Case Nos. 06-20874, 06-20905 and 06-20915

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 06-20874

REGINALD CECIL LANE, *et al.*,
Plaintiffs-Appellants,

v.

HALLIBURTON, A CORPORATION, *et al.*,
Defendants-Appellees.

Consolidated with Case No. 06-20905

KEVIN SMITH-IDOL,
Plaintiff-Appellant,

v.

HALLIBURTON, *et al.*,
Defendants-Appellees.

Consolidated with Case No. 06-20915

INGRID FISHER, *et al.*,
Plaintiffs-Appellants,

v.

HALLIBURTON, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF AMICUS CURIAE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Defense Industrial Association ("NDIA") is a non-profit organization comprised of more than 1,200 corporations and 39,000 individuals spanning the entire spectrum of the defense industry. Members include individuals from academia, government, the military services, small businesses, corporations, prime contractors, and the international community. They fulfill a large share of the Department of Defense's contracts for goods and services. Members are located in and perform services and contracts throughout the United States and around the world. NDIA is concurrently filing a motion for leave to file this amicus curiae brief.

In its 2006 Quadrennial Defense Review Report, the Department of Defense ("DOD") explains that military contractors – including NDIA member companies – serve as an integral component of our nation's military capability: "The Department's Total Force – its active and reserve military components, its civil servants, *and its contractors* – constitutes its warfighting capability and capacity."[1] Likewise, the Joint Chiefs of Staff explains that the county's national defense depends upon the close integration of the contracted workforce into military

[1] United States Department of Defense, Quadrennial Defense Review Report (Feb. 6, 2006) ("2006 DOD Quadrennial Review") at 75 (emphasis added) (available at http://www.defenselink.mil/pubs/pdfs/QDR20060203.pdf); *see also id.* at 16 ("The Total Force of active and reserve military, civilian, and contractor personnel must continue to develop the best mix of people equipped with the right skills needed by the Combatant Commanders.").

operations: "[T]he Armed Forces of the United States must maintain force quality, enhance joint warfighting capabilities and transform to meet the challenges of the 21st century. Executing this strategy will require a truly joint, full spectrum force – with a seamless mix of active forces, the Reserve Component, DoD civilians, *and contracted workforce*."[2] And the United States General Accounting Office concluded that "strategic planning for the civilian workforce [must] be undertaken in the context of the total force – civilian, military, *and contractors* – because the three workforces are expected to perform their responsibilities in a seamless manner to accomplish DOD's mission."[3] In recognition of private contractors' necessary role in this "seamless" mix, the Department of Defense has directed Combatant Commanders to include contractors in their operational plans and orders.[4]

NDIA files this amicus brief because affirmance of the rulings below is critical to the ability of its member companies to continue their effective service to the United States as part of the nation's military Total Force. The district court below properly dismissed Appellants' claims for lack of subject matter jurisdiction

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[2] United States Joint Chiefs of Staff, Military Strategy of the United States of America: A Strategy for Today: A Vision for Tomorrow (2004) at 27 (emphasis added) (available at http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf).

[3] GAO, Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans, GAO-03-695, at 19 (Washington, D.C. June 24, 2003) (emphasis added). (available at http://www.gao.gov/new.items/d03695.pdf).

on political question grounds, because resolution of those claims would require the courts to intrude upon on-the-ground military decision-making and issues of national defense constitutionally committed to the political branches of the federal government. While not reached below, Appellants' claims also fail because they would improperly subject military decisions in overseas operations to the vagaries of state tort law, contrary to federal preemption and immunity-based doctrines.[5] NDIA focuses on these additional bases for affirmance, because they provide the liability protection that NDIA member companies need in connection with the goods and services that they provide to the United States military.

INTRODUCTION AND SUMMARY OF ARGUMENT

> In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army.
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> – Robert Morris, Superintendent of Finance, 1781[6]

Private contractors have served in support of the United States military since the American Revolution, when General George Washington used civilian wagon

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[4] 2006 DOD Quadrennial Review, at 81.

