NO. _____

In the
Supreme Court of the United States

KBR, INCORPORATED, ET AL.,
Petitioners,

v.

ALAN METZGAR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE PROFESSIONAL SERVICES COUNCIL, AND THE AMERICAN COUNCIL OF ENGINEERING COMPANIES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTEREST OF THE *AMICI CURIAE* [1]

The three trade association *amici* represent thousands of U.S. companies and professional firms that perform contracts for the U.S. government. The *amici* and their members (as well as their members' employees) therefore have a strong interest in preserving the pretrial immunities and defenses traditionally available to government contractors, including **derivative sovereign immunity**, which protects government contractors from tort litigation based on their performing the same functions or activities that would result in a government department or agency being immunized from liability. If left standing, the Fourth Circuit's flawed decision in the *Burn Pit Litigation* would seriously erode this protection and other defenses available to qualifying contractors. For this reason, the *amici* urge the Court to grant certiorari and reverse the Fourth Circuit's decision as it relates to derivative sovereign immunity.[2]

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[1] The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk. Pursuant to Rule 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than the *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

[2] *Amicus* Professional Services Council also urges the Court to grant certiorari on all three issues presented in the Petition, but this brief addresses only the third issue about the application of derivative sovereign immunity. The other two issues – application of the political question doctrine and the combatant activities preemption – also are raised in the pending certiorari petition in *Kellogg Brown & Root Services,*

- The Associated General Contractors of America ("AGC") is a nationwide trade association of construction contractors and their suppliers and related firms. The nation's leading contractors formed the organization in 1918, and over time, AGC has become the recognized leader of the construction industry. It has 93 state and local chapters and approximately 27,000 members in the United States and Puerto Rico. The association's members construct office buildings, apartments, hospitals, laboratories, schools, shopping centers, factories and warehouses. They also construct the public and private infrastructure that serves as the critical starting point for nearly all of the nation's other economic activity, including highways, tunnels, airports, power lines, power plants, clean and waste water facilities, and the utilities necessary for housing development.

- The Professional Services Council ("PSC") is the voice of the government professional and technical services industry. PSC's more than 370 member companies represent small, medium, and large businesses that provide federal agencies

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Inc. v. Harris, No. 13-817, in support of which the Professional Services Council previously filed a brief. Unlike the Third Circuit's opinion in *Harris*, the Fourth Circuit's *Burn Pit Litigation* opinion addressed the additional issue of derivative sovereign immunity.

with a wide range of services, including information technology, engineering, logistics, facilities management, and operations and management services. The petitioner KBR is a member of PSC but took no part in PSC's decision to submit this amicus brief.

- The American Council of Engineering Companies ("ACEC") is the national non-profit trade association of the engineering industry, representing more than 5,000 firms throughout the country. Founded in 1909, the Council's mission is to advance America's prosperity, health, safety, and welfare through legislative advocacy and business education services on behalf of the engineering industry. ACEC is organized into 51 state and regional member organizations. Member firms employ more than 500,000 engineers, architects, surveyors, scientists, and other specialists, responsible for more than $200 billion of private and public works annually.

Each of the *amici* represents their members' interests in matters before Congress, the Executive Branch, and the courts. And members of each *amici* perform a wide variety of service and construction contracts for many different federal departments and agencies, including the U.S. Department of Homeland Security, the U.S. Department of State, the U.S. Department of Defense, the U.S. Army Corps of Engineers, and the Veterans

Administration, to name just a few. A complete list of the services that members of the *amici* perform for or on behalf of U.S. government departments, agencies, bureaus, and other offices would fill volumes.

Whether performing contracts in war zones, such as KBR's contract with the U.S. military in this case, or performing other high liability-risk functions such as cleaning up Ground Zero (after the 9/11 attacks) or cleaning up New Orleans (after Hurricane Katrina) or providing security and support for border patrols and "war on drugs" programs, or carrying out the design, construction, and/or operation and maintenance of roads, bridges, water treatment facilities or other critical infrastructure, government contractors are entitled to derivative sovereign immunity. As representatives of such contractors, the *amici* have a direct and substantial interest in the scope and application of derivative sovereign immunity, which they regard as an essential pretrial defense to tort suits that might arise out of functions or activities they performed for or on behalf of the federal government.

