Nos. 09-1335 (lead case), 10-1891 & 10-1921

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAZIM ABDULLAH AL SHIMARI, ET AL.,
Plaintiffs-Appellees,
v.
CACI INTERNATIONAL INC., ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division, No. 08-00827

WISSAM ABDULLATEFF SA'EED-AL-QURAISHI, ET AL.,
Plaintiffs-Appellees,
v.
L-3 SERVICES, INC. & ADEL NAKHLA,
Defendants-Appellants.

On Appeal from the United States District Court for the United States District Court for the District of Maryland, No. 08-1696

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici, listed in the appendix, are distinguished civil procedure scholars in the United States.[1] The purpose of this brief is to assist the Court in the proper application and interpretation of the "collateral order doctrine," which has been invoked here as the basis for interlocutory appellate jurisdiction. *Amici* join this brief because of their shared recognition of the importance of the final judgment rule in promoting efficient litigation, preserving scarce judicial resources, and protecting the proper institutional prerogatives of the Article III district courts and courts of appeals. *Amici* agree that, for the reasons set forth below, extending the collateral order doctrine to these cases would be inconsistent with Supreme Court precedent delineating the scope of this narrow doctrine.

All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over Defendants' interlocutory appeal. Defendants frame their arguments as five different grounds for dismissal and assert that the denial of each one constitutes ground for an immediate appeal because each amounts to an immunity from suit. But in fact Defendants' claimed defenses sound in preemption and personal jurisdiction—doctrines that are not subject to

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief.

immediate appeal under the collateral order doctrine. No case has extended the collateral order doctrine as sought by Defendants here and the circuit courts presented with related questions have held that the collateral order doctrine does not provide jurisdiction. Because, properly framed, Defendants' theories cannot satisfy the stringent conditions of the collateral order doctrine, *Amici* urge this Court to dismiss this appeal for lack of jurisdiction.

PROCEDURAL BACKGROUND

Plaintiffs are Iraqi citizens who allege that they were tortured by employees of three U.S. government contractors while being held in U.S. military detention in Iraq. In the two cases now pending before this Court, *Al-Quraishi v. L-3 Services*, Nos. 10-1891 & 10-1921, and *Al Shimari v. CACI International*, No. 09-1335, the Plaintiffs seek damages for the injuries they sustained in the course of their physical and psychological torture.

The courts below denied the contractors' motion to dismiss on various grounds. In *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010), the court rejected L-3 Services' federal preemption and political question defenses, as well as its derivative sovereign and law-of-war "immunity" claims. In *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009), the court rejected CACI's political question argument and held that it was premature to dismiss on CACI's federal preemption defense or its asserted claim to derivative

official immunity. The contractors did not request certification for immediate review under 28 U.S.C. § 1292(b), nor do they claim a statutory right to appeal pursuant to 28 U.S.C. § 1292(a). Instead, they claim jurisdiction solely under 28 U.S.C. § 1291.

ARGUMENT

I. THE FINAL JUDGMENT RULE PERMITS INTERLOCUTORY APPEAL FROM ONLY A SMALL CLASS OF COLLATERAL ORDERS.

A. The final judgment rule.

"It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal*., 426 U.S. 394, 403 (1976) (quoting *Will v. United States*, 389 U.S. 90, 96 (1967)); *see also Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009); *Will v. Hallock*; 546 U.S. 345, 349-50 (2006); *Johnson v. Jones*, 515 U.S. 304, 309 (1995); *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 867-68 (1994); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989); *United States v. Hollywood Motor Car Co*., 458 U.S. 263, 265 (1982). This "final judgment rule," codified at 28 U.S.C. § 1291, serves three critical policy interests: it discourages inefficient, piecemeal litigation; it acts as bulwark against unnecessary pressure on appellate dockets; and it maintains the independence of the trial courts. *Mohawk Indus.*, 130 S. Ct. at 605.