[5] "This Court may affirm if there are any grounds in the record to support the judgment, even if those grounds were not relied upon by the courts below." *In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006).

drivers to haul military supplies.[7] However, the integration and importance of contractor personnel into overseas military activities has increased dramatically in recent years. Tens of thousands of NDIA member company personnel are currently deployed in Iraq, where they serve as an essential part of our nation's "Total Force" in that theater of military operations. The United States Government Accountability Office recently reported:

> [T]he scale of contractor support the Department of Defense (DOD) relies on today in locations such as Iraq and elsewhere throughout Southwest Asia has increased considerably from what DOD relied on during previous military operations, such as Operation Desert Shield/Desert Storm and the Balkans. Moreover, DOD's reliance on contractors continues to grow. The Army alone estimates that almost 60,000 contractor employees currently support ongoing operations in Southwest Asia.[8]

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[6] Quoted in Colonel Ronda G. Urey, *Civilian Contractors on the Battlefield*, U.S. Army War College Strategy Research Project (Mar. 18, 2005), at 1 (available at http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil17.pdf)

[7] Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F.L. Rev. 127, 130 (2004) ("*Contractors Accompanying the Force*") (available at http://permanent.access.gpo.gov/lps28111/Vol.55 (2004)/Air_Force_Law_Review_Volume_55_(Fall_2004).pdf).

[8] GAO, *Military Operations: High Level DOD Action Needed to Address Long-standing Problems with Management and Oversight of Contractors Supporting Deployed Forces*, GAO-07-145, at 1 (Washington, D.C., Dec. 18, 2006) (available at http://www.gao.gov/new.items/d07145.pdf).

"Over the past decade, DOD has increasingly relied on contractors to perform a range of mission-critical services."[9] GAO has concluded that defense contractors "have an important role to play in the discharge of the government's responsibilities."[10]

"[T]he increasingly hi-tech nature of [military] equipment and rapid deployment requirements have significantly increased the need to properly integrate contractor support into all military operations."[11] As is the case here, the United States Army relies upon contractors for logistical support services previously performed by uniformed soldiers. In addition, contractors "span[] the spectrum of combat support (CS) and combat services support (CSS) functions."[12] Contracted services support "the full range of Army operations, [including] offense, defense, stability, and support within all types of military actions from small scale contingencies to major theater of war."[13] Moreover, "contractor support can give the commander the flexibility of increasing his combat power by

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[9] GAO, *Rebuilding Iraq: Reconstruction Progress Hindered by Contracting, Security, and Capacity Challenges*, GAO-07-426T, at 3 (Washington, D.C. Feb. 15, 2007) (available at http://www.gao.gov/new.items/d07426t.pdf).

[10] *Id.*

[11] United States Department of the Army, Field Manual 3-100.21, *Contractors on the Battlefield*, at preface (Jan. 3, 2003) ("U.S. Army Field Manual") (available at http://www.osc.army.mil/gc/files/fm3_100x21.pdf).

[12] *Id.* at 1-1

[13] *Id.*

substituting combat units for military support units. This force-multiplier effect permits the combatant commander to have sufficient support in the theater, while strengthening the joint force's fighting capability."[14]

In a recent analysis, RAND Corporation examined the reasons behind the military's increasing reliance on contracting firms:

> Army personnel believe that, by adding contract support to the force, the Army can increase its likelihood of mission success. This benefit can occur in two ways. It can occur if the Army either adds contract support to a deployed military force of given size or replaces deployed personnel with contractors so that a fixed force of military personnel need not deploy as often or as long. This second benefit accrues by helping the Army retain higher-quality active military personnel in the force over the longer term – perhaps beyond the planning horizon of any one contingency.[15]

As the United States Army explains in its Field Manual, *Contractors on the Battlefield*: "Recent reductions in military structure, coupled with high mission requirements and the unlikely prospect of full mobilization, mean that to reach a minimum requirement of required levels of support, deployed military forces will often have to be significantly augmented with contractor support."[16] Moreover,

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[14] *Id.*

[15] Frank Comm & Victoria A. Greenfield, *How Should the Army Use Contractors on the Battlefield: Assessing Comparative Risk in Sourcing Decisions* at 33 (RAND Arroyo Center 2005) (prepared for United States Army) ("RAND Report") (emphasis added) (available at http://www.rand.org/pubs/monographs/2005/RAND_MG296.pdf).