While the Fourth Circuit addressed derivative sovereign immunity in the *Burn Pit Litigation* in the context of KBR's work performed for the U.S. military in war zones, the Fourth Circuit's decision has much broader implications because it failed to follow this Court's precedent and other circuit court decisions about the *scope* of derivative sovereign immunity – thus creating a split in the circuits – and, in the process, the Fourth Circuit impermissibly

and inappropriately *narrowed* the availability of such immunity.

The Fourth Circuit's narrowing of the doctrine of derivative sovereign immunity means that the *amici's* government-contractor members (and their employees) face the risk of an increasing volume of costly and time-consuming litigation filed by persons allegedly harmed by some aspect of the contractors' work for the federal government. Given the increasingly litigious environment in this country, the growing costs of defending against tort litigation are an important concern of the *amici's* members. Such costs could impact the members' financial stability, bonding capabilities, and ability to continue their ordinary business activities. Indeed, the very risk of costly tort litigation could impact contractors' ability and willingness to undertake future high-risk contract work for the United States government. The *amici* believe that this Court's confirmation of the proper scope of derivative sovereign immunity could correctly deter individuals from filing actions against government contractors, which would ultimately be dismissed based on such immunity.

For these reasons, the *amici* urge the Court to grant certiorari in order to reaffirm: (1) that derivative sovereign immunity protects government contractors from tort litigation based on their performing the same functions or activities that would result in immunity to United States government departments or agencies, and (2) that government contractors are entitled to such immunity upon a showing that their conduct was

within the scope of their contractual authority. As this Court has noted, immunity from suit is conferred "not for [the] private indulgence of [those receiving it] but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). *See also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (identifying multiple benefits to the public interest that result from "[a]ffording immunity not only to public employees but also to others acting on behalf of the government").

SUMMARY OF ARGUMENT

Derivative sovereign immunity is a simple and straightforward doctrine that protects government contractors from tort liability for doing the same kind of work that would entitle a government department or agency to sovereign immunity if it were sued in a similar tort action. The Fourth Circuit correctly noted in the *Burn Pit Litigation* that "[t]he concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 . . . (1940)," Pet.App. 28, but it then abandoned the simplicity of the *Yearsley* doctrine and confused it with other more complex statutory issues that do not apply to the doctrine. The issues confused by the Fourth Circuit include whether and how to apply certain exceptions to immunity set out in the Federal Tort Claims Act ("FTCA") even though this Court has expressly noted that such FTCA exceptions do not govern the separate question of when government contractors are entitled to share the sovereign's immunity. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 n.1 (1988).

Moreover, the Fourth Circuit's focus on the military and battlefield contexts in which the *Burn Pit Litigation* arose – while essential to other issues in the Petition for Certiorari – appears to have complicated what should have been a straightforward application of the derivative sovereign immunity doctrine. For these reasons, the *amici* respectfully urge this Court to grant certiorari in order to confirm that derivative sovereign immunity remains available to government contractors that work closely with government officials to carry out vital interests of the United States *on behalf of* the United States.

ARGUMENT

I. A Broad Range of Government Contractors Perform Functions that Entitle the Contractors to Derivative Sovereign Immunity.

In *Yearsley*, this Court applied the doctrine of derivative sovereign immunity to foreclose tort claims brought against a private contractor that performed services on behalf of the U.S. government. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). The *Yearsley* plaintiffs alleged that the contractor damaged their property while performing dredging in the Missouri River to improve its navigation. The dredging work had been authorized by the government and was carried out pursuant to a contract between the government and the contractor. The Supreme Court held that because the "authority to carry out the project was validly conferred, that is . . . [performed] within the constitutional power of Congress, there is no liability

on the part of the contractor for executing its will." *Id.* at 20-21. The Court reasoned that the contractor could not be held liable because it was a government agent "simply acting under the authority thus validly conferred." *Id.* at 22.[3]

In *Butters v. Vance International, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), the court referred to the result in *Yearsley* as "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity." The *Butters* court further explained that "[s]overeign immunity exists because it is in the public interest to protect the exercise of certain governmental functions," and added that "[t]his public interest remains intact when the government delegates that function down the chain of command," even to private contractors. *Id. See also Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) (noting that private contractors are entitled to derivative sovereign immunity "particularly in light of the government's unquestioned need to delegate governmental functions").