The first, and perhaps paramount, purpose the final judgment rule serves is to promote efficient judicial administration by discouraging piecemeal litigation. *See Kerr*, 426 U.S. at 403 ("particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"). In addition, both Congress and the courts have warned against the flood of interlocutory appeals that would result from loosening the strictures of the final judgment rule. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978) (citing H.R. Rep. No. 85-1667, at 5-6 (1958)); *In re Carefirst of Md., Inc*., 305 F.3d 253, 261 (4th Cir. 2002); *MDK, Inc. v. Mike's Train House, Inc*., 27 F.3d 116, 119 (4th Cir. 1994); *Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). Finally, as the Supreme Court explained in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), "[i]mplicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Id.* at 436. The final judgment rule "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). For over two hundred years, Congress and the

judiciary have enforced the final judgment rule and permitted interlocutory appeal in only a few, narrow categories.

In light of these critical policy interests, Congress permitted a limited range of interlocutory appeals in 28 U.S.C. § 1292(a) and empowered district courts in certain circumstances to certify additional issues for immediate review under 28 U.S.C. § 1292(b). Specifically, section 1292(b) authorizes certification of an otherwise unappealable order "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The orders here do not qualify as immediately appealable under section 1292(a) and Defendants did not seek certification of the orders pursuant to section 1292(b). Thus, their entitlement to review rests solely on satisfaction of the requirements of the collateral order doctrine.

B. The collateral order doctrine.

The collateral order doctrine was first articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), where the Supreme Court held that the phrase "final decision" encompasses a "small class" of district court orders that do not necessarily conclude the litigation, but do "finally determine claims of right

separable from, and collateral to, rights asserted in the action." *Id.* at 545-46. The Supreme Court identified three requirements for invocation of the collateral order doctrine. In order to be immediately appealable, the order must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. All three prongs must be met. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989). The requirements of the collateral order doctrine are "stringent," *Digital Equip. Corp.*, 511 U.S. at 868, and whether the requirements are met is a jurisdictional question. *Id.* at 869 n.3.

Appealability "is to be determined for the entire ***category*** to which a claim belongs." *Digital Equip. Corp.*, 511 U.S. at 868 (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)) (emphasis added); *see also Mohawk Indus.*, 130 S. Ct. at 605 (evaluating the appealability of "the class of claims, taken as a whole"); *Johnson*, 515 U.S. at 315 ("We of course decide appealability for categories of orders rather than individual orders. . . . Thus, we do not now in each individual case engage in ad hoc balancing to decide issues of appealability."). Accordingly, this Court must decide not just whether these two orders are immediately appealable, but whether the entire category of orders falling within, for example, a federal preemption defense, is entitled to collateral order review.

In applying the three-prong test, the Supreme Court has repeatedly emphasized the narrowness of the doctrine: "we have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope . . . . And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Hallock*, 546 U.S. at 350.

Most recently, the Supreme Court opined on the limited scope of this doctrine in *Mohawk Industries*, 130 S. Ct. at 605-09. In deciding whether a disclosure order adverse to the attorney-client privilege qualifies for immediate appeal, the Court reiterated that "*Cohen*'s collateral order doctrine . . . must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Id*. at 605 (citing *Digital Equip. Corp.*, 511 U.S. at 868). The Court emphasized that the "crucial question" under *Cohen* "is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id*. at 606. Concluding that "postjudgment appeals generally suffice to protect the rights of litigants" where the attorney-client privilege is at stake, the Court held that orders adverse to the privilege are not subject to immediate appeal under the collateral order doctrine. *Id*.

The "stringent" conditions the Court maintains on the collateral order doctrine are necessary so that it does not "overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further." *Hallock*, 546 U.S. at 349-50; *see also Hollywood Motor Car Co.*, 458 U.S. at 265 (refusing to expand the doctrine to an order refusing to dismiss a criminal indictment on grounds of prosecutorial vindictiveness); *United States v. MacDonald*, 435 U.S. 850, 853 (1978) (rejecting collateral order jurisdiction over a claimed violation of a Sixth Amendment right to a speedy trial).

The two orders here do not meet the stringent requirements the Supreme Court has established for collateral order jurisdiction.

II. THE ORDERS HERE DO NOT SATISFY THE REQUIREMENTS OF THE COLLATERAL ORDER DOCTRINE.

Defendants frame their arguments as five different grounds for dismissal: federal preemption, law-of-war immunity, derivative sovereign immunity (L-3 Services only), derivative absolute immunity (CACI Defendants only), and the political question doctrine.