[16] U.S. Army Field Manual, at Preface.

"[a]s these trends continue, the future battlefield will require ever increasing numbers of often critically important contractor employees."[17]

Military observers have thus concluded that "[t]he use of contractors to support military operations is no longer a 'nice to have.' Their support is no longer an adjunct, ad hoc add-on to supplement a capability. Contractor support is an essential, vital part of our force projection capability – and increasing in importance."[18]

> Never before has there been such a reliance on non-military members to accomplish tasks directly affecting the tactical successes of an engagement. As a result, government employees and contractors are in closer proximity to the battlespace than ever before, and in roles functionally close to combatants; many of these roles formerly exclusively held by uniformed members of the armed forces.[19]

This case, in particular, involves a military contractor's provision of in-theater services that DoD determined to be critical to the nation's mission in Iraq. In 1985, the United States Army issued regulations that authorized the use of civilian contractors to provide services in wartime that previously were provided exclusively by military personnel. *See* "Logistics Civil Augmentation Program

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[17] *Id.*

[18] *Contractors Accompanying the Force*, at 132.

[19] *Id.* (quoting Colonel Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?*, A.F.J. Log 9 (Fall 1999)).

(LOGCAP")," Army Regulation 700-137 (16 December 1985) ("AR 700-137) at 1-1 (available at http://www.army.mil/usapa/epubs/pdf/r700_137.pdf). Pursuant to a LOGCAP contract awarded on December 14, 2001, the Appellees here provide a variety of critical military services in Iraq and around the world. Appellants' claims here arise from the provision of transportation services under Task Orders (TOs) 43 and 59, which state that KBR is required to "provide the equipment, operators, and services to deliver classes of supply between logistics support areas in Iraq." Because of its importance to the military operations in Iraq, the Army has designated the 2001 LOGCAP contract and the TOs as "rated" orders under the Defense Production Act ("DPA") with a priority rating of "DOC9." Pursuant to the DPA, the performance of "rated" contracts is mandatory and any nonperformance will subject the contractor to civil and criminal penalties. *See* 50 U.S.C. app. § 2073.

The actions giving rise to Appellants' claims sharply highlight the degree to which government contractors have been integrated into the United States military operations and the extent to which Appellees were providing services as agents of the federal government. *See* Smith-Idol Compl. ¶ 69 (alleging that Appellees were "acting in their official capacities as agents of the United States Department of Defense by way of the government contract, acting under color of federal law"). As the district court noted below, the overseas military transportation services here

at issue were "the result of a joint effort between the defendants and the Army." *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 642 (S.D. Tex. 2006). "The contracts show that the Army, not the defendants, was responsible for the security of the convoys, up to and including the force protection for the trucks, the intelligence regarding the possible routes, the decision which route to take, and the manner in which the drivers were to operate ... the Army chose the routes for the convoys and requested that they be sent. ... the Army was involved at each step in the process." *Id.*; *see also Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279 (M.D. Ga. 2006) (dismissing suit involving convoy accident in Iraq) ("The Army regulates all aspects of control, organization, and planning of Army convoy operations.").

The Appellees' actions in providing convoy services pursuant to the rated LOGCAP contract and specific Army direction is not a proper subject for a private lawsuit. NDIA therefore urges this Court to affirm the dismissals below under the political question doctrine. NDIA submits this *amicus* brief also to provide the Court with additional reasons for dismissal not ruled on below, each of which leads to the conclusion that the inherent risks of war cannot be judged by civil standards of behavior set forth in state tort law. In particular, Appellants' claims cannot stand because they (1) challenge discretionary military decisions that are immune from state tort law challenge, (2) would impermissibly interfere with the federal

government's plenary control over military operations and conflict with the federal government's ability to effectively deploy its Total Force in connection with overseas military operations such as the war in Iraq, and (3) are expressly preempted by provisions of the Defense Production Act and Defense Base Act.