Other circuits have also recognized that the grant of derivative sovereign immunity set out in *Yearsley*

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[3] *See also In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 560 (S.D.N.Y. 2006) (describing *Yearsley*'s holding that "the interests of justice required that federal immunity be extended to private contractors where: (1) the contractor was working pursuant to the authorization and direction of the federal government; and (2) the acts complained of fell within the scope of such government directives.").

applies to various kinds of service contracts where the contractor, in the words of the Eleventh Circuit, "acts under the authority and direction of the United States." *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1316 (11th Cir. 1989). Relying on *Yearsley*, the Fifth Circuit affirmed the dismissal of an environmental damage claim against a government contractor in *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206 (5th Cir. 2009) (noting that in both *Yearsley* and *Ackerson*, "the actions causing the alleged harm were taken pursuant to contracts with the federal government that were for the purpose of furthering projects authorized by acts of Congress"). *See also Weggeman v. Ashbritt, Inc.*, No. 106CV1256, 2007 WL 2026820 (S.D. Miss. July 6, 2007) (finding that a contractor performing clean-up after Hurricane Katrina was entitled to the same immunity from suit possessed by the U.S. Army Corps of Engineers, which had decided where and how the contractor should perform its clean-up work). Similarly, in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965), the court relied on *Yearsley* to grant summary judgment in favor of a government contractor that did not take action to prevent the escape of fumes from waste dumped near the plaintiff's property. The grant of derivative sovereign immunity to the contractor resulted from the fact that "[t]he Government did not provide for such additional precautions [against escaping fumes] in the [contract] plans, and [accordingly, the contractor] is not to be held liable for this omission." *Id.* at 827.

It is also important to recognize that *Yearsley's* application of derivative sovereign immunity is

separate and distinct from the preemption-based "government contractor defense" recognized in *Boyle*, which was rooted in the "discretionary function" exception set out in the FTCA. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (noting the different purposes served by "*Boyle* preemption" and by derivative sovereign immunity). The *Boyle* defense, if applicable, results in the preemption of certain state law tort claims – whereas the doctrine of *Yearsley*, if applicable, results in a grant of immunity to the contractor.

II. The Fourth Circuit Has Impermissibly and Inappropriately Narrowed the Availability of Derivative Sovereign Immunity.

The Fourth Circuit appeared to have recognized that derivative sovereign immunity and *Boyle* preemption are distinct in acknowledging that this Court:

> specified that *Boyle* does not govern the question of whether immunity extends to "nongovernment employees." (citation omitted) KBR asks for derivative sovereign immunity rather than preemption under the discretionary function exception in this case, **thus rendering *Boyle* inapposite.**

Pet.App. 28, n.6 (citing *Boyle*, 487 U.S. at 505 n.1) (emphasis added). But in its actual application of derivative sovereign immunity in the same opinion, the Fourth Circuit disregarded the cited distinction between *Yearsley* and *Boyle*, and concluded that it could not yet determine "whether KBR is entitled to

derivative sovereign immunity under the discretionary function exception." Pet.App. 36. Clearly, the Fourth Circuit improperly combined the two doctrines that *Boyle* clearly separated, 487 U.S. at 505 n.1, thus making derivative sovereign immunity unavailable to the contractor defendants without a great deal more discovery and motions practice.

In particular, although the Fourth Circuit recognized that the court of appeals in *Yearsley* had found that the dredging work performed by the contractor "was all authorized and directed by the Government of the United States," Pet.App. 34-35 (quoting *Yearsley*, 309 U.S. at 20), the Fourth Circuit went well beyond this basic *Yearsley* standard to add a new test – that the work also be shown to have been performed in strict compliance with the government's directions. Pet.App. 35-36. The latter is a *Boyle* requirement and not a *Yearsley* requirement.