Defendants, correctly, do not argue that the collateral order doctrine provides a basis for review of an order denying a motion to dismiss on political question grounds. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007). Defendants, however, incorrectly assert that the other four grounds provide a basis for immediate review. The *Al-Quraishi* Plaintiffs demonstrate in

their brief that none of these grounds provides a basis for immediate appeal under the collateral order doctrine. Opp'n Br. for Appellees at 11-30, Nos. 10-1891 & 10-1921 (Dec. 14, 2011). *Amici* supplement Plaintiffs' arguments by focusing on an overarching error in Defendants' jurisdictional argument: their attempt to cast their defenses as "immunities," in order to manufacture a right to immediate appeal.

Notwithstanding Defendants' effort at re-labeling, Defendants' defenses in fact fall into just two categories—a government contractor defense under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which is a species of federal preemption, and a law-of-war defense, which sounds in personal jurisdiction. Neither category satisfies the stringent requirements of the collateral order doctrine. Indeed, if private litigants could simply label their defenses as "immunities," collateral order review would lie in virtually every case, eviscerating the final judgment rule.

Defendants' eagerness to characterize their defenses as immunities appears to stem from the fact that some types of immunities are within the limited scope of the collateral order doctrine, while ordinary defenses to liability generally are not. The Supreme Court has stated many times that collateral order review is available only where an order involves a "right not to be sued," the denial of which is "effectively unreviewable on appeal from a final judgment." *P.R. Aqueduct &*

Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-45 (1993). The "effectively unreviewable" prong requires that the party seeking appellate review demonstrate that the order in question affects "rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc.*, 472 U.S. at 430-31; *see also Firestone Tire & Rubber Co.*, 449 U.S. at 376 ("effectively unreviewable" means denial of review "would render impossible any review whatsoever").

Justice Scalia, writing for a unanimous Supreme Court in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), explained that under the collateral order doctrine, "[t]here is a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges":

> One must be careful . . . not to play word games with the concept of a "right not to be tried." In one sense, any legal rule can be said to give rise to a "right not to be tried" if failure to observe it requires the trial court to dismiss the indictment or terminate the trial. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule.

Id. at 801 (citation omitted); *see also Digital Equip. Corp.*, 511 U.S. at 873 (noting that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'").

Under these guidelines, defenses to liability or even immunity from damages, as distinguished from true immunities from suit, generally do not satisfy

the requirements of the collateral order doctrine. To skirt that rule, Defendants first attempted to cast their government contractor and law-of-war defenses as "immunities," and then raised additional derivative immunity arguments that are, upon inspection, merely reiterations of their primary government contractor defense under *Boyle*. These defenses are not "immunities" under the doctrines Defendants invoke. As discussed below, each of Defendants' arguments must be rejected to prevent a substantial erosion of the final judgment rule.

A. The government contractor defense is not grounds for immediate appeal.

No court has permitted the immediate appeal of orders denying a government contractor preemption defense under the collateral order doctrine. Rather, the courts that have addressed this issue have held the government contractor defense announced in *Boyle*, 487 U.S. 500, is a species of federal preemption that "is not a grant of immunity," *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1265 (9th Cir. 2010), and does not confer a right not to stand trial that is subject to immediate review. *See, e.g., id.* at 1266 (denial of *Boyle* federal government contractor defense not subject to interlocutory appeal); *Martin v. Halliburton*, 618 F.3d 476, 486-87 (5th Cir. 2010) ("denial of a claim that state law is preempted by federal law is not an order that may be immediately appealed"); *see also id.* at 486 n.16 (collecting cases concerning federal preemption generally); *Jordan v. AVCO Fin. Servs. of Ga., Inc.*, 117 F.3d 1254, 1258 (11th Cir. 1997)

(federal preemption "does not provide immunity to suit, but rather a defense to liability").

The principal case relied on by defendants, *Saleh v. Titan Corp.*, 580 F.3d 1, 4 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011), illustrates that the appropriate avenue for seeking immediate review of their federal preemption defense is under 28 U.S.C. § 1292(b). The contractor defendants in *Saleh*—the same CACI Defendants here—sought and obtained certification under section 1292(b) for their interlocutory appeal. *Id.*

No court has sanctioned immediate appeal for denials of a federal preemption argument, and Supreme Court precedent unequivocally cautions against expanding the doctrine as Defendants seek. *Mohawk Indus.*, 130 S. Ct. at 609; *Hallock*, 546 U.S. at 350.