NDIA also urges affirmance because of the very real impact that the prospect of potential tort liability would have on contractors considering whether to enter into the types of logistical support contracts upon which the United States military so heavily depends. If, as was the case here, a contractor can be subject to litigation based upon its support for United States overseas military operations, that contractor will need to think seriously before entering into such contracts, and the effectiveness of our country's military capabilities will suffer.

ARGUMENT

I. Appellants' State Law Claims Are Preempted Because They Would Interfere and Conflict with Federal Authority Over Military Decisions and Are Barred By Express Provisions of the Defense Production Act and Defense Base Act.

Appellants' claims are barred under the doctrine of federal preemption. Federal preemption bars state tort law claims in three circumstances, each of which applies here. First, state law claims are preempted where "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the states to supplement it'" ("field preemption"). *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Fidelity Fed.*

Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)). Second, state law claims are preempted where they conflict with federal law, either by making it impossible for a party to comply with both federal and state law requirements or by standing as an obstacle to or frustrating federal objectives ("conflict preemption"). *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). Third, Congress may preempt state law claims through an express provision in a federal statute ("express preemption"). *Cipollone*, 505 U.S. at 518.

A. Appellants' Claims Are Preempted Because the Federal Government Occupies the Field on Issues of Military Decisions, Including Utilization of Logistical Support Contractors in Military Theaters of Operation.

Appellants' claims challenge military decisions made in the deployment of supply convoys in the Iraq theater of operations and thus impermissibly intrude upon the plenary authority of the federal government over matters of war. "[T]he Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare." *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). Thus, "[m]atters relating to war are for the federal government alone to address." *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003).

"The war power of the national government ... extends to every matter and activity so related to war as substantially to affect its conduct and progress. ... It embraces every phase of the national defense." *Hirabayashi*, 320 U.S. at 93. "[I]t

has necessarily given [the President and Congress] wide scope for the exercise of judgment and discretion in determining the nature and extent of threatened injury or danger and in selecting the means for resisting it." *Id.*; *see Perpich v. Dep't, of Defense*, 496 U.S. 334, 353 n.27 (1990) ("No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.") (citation omitted).[20]

As courts have recognized, the argument for preemption is particularly pressing when the conduct and discretionary acts at issue occur in combat zones, including where the acts are taken by government contractors. *See Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992); *Bentzlin v. Hughes Aircraft*, 833 F. Supp. 1486 (C.D. Cal. 1993). In *Koohi*, the Ninth Circuit cited to the combatant activities exception to the Federal Tort Claims Act in explaining the need for immunity for acts taken in times of war:

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[20] *See also Zschernig v. Miller*, 389 U.S. 429, 442-43 (1968) ("[o]ur system of government is such that the interests of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (citing *Zschernig* for proposition that "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict").

> War produces innumerable innocent victims of harmful conduct – on all sides. It would make little sense to single out for compensation a few of these persons ... on the basis that they have suffered from negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.

976 F.2d at 1334-35. The *Koohi* Court explained that Congress provided for immunity for combatant activities because it did not want the military to "exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces nor did it want our soldiers, sailors, or airmen to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat." *Id.* The Court held that tort claims brought against military contractors accordingly should be preempted: "The imposition of such liability on [the government contractor] would create a duty of care where the combatant activities exception is intended to assure that none exists. Accordingly, preemption is appropriate." *Id.* at 1337.

The *Bentzlin* court agreed:

> In enacting the combatant activities exception, Congress determined that the government should not be punished for mistakes made during war. This purpose of the exception similarly applies to government contractors, since tort law is not required to punish government contractors. The United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution.

833 F. Supp. at 1493. "Unsuccessful military strategy, unwise orders by individual officers and mistakes by fellow soldiers all lead to loss of life, and these causes clearly do not give rise to civil liability ... civilian state law cannot be applied to those who suffer the tragedies contemplated in war. *Id.* at 1494 "Decisions must be made and compromises accepted in the national interest by the government and its contractors without fear of the consequences of civil liability." *Id.* at 1495.

The scope of the preempted federal field plainly covers the actions here at issue. Appellants' claims go to the very core of the federal government's power to wage war – the control over the movement of supplies on foreign soil at times of war. In exercising this plenary authority, the Department of Defense must maintain absolute authority over all of the "seamless" components of its "Total Force," including procurement, control, and protection of military logistical support contractors. Military commanders cannot be restricted in their ability to get needed supplies transported to forces in overseas military operations by state tort law doctrines. Government contractors providing these essential services must be free to respond to fluid military needs as determined by those commanders without fear of second-guessing by courts applying state law. If not, our military's ability to effectively wage war will suffer, and uncounted lives will be put at risk.

B. Appellants' Claims Are Impliedly Preempted Because They Would Conflict With and Frustrate Military Decisions Regarding the Transportation of Supplies In Overseas Military Operations.

Appellants' claims also are preempted because (1) it would be impossible for Appellees to comply both with military orders regarding the transportation of supplies in Iraq and with the alleged state law obligations to provide a tort-law derived standard of security for contractor employees, and (2) the imposition of such state law obligations on government contractors would frustrate the military's ability to achieve its federal objectives in Iraq. *See Geier,* 529 U.S. 861 (state law preempted where it would be impossible to comply with both state and federal law or where state law would frustrate federal objectives). As the United States Supreme Court has recognized, where – as here – a state law claim would conflict with a contractor's obligation under a military contract, that claim is preempted. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) ("state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced").[21]

In *Boyle*, the Supreme Court held that the degree of conflict needed for a finding of preemption in cases involving the federal government's war powers

[21] *See also Garamendi*, 539 U.S. at 419 (state laws "must give way if they impair the effective exercise of the Nation's foreign policy"); *Bentzlin*, 833 F. Supp. at 1492 ("The federal interests

"need not be as sharp as that which exists for ordinary preemption when Congress legislates in a field which the States have traditionally occupied." 487 U.S. at 507. The fact that a state law claim involved military decisions and thus "is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* at 508; *see also Garamendi*, 539 U.S. at 425 ("If any doubt about the clarity of the conflict remained..., it would have to be resolved in the National Government's favor, given the weakness of the State's interest" in matters of foreign affairs).

In this case, however, the conflict arising from Appellants' claims is sharp enough to meet any standard. Appellants' allege that government contractors can be held liable under state tort law because they complied with Army commanders decisions on the ground in transporting military supplies in Iraq. *See Fisher*, 454 F. Supp. 2d at 642 ("the Army ... was responsible for the security of the convoys ... the decisions regarding which route to take, and the manner in which the drivers were to operate"). It would be impossible for Appellants to comply both with their federal obligation to provide transport services as required by the military under the LOGCAP contract and with the alleged state law obligation not to provide the requested transport services because of the risks posed to the contractor employees.

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that exist in wartime would be frustrated by allowing state tort suits against government contractors that arise from wartime deaths.").

And it would plainly frustrate the Army's federal objective if their contractors were to refuse to provide the contracted and critical transport services in Iraq because of fear of state tort liability. For this reason as well, Appellants claims were properly dismissed.

C. Appellants' Claims Are Expressly Preempted.

Appellants' claims are also expressly preempted by the Defense Production Act and by the Defense Base Act.

1. Preemption Under the Defense Production Act

Section 707 of the Defense Production Act ("DPA") provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

50 U.S.C. app. § 2157. The plain language of this provision encompasses Appellants' claims here, which indisputably allege "an act or failure to act resulting directly or indirectly from [defendants'] compliance" with the LOGCAP transportation services contractual provisions, which were issued as rated orders pursuant to the DPA. NDIA understands that Appellees' brief explains how their specific contractual activities fall within the scope of the DPA preemption provision and NDIA will not address those arguments herein. NDIA submits,

however, that Appellants arguments to avoid DPA preemption fail more generally as a matter of law.