To be clear, *Boyle* required that a contractor demonstrate that, *inter alia*, "(1) the United States approved reasonably precise specifications [for the contractor's work]; [and] (2) the [contractor's work] conformed to those specifications." 487 U.S at 512. *Yearsley* does not require such proof and the reason for this is obvious: contractors working alongside government employees who act within the scope of their contract authority to carry out important public functions should not "be left holding the bag – facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 132 S. Ct. at 1666.

Filarsky also explained why granting immunity is needed to avoid "unwarranted timidity" by those doing the government's work, and to help ensure that "talented individuals" with "specialized knowledge or expertise" are willing to continue doing the government's work. *Id.* at 1665-66. The organizations represented by the *amici* employ precisely these kinds of "talented individuals" with "specialized knowledge or expertise" as they carry out sensitive, dangerous, or other high liability-risk contract work for the federal government. These contractors deserve the protection of *Yearsley* immunity.

Moreover, the *amici* believe that the Fourth Circuit impermissibly strained to find justification to disregard this Court's guidance in *Filarsky* by stating that "there is no indication that the Supreme Court intended *Filarsky* to overrule *Yearsley* and its progeny." Pet.App. 32. In support of this conclusion, the Fourth Circuit cited a comment in a concurring opinion by Justice Sotomayor in *Filarsky*, 132 S. Ct. at 1669, which noted that the Court's decision did not mean that every private individual who works for the government will necessarily be able to claim qualified immunity. Of course, the *amici* agree that not every contractor will be entitled to derivative sovereign immunity in every case; only those acting within the scope of their government contracts will be so entitled. Moreover, the same concurring opinion in *Filarsky* also observed that the Supreme Court's "usual test for conferring immunity" would need to be satisfied. *Id.* *Yearsley*, of course, establishes the "usual test" for conferring immunity on government contractors.

When the Fourth Circuit applied *Yearsley* in the *Burn Pit Litigation* ruling, the court cited its own earlier ruling in *Butters* for the proposition that it must determine whether a contractor "exceeded [its] authority under [its] valid contract," or exceeded "the scope of its employment." Pet.App. 33-34 (citing *Butters*, 225 F.3d at 466). But the Fourth Circuit then went beyond these stated inquiries to examine whether KBR complied with the government's precise "instructions" – not to look at whether KBR acted within its contract authority or within the scope of its employment as a government contractor. Pet.App. 35-36 (concluding that "the contractor must adhere to the government's instructions" and that there was not enough evidence to know if KBR acted "in conformity with [its contract]" as well as "appended task orders, and any laws and regulations that the contract incorporates"). The Fourth Circuit cited no persuasive authority for adding such a detailed inquiry and "compliance test," and neither *Yearsley* nor any of its progeny requires such an inquiry or such a test.

If allowed to stand, the Fourth Circuit's ruling would mean that a detailed, fact-laden inquiry must be performed by a district court in every case (in the Fourth Circuit) to determine whether the pertinent contract requirements were complied with, which often cannot be done unless or until more expensive and time-consuming discovery can be completed.[4]

[4] Such discovery is often dependent on additional questions such as whether pertinent government materials involving national security or other government interests may be revealed in civil litigation. These issues may not need to arise

Contractor defendants would be forced to expend significant amounts of money on legal fees and expenses up front, which would be unnecessary if *Yearsley* immunity is properly applied. The *amici* believe that district courts are well qualified to apply *Yearsley* and determine whether government contractors acted within the scope of their contractual authority, which is the only necessary showing based on this Court's precedent.

CONCLUSION

For all of the reasons set out above, the *amici* respectfully urge the Court to grant the petition for writ of certiorari in order to reaffirm: (1) that the doctrine of derivative sovereign immunity protects government contractors from tort litigation based on their performing the same actions or functions that would result in immunity to United States government departments and agencies, and (2) that government contractors are entitled to such immunity upon a showing that their conduct was within the scope of their contractual authority.

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in many cases if *Yearsley* immunity is accorded to contractors pursuant to its straightforward terms.

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Respectfully submitted,

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