Brown & Root Services, Inc.*, 618 F.3d 398 (3d Cir. 2010); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010); *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224 (D. Or. 2010); *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012); *McManaway v. KBR, Inc.*, 554 Fed. Appx. 347 (5th Cir. 2014).

KBR thus has considerable experience litigating these complex

issues, and substantial interest in ensuring that courts properly interpret the law applicable to battlefield contractor suits. KBR submits this brief to provide its unique perspective and broad understanding of the legal landscape relevant to battlefield contractors.

SUMMARY OF ARGUMENT

The U.S. military's increased reliance on contractors in recent decades has had several consequences, including a proliferation of lawsuits arising out of the performance by contractors of functions historically carried out by military personnel. These suits raise legal issues of exceptional importance. The United States has explained that the scope of liability faced by battlefield contractors "has significant importance for the Nation's military" because imposing liability "for actions taken within the scope of [a contractor's] contractual relationship supporting the military's combat operations would be detrimental to military effectiveness." Br. for the U.S. as Amicus, *Harris v. Kellogg Brown & Root Servs., Inc.*, No. 13-817 (U.S. Dec. 16, 2014) at 19. Further, these suits "can impose enormous litigation burdens on the armed forces." *Id.* at 20.

The panel's decision disregards the critical need to resolve

immunity and related threshold defenses in battlefield contractor suits "at an early stage." *Martin*, 618 F.3d at 488. When a district court rejects such defenses, there must be a vehicle for timely appellate review. If interlocutory review is denied, the ensuing litigation can inflict the very harms to federal interests that the defenses are designed to prevent. *See Al Shimari v. CACI International, Inc. ("Al Shimari II")*, 679 F.3d 205, 225 (4th Cir. 2012) ("these are not routine appeals that can be quickly dismissed through some rote application of the collateral order doctrine") (Wilkinson, J., dissenting); Panel Decision at 5 ("Our narrow interpretation of the collateral order doctrine in this case has taken us down a dangerous road.") (Quattlebaum, J., concurring).

The panel's decision follows an unfortunate pattern in recent battlefield contractor suits in which appellate courts have been reluctant to provide clear answers to difficult legal questions, choosing instead to defer ruling pending further litigation. *See*, *e.g.*, *McManaway*, 554 Fed. Appx. at 350 (Jones, J., dissenting) ("The panel's unenlightening explanation for remand, however, ensures there will be no early stage resolution of this case. The existence of a record ready for trial demanded and facilitated a final decision in this court."). This

"kick the can down the road" jurisprudence has spawned unnecessarily-protracted litigation with significant consequences: massive burdens on the U.S. military; intrusion into military affairs; and expenditure of resources and money—including enormous costs borne by taxpayers.

The panel's decision, and other appellate decisions to defer definitive rulings, are in part the product of inconsistent litigation positions expressed by the United States. On one hand, the government argues that battlefield contractor suits implicate vital federal interests, harm national defense, and should be dismissed. On the other hand, the government has consistently shied away from advocating for interlocutory appellate review when such review is essential to resolve important dispositive issues. That happened in this appeal even though, in a prior appeal, the United States acknowledged that a "conclusive determination of a substantial claim to immunity would be entitled to collateral order review." *See* En Banc Audio[2] of *Al Shimari II* at 1:00:30.[3]

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[2] *Available at* http://www.ca4.uscourts.gov/opinions/en-banc-cases.

[3] We respectfully submit that the Court should solicit the United States' views regarding jurisdiction here, as the Court did in *Al Shimari II*.

Rather than remand for a fourth time, the Court should grant *en banc* review to clarify that an interlocutory appellate right exists under the circumstances presented, and to resolve other issues of exceptional importance, including matters of derivative immunity, justiciability, and federal preemption—matters that members of this Court have acknowledged are worthy of serious consideration. *See*, *e.g.*, *Al Shimari II*, 679 F.3d at 224 (Duncan, J., concurring) ("I write separately only to express my hope that the district courts in these consolidated appeals will give due consideration to the appellant's immunity and preemption arguments… which are far from lacking in force.").

ARGUMENT

Rehearing is warranted for reasons set forth in Appellant's petition.[4] Rather than repeat those arguments, we write separately to provide additional, independent reasons for granting rehearing.