B. Defendants' law-of-war defense is not grounds for immediate appeal.

Likewise, Defendants' so-called "law-of-war immunity" does not provide an immunity from suit of the kind that permits immediate review.

The law-of-war defense provides that foreign courts lack personal jurisdiction over members of the United States military. *Coleman v. Tenn.*, 97 U.S. 509, 516 (1878). When the foreign country is friendly, the army "is exempt from the civil and criminal jurisdiction of the place" because the foreign nation has in effect "cede[d] a portion of his territorial jurisdiction when he allows the troops of

a foreign prince to pass through his dominions." *Id*. at 515 (citing *The Schooner Exchange v. McFaddon (The Exchange)*, 11 U.S. (7 Cranch) 116, 139 (1812)). In other words, although the troops are physically present in a foreign nation, they are regarded as if they were in their home country, and thus are not considered present in the host country for purposes of the jurisdiction of the host-country's courts. When the foreign country is hostile, the invading army is said to be "exempt" from the foreign nation's laws and jurisdiction. *Id*. at 516-19.

In *Dow v. Johnson*, 100 U.S. 158 (1879), a case relied on heavily by Defendants, the Court articulated similar principles underlying the law-of-war defense, further demonstrating its relationship to personal jurisdiction. The Court began by restating "[t]he law [that] was so stated in the celebrated case of *The Exchange*"—that soldiers authorized to be in a foreign nation are free from suit in that nation's courts because they are regarded as beyond the territorial reach of the courts. *Id.* at 165. The Court then stated that a similar conclusion applies "where a hostile army invades an enemy's country." *Id*. Moreover, even after the invading army gains control of the foreign country and its courts, the conquering soldiers still cannot be subject to the laws of the conquered country because the laws are "not for the protection or control of the army, or its officers or soldiers," but to ensure that the "ordinary pursuits and business of society" can be carried out. *Id.* at 166. Thus, "the tribunals of the enemy must be without *jurisdiction* to sit in

judgment upon the military conduct of the officers and soldiers of the invading army." *Id.* at 165 (emphasis added).

Looking to *Coleman*, which anchors the law-of-war defense in the notion that courts lack personal jurisdiction over foreign soldiers, the D.C. Circuit has described the defense as an argument about jurisdiction over the defendant. In *Dostal v. Haig*, 652 F.2d 173 (D.C. Cir. 1981), the D.C. Circuit explained that United States soldiers occupying Berlin following the end of World War II "were immune from the *jurisdiction* of the courts of the conquered country." *Id.* at 176 (emphasis added). The jurisdictional limitation of the courts of the invaded country stemmed from Justice "Marshall's analysis in the Schooner Exchange case," which recognized that armed forces "carr[ied] with them" certain legal fictions that prevented the exercise of foreign courts' control over them. *Id.*; *see also* Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 Yale J. Int'l L. 294, 297-98 (1987) (relying on *Coleman* to explain that courts lack the ability to "regulate conduct" and "enforce . . . prescriptions" against foreign soldiers operating in their territory because when a military force is "deployed abroad" it is not viewed as in the territory of the foreign country, but rather the soldiers' country of origin).

Because the law-of-war defense is based on the principle that foreign courts lack personal jurisdiction over the defendant, an order denying a motion to dismiss

based on the defense should be appealable on the same basis as an order denying a motion to dismiss for lack of personal jurisdiction. *See Hallock*, 546 U.S. at 354-55 (looking to the intended "function[]" of a statutory judgment bar to determine whether defense based on the bar is immediately appealable). Orders concerning personal jurisdiction are not immediately appealable collateral orders.