Appellants argued below that Section 707 should be read narrowly – and contrary to its plain language – to only preclude breach of contract claims brought by third parties. But as the DPA's predecessor statute makes clear, when Congress intended to provide such limited protection, it knew how to do so. The Second War Powers Act, chapter 199, § 301, 51 Stat. 177, 180 (1942), provided in relevant part:

> No person shall be held liable for damages or penalties for any *default under any contract or order* which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

(emphasis added). Section 707 does not – like its predecessor – limit preemption to damages claims "for any default under any contract or order." It broadly extends preemption to damages claims "for any act or failure to act." The legislative history of the DPA also makes clear that Congress intended for this preemption to reach broadly beyond breach of contract claims. *See* S. Rep. No. 82-1599 (1952), as *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818 ("[Section 707] protects a person from liability, *under contract or otherwise*, as the result of compliance with the act or regulations issued under the act.") (emphasis added);

see also Winters v. Diamond Shamrock Chem. Co., 901 F. Supp. 1195, 1202 (E.D. Tex. 1995) (holding that Section 707 of DPA provides colorable defense to personal injury tort claim), *aff'd*, 149 F.3d 387 (5th Cir. 1998); *see generally E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 996-998 (5th Cir. 1976) (explaining that Congressional purpose behind Section 707 requires broad interpretation of statute).

The preemption provision of the Defense Production Act ("DPA") "was enacted as the quid pro quo to . . . the section authorizing the President to compel acceptance and give high priority to defense contracts." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 845 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also Hercules, Inc. v. United States*, 24 F.3d 188, 203 n.15 (Fed. Cir. 1994) (in *dicta*, recognizing potential for immunity from tort under DPA), *aff'd,* 516 U.S. 417 (1996). The "quid pro quo" relief of preemption from liability should not be restricted to breach of contract, but should be commensurate with the criticality of the compelled activity to the military. Where – as here – contractors are acting pursuant to a rated order to provide services critical to the military, and where – as here – the provision of such services expose the contractor's employees to a greater risk of harm due to compulsion of the activity at issue, the appropriate "quid pro quo" for the contractor under the DPA should be preemption from state tort liability.

2. Preemption Under the Defense Base Act

Appellants' claims also are expressly preempted by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* ("DBA"). The DBA incorporates the provisions of the Longshore and Harbor Worker's Compensation Act ("LHWCA") as the exclusive means for compensation for personal injuries or deaths of employees of government contractors working "under a contract entered into with the United States ... where such contract is to be performed outside the continental United States ... for the purpose of engaging in public work" 42 U.S.C. § 1651(a)(4).[22] *See* 33 U.S.C. § 905(a) (LHWCA's compensation system "shall be exclusive and in place of all other liability of such employer to the employee"). "Public work" is defined as "projects or operations under service contracts and projects in connection with the national defense or with war activities ..." 42 U.S.C. § 1651(b)(1). The DBA thus "provide[s] uniformity and certainty in availability of compensation" for injuries and deaths to government contractor employees in connection with overseas military operations, *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) (holding military contractor employee's state tort claims preempted), and provides further evidence that military-related injuries and deaths are not the proper subject of state tort law. *See also, e.g.,*

[22] Each of the Appellees must be considered Appellants' employer for purposes of the DBA. *See Heavin v. Mobil Oil Exploration & Producing Se., Inc.*, 913 F.2d 178, 180 (5th Cir. 1990) (joint

Nauert v. Ace Prop. & Cas. Ins. Co., No. 104CV02547WYDBNB, 2005 WL 2085544, *3 (D. Colo. Aug. 27, 2005) ("the legislative history of the LHWCA and the DBA makes clear Congress' intent to preempt state law"); *Carr v. Lockheed Martin Tech. Servs., Inc.*, No. Civ. SA-97-CA-1408-OG, 1999 WL 33290613 (W.D. Tex. Feb. 8, 1999) (state law claims brought by military contractor employee preempted by DBA).

Appellants' injuries fall squarely within the scope of the DBA's exclusivity provision, which incorporates the LHWCA definition of injury as including an injury or death "caused by the willful act of a third party directed against an employee because of his employment." 33 U.S.C. § 902(2). NDIA understands that the facts surrounding Appellants' injuries and giving rise to DBA preemption are addressed in Appellees' brief, but it is readily apparent that Appellants' argument below that they can avoid DBA preemption by alleging that Appellees acted with the specific intent to injure the plaintiffs is without merit. First, unlike some state workers' compensation acts, where an exception is drafted into the statute,[23] the LHWCA (and thus the DBA) does not contain any "intentional act" exception. Second, even the one district court opinion upon which they relied for

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venturer subject to DBA); *Claudio v. United States*, 907 F. Supp. 581, 586-89 (E.D.N.Y. 1995) ("alter ego" subject to DBA).

[23] *See, e.g.*, La. Rev. Stat. Ann. § 23:1032 (2006) (Louisiana workers' compensation statute) ("[n]othing in this Chapter shall affect the liability of the employer ... [to] the liability, civil or criminal, resulting from an intentional act").

such an exception made clear that it would only apply if plaintiffs could prove "that Defendants *specifically intended* for truck drivers to be attacked by the anti-American insurgents." *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 613, 614 n.2 (S.D. Tex. 2005). (emphasis in original). Absent an argument that Appellees somehow conspired with the enemy in Iraq – a claim for which no evidence exists – Appellants cannot make such a showing. *See Clements v. Ace Cash Express*, Inc., No. C.A. 042123 (HHK), 2005 WL 1490005, at 1 n.3 (D.D.C. June 23, 2005) ("injuries caused by the intentional acts of third parties, a circumstance expressly covered by the [D.C. worker's compensation act], cannot establish specific intent on the part of the employer unless an employer conspired with a third party to injure an employee").

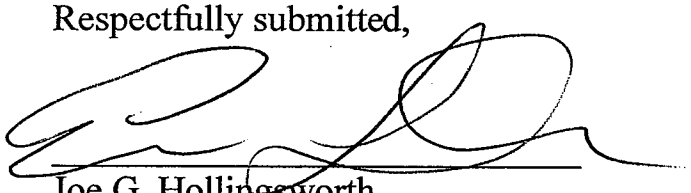
Ultimately, Appellants' efforts to avoid DBA preemption founder for many of the same reasons that their claims independently fail on political question, immunity, and implied preemption grounds. Appellees provided transportation services in Iraq not on their own authority and based on civilian judgments, but pursuant to a LOGCAP contract at the direction of the United States Army in support of the Army's military judgments in a time of war and on hostile foreign soil. Appellees could never have had the specific intent required under *Fisher* because the decisions regarding the convoy's mission, the route the convoy should follow, the timing of the mission and the appropriate force protection were made

by the United States Army. State tort law considerations of a defendant's specific intent simply cannot speak to these military judgments.

CONCLUSION

The United States military is increasingly reliant on the services of government contractors as an integrated part of the Total Force fighting the war in Iraq. NDIA member companies are proud to serve as part of our country's seamless military effort, but their ability to do so effectively will be seriously impaired if they – or courts – are required to second-guess the military's combat-related decisions due to state law obligations imposed by civil juries. The NDIA respectfully urges this Court to affirm dismissal of Appellants' claims.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 9, 2007, I mailed for filing to the Clerk's Office of the United States Court of Appeals for the Fifth Circuit, via Overnight Mail, the required copies of the foregoing Brief of *Amicus Curiae* National Defense Industrial Association in Support of Appellees and Urging Affirmance, and further certify that I have served, via Overnight Mail, the required copies of same, to the following:

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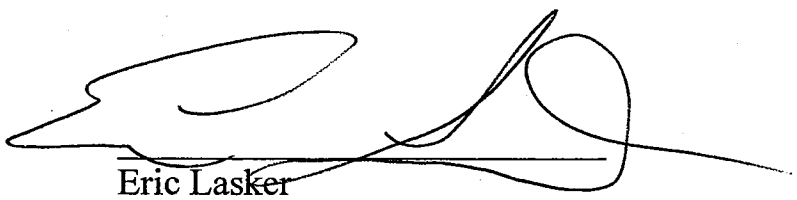

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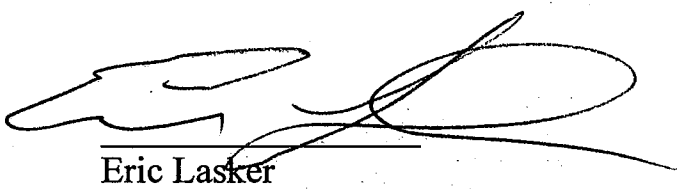

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Dated May 10, 2007