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[4] In particular, the panel's decision conflicts with controlling precedent because, as the United States notes, the district court's opinion is based on a "fundamental misunderstanding of both sovereign immunity and international law," and it "departed from settled law." Br. for the U.S. as Amicus at 1, 13. These are pure issues of law, thus conferring jurisdiction. *Al Shimari II*, 679 F.3d at 222 (interlocutory jurisdiction exists "if the record at the dismissal stage can be construed to present a pure issue of law").

I. In Battlefield Contractor Suits, Courts Should Resolve Threshold Defenses at An Early Stage to Avoid Unnecessarily-Protracted Litigation and Unwarranted Harms to Federal Interests.

The panel's decision disregards the critical need for *early* resolution of immunity and related threshold defenses, including through immediate appellate review of denied immunity claims. As the Fifth Circuit explained:

> Because the basis for many of these 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.

618 F.3d at 488. As Judge Wilkinson warned in his *Al Shimari II* dissent, denial of immediate appellate review in suits like this is "anything but innocuous" because it "gives individual district courts the green light to subject military operations to the most serious drawback of tort litigation." 679 F.3d at 225-26 (Wilkinson, J., dissenting); *see also McManaway*, 554 Fed. Appx. at 354 (Jones, J., dissenting) ("the court, by condoning indecision here that amounts to a decision, has abandoned the restraint we ought to exercise when facing wartime conduct that we are constitutionally and statutorily forbidden and ill-suited to evaluate").

KBR's experience illustrates the serious harms that are inflicted when appellate courts defer definitive rulings on threshold immunity or related defenses.

For example, in *Burn Pit I*, this Court reversed and remanded an early dismissal based on its conclusion that a larger factual record was needed. *See* 744 F.3d at 351-52. Over the next several years, the district court presided over a "herculean discovery process," which "yielded over 5.8 million pages of documents, including almost a million pages of contract documents, and 34 witness depositions." *Burn Pit II*, 893 F.3d at 253, 254. Most witnesses were military personnel, including commanding generals and other high-ranking officials, some of whom were on active duty. The litigation required participation by dozens of government attorneys from DOJ, DOD, the Army, and DCMA. During depositions and at an evidentiary hearing, sensitive military judgments were subjected to second-guessing, as commanders faced probing questions regarding their wartime decisions, such as how they chose to devote resources to best ensure the safety of U.S. troops. Ultimately, the expansive remand proceedings were not essential, as the core factual predicate for the eventual dismissal (based on the threshold

justiciability question) had already been established prior to remand. *Compare Burn Pit I*, 744 F.3d at 337 (citing sworn testimony regarding key military decisions); *with Burn Pit II*, 893 F.3d at 254 (same).[5]

Other suits, including this one, have followed similar trajectories and imposed harms that could have been avoided with more definitive appellate guidance. Here, following denial of an interlocutory appeal, "[t]his proceeding has allowed discovery into sensitive military judgments and wartime activities." Panel's Decision at 6 (Quattlebaum, J., concurring). In *Harris*, the Third Circuit rejected an interlocutory appeal; several years of remand proceedings followed, and nearly 20 active or retired military personnel were deposed. 618 F.3d at 398. In *Fisher*, the Fifth Circuit reversed an early dismissal order; thereafter, the case proceeded through extensive discovery, including an attempt by the Army to quash proposed testimony of a former commanding general based on concerns about "the detrimental impact of unfettered access to current and former DoD and Army officials" in private

[5] Further illustrating the wastefulness of the remand to "develop facts" is the fact that plaintiffs obtained millions of pages of emails in discovery, but cited only seven emails when they opposed dismissal.

litigation—an argument the court rejected. *See Fisher v. Halliburton*, No. 4:05-cv-01731 (S.D. Tex.), ECF 516-1 at 10 (Mar. 1, 2010).

Unnecessary delays in these suits are especially troubling because the costs of the litigation are frequently borne by taxpayers. Pursuant to basic cost-reimbursement contracting principles, the United States is typically the real party in interest, as "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 in *Harris* at 19-20 (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) (any suit in which "the judgment sought would expend itself on the public treasury . . . is [a suit] against the sovereign").

II. In This and Other Battlefield Contractor Suits, the United States Has Encouraged Appellate-Court Indecision By Asserting Equivocal and Inconsistent Litigation Positions.

The United States agrees that *early* resolution of threshold defenses is "imperative" because these suits can be "detrimental to military effectiveness" and "can impose enormous litigation burdens on the armed forces." Br. for the U.S. as Amicus in *Harris* at 19-20

(quoting *Martin*, 618 F.3d at 488). But when the issue of entitlement to interlocutory appeal has arisen, the government has taken litigation positions that facilitate protracted litigation.

Understandably, the United States must juggle a variety of policy considerations when formulating litigation positions. But it is hard to reconcile the government's positions in recent battlefield contractor suits. And it is hard not to conclude that these suits have inflicted *greater* harm to federal interests than was necessary because of the United States' equivocal stances.

For example, in the prior *en banc* appeal, the United States advocated for a broad preemption rule that might have extinguished this suit seven years ago, but also argued it was premature for the Court to apply that rule. Members of this Court criticized the United States' position as "equivocal" and internally inconsistent. *See*, *e.g.*, En Banc Audio at 56:00 ("this is the most equivocal brief I have ever read"); *id.* at 1:02:25 ("unlike the positions of the various litigants, this is the most obscure, equivocal kind of presentation"); *Al Shimari II*, 679 F.3d at 233 (Wilkinson, J., dissenting) ("the government's amicus position is at odds with its own conduct").

In this appeal, following years of discovery and conclusive pretrial rulings, the United States again offers seemingly contradictory positions. First, the government argues that the opinion below was based on a "fundamental misunderstanding of both sovereign immunity and international law," and "cannot be squared with many decisions of the Supreme Court and this Circuit." Br. for the U.S. as Amicus at 1, 7. Yet, the United States takes no position regarding whether this Court has jurisdiction to correct these fundamental *legal* errors. *See* Panel Hearing Audio[6] at 42:04 ("we've not taken a position on the plaintiff's arguments about this Court's appellate jurisdiction"); *id.* at 44:14 ("[Q.] Have you taken a contrary position? [A.] I don't think we have taken a contrary position directly…"). To be sure, the United States appears to reject the proposition, adopted in the panel's decision, that "factual issues remain with regard to the immunity question." *Id.* at 45:24 ("[Q.] Would you agree that…there are factual issues with regard to the immunity question…? [A.] No, Judge Floyd, I don't think that explains it necessarily. I think this is potentially a difficult question,

[6] *Available at* https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments.

and it's one that, again, we didn't address in our brief…").

The United States' current position appears to be at odds with its position in the *en banc* appeal, when the government acknowledged that an immediate appellate right *would* exist later in the litigation. *See* En Banc Audio at 56:45 ("[Q.] There might be an interlocutory appeal somewhere along the way but not now?" "[A.] Indeed Judge Motz, that's exactly right."); *id.* at 59:40 ("a conclusive determination of a substantial claim to immunity would be entitled to collateral order review"); *id.* at 1:00:34 ("[Q.] So, the district court reviews the contracts, maybe some other minor matters in a limited basis under your scenario, and then concludes that there's no federal interests here and denies the immunity. Is that appealable?" "[A.] It seems that it would be.").

The United States took similarly equivocal positions in other battlefield contractor suits. For example, in *Burn Pit* and *Harris*, at the *certoriari* stage, the United States argued that the suits should have been dismissed as preempted, but argued against a dispositive ruling due to the purported "interlocutory" posture; this resulted in years of additional, unnecessary litigation. *See* Br. for the U.S. as Amicus in *Harris* at 20. In *Fisher*, it was not until a *second* appeal, following an

expansive remand proceeding, that the United States argued for dismissal based on a preemption theory that was evident on the face of the complaint. *See Fisher*, 667 F.3d at 19.

CONCLUSION

For the foregoing reasons, *amicus* KBR respectfully urges the Court to grant *en banc* review.

Dated: September 12, 2019

Respectfully submitted,

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This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2,561 words.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: Kellogg Brown & Root Services, Inc.

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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No. 19-1328 Caption: CACI Premier Technology, Inc. v. Al Shimari

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Counsel for: Kellogg Brown & Root Services, Inc.

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