As the Supreme Court explained in *Van Cauwenberghe*, "In the context of due process restrictions on the exercise of personal jurisdiction, this Court has recognized that the individual interest protected is in 'not being subject to the binding judgments of a forum . . . .'" 486 U.S. at 526 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985)). "Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, . . . the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order." *Id.* at 527 (citing *Catlin v. United States*, 324 U.S. 229, 236 (1945)). Similarly, this Court has held an order denying a motion to dismiss for lack of personal jurisdiction "is not a final order because it does not 'end [ ] the litigation on the merits and leave [ ] nothing for the court to do but execute the judgment.'" *Rux v. Republic of Sudan*, 461 F.3d 461, 474 (4th Cir. 2006) (alterations in original) (quoting *Catlin*, 324 U.S. at 233). "Nor does it fall within the category of non-final orders that are immediately appealable under the collateral-order doctrine because they are 'conclusive, . . . resolve important questions separate from the

merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action.'" *Id*. (omissions in original) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).[2]

Consistent with that understanding of the law-of-war defense, where the Supreme Court has reviewed the applicability of the law-of-war defense, it has done so as part of its review of a final judgment.[3] In short, the law-of-war

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[2] *See also, e.g.*, *Turi v. Main St. Adoption Servs., LLP*, 633 F.3d 496, 502 (6th Cir. 2011) (denial of motion to dismiss for lack of personal jurisdiction is not immediately appealable under the collateral-order doctrine); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1025 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 3057 (2011) (same); *S & Davis Int'l, Inc. v. Yemen, The Republic of*, 218 F.3d 1292, 1297 (11th Cir. 2000) (same); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs., Co.*, 199 F.3d 94, 96-97 (2d Cir. 1999) (same).

[3] For example, in *Coleman*, a Union solider was charged and convicted of committing murder in Tennessee during the time he was stationed there as an occupying force against the confederacy. While his conviction was being appealed, the defendant obtained a writ of habeas corpus from the federal circuit court, which concluded that he was being "held in contravention of the Constitution and laws of the United States." 97 U.S. at 512. Both the state supreme court and the United States Supreme Court then considered the propriety of the writ alongside an "appeal from the Criminal Court" of the final judgment convicting the defendant. *Id.* The Supreme Court eventually concluded that the law-of-war defense applied and barred the defendant's conviction, ordering that the defendant be "discharge[d]" from custody "on the indictment and conviction for murder in the State court." *Id.* at 519. Similarly, in *Dow*, the Court considered a judgment against a Union general whose troops had occupied New Orleans during the civil war. The plaintiff had alleged that, acting on the general's orders, the troops stole the plaintiff's property. The Court held that a judgment against the general was unenforceable because "an officer of the army of the United States is [not] liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country." 100 U.S. at 163. And in *Freeland v. Williams*, 131 U.S. 405 (1889), the Court, reviewing a judgment and order to enjoin enforcement of

defense, where it applies, is not a "right not to be sued." *P.R. Aqueduct and Sewer Auth.*, 506 U.S. at 144-45. It is a defense against enforcement of the judgment, which is properly reviewed following final judgment. *See Midland Asphalt Corp.*, 489 U.S. at 801.

C. Defendants' remaining arguments are not grounds for immediate appeal.

Defendants' remaining "immunity" arguments—an absolute immunity argument made by the CACI Defendants in *Al Shimari*, No. 09-1335, and a derivative sovereign immunity argument made by L-3 Services and Adel Nakhla in *Al-Quraishi v. L-3 Services*, Nos. 10-1891 & 10-1921—are not grounds for immediate appeal under the collateral order doctrine. Defendants have repackaged their government contractor preemption defense into an "immunity" claim in order to bring "otherwise nonappealable questions to the attention of the courts of appeals" at this interlocutory stage. *Swint*, 514 U.S. at 49 (quoting *Abney v. United States*, 431 U.S. 651, 663 (1977)).

If collateral order review were made available to any defendant claiming an immunity—even private defendants with no legitimate basis for such a claim—the temptation to assert some form of immunity at the motion to dismiss stage would

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the judgment, refused to apply the defense, explaining that it was not "established by the evidence." *Id.* at 417; *see id.* ("It [would] only [be on] the facts proved by the evidence taken in the present case which impeach th[e] judgment, and establish that it was rendered on account of acts done in pursuance of the powers of a belligerent in time of war.").

be irresistible. *See Digital Equip. Corp*., 511 U.S. at 873 (if every defense could be characterized as a claim to immunity from suit, such a right could be asserted "in virtually every case"). And the more those "immunity" claims were simply reiterations of their primary legal defenses, the better, since the defendant could then more easily assert that the defenses and purported "immunities" were intertwined and should be heard together on appeal. This Court should reject Defendants' attempt to expand the collateral order doctrine through incomplete and unsupported claims of immunity.[4]

First, the CACI Defendants' argument for absolute immunity is irreconcilable with Supreme Court precedent. Defendants argue that they are entitled to immunity because they were carrying out a delegated governmental function—the interrogation of prisoners—for which the United States is immune. *See* Br. for Appellants at 34, *Al-Quraishi v. L-3 Services*, No. 10-1891 & 10-1921, Nov. 23, 2011, ECF No. 69 ("L-3 Services Br."); Br. of Appellants CACI International Inc. and CACI Premier Technology, Inc. at 30, *Al Shimari v. CACI International*, No. 09-1335, Nov. 29, 2011, ECF No. 102 ("CACI Br."). They further argue that the United States approved at least some of the interrogation methods that were linked to Plaintiffs' claims of torture and abuse. CACI Br. at

[4] To avoid misuse of interlocutory appeals, courts have required that a claim of official immunity be "substantial" before it will justify collateral order review. *See Martin*, 618 F.3d at 483. Whether the standard is substantial or non-frivolous, Defendants' immunity claims fail to the support immediate appeal.

17.

That argument is tailored to the elements of a preemption defense set forth in *Boyle*, where the Supreme Court found that the United States "approved reasonably precise specifications" and the contractor conformed to those specifications. 487 U.S. at 512. As discussed above in Part II.A, *Boyle* concerns only a defense from liability, not an immunity from suit. As one court of appeals explained, "Although the source of the government contractor defense is the United States' sovereign immunity . . . the government contractor defense does not confer sovereign immunity on contractors." *Rodriguez*, 627 F.3d at 1265 (citation omitted). Accordingly, it does not support immediate appellate review.

Defendants' argument is not, by contrast, tailored to any recognized form of absolute immunity. Absolute immunity derives from a common law rule insulating a small number of governmental functions from review, including judges and testifying witnesses in a judicial process and the President of the United States when performing an official act. *Cleavinger v. Saxner*, 474 U.S. 193, 200-01 (1985). It is not available to the vast majority of government officials, whose immunity, if any, is qualified. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("For executive officials in general, however, our cases make plain that qualified immunity represents the norm."); *see also Cleavinger*, 474 U.S. at 205 (denying absolute immunity to prison officials hearing cases on prisoners' rule infractions).

The application of absolute immunity depends on the whether the governmental function at issue is one of the "functional categories" that warrants an absolute privilege. *Cleavinger*, 474 U.S. at 201 (citing *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983)).

The Supreme Court has firmly rejected the notion that prison officials are engaged in the type of governmental function that warrants absolute immunity. *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978). Instead, the Court has held that government prison officials may only invoke a limited *qualified* immunity, *id.*, a form of immunity Defendants here do not claim. *See Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980) (burden is on the defendant to plead qualified immunity as an affirmative defense). The Court further limited this immunity by holding that private prison guards accused of abusing prisoners are not entitled to even *qualified* immunity. *Richardson v. McKnight*, 521 U.S. 399, 404-06 (1997).

These precedents are consistent with a long line of Supreme Court authority declining to expand the categories of individuals entitled to absolute immunity. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 262 n.8 (2006) (absolute immunity does not extend to a prosecutor for conduct taken in an investigatory capacity); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (declining to extend absolute immunity to a prosecutor for providing advice regarding interrogation techniques: "[w]e do not believe, however, that advising the police in the investigative phase of a criminal

case is so 'intimately associated with the judicial phase of the criminal process,' . . . that it qualifies for absolute immunity") (citation omitted); *Malley v. Briggs*, 475 U.S. 335, 340-44 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985), *abrogated in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

Defendants have failed to cite any precedent extending absolute immunity to a private contractor carrying out prisoner interrogations. For example, both sets of Defendants rely heavily on *Mangold v. Analytic Services*, 77 F.3d 1442, 1449 (4th Cir. 1996), but *Mangold* concerned the absolute immunity applicable to testifying witnesses—the quintessential application of absolute immunity. *See Briscoe*, 460 U.S. at 335. *Mangold* and Defendants' other citations have no bearing on the availability of absolute immunity for parties whose asserted "governmental function" is interrogating prisoners.[5]

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[5] Defendants' other authority is similarly inapposite. In *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998), the court held that the Medicare carrier was an "officer or employee" of the United States—an assertion Defendants do not make here—in the context of a comprehensive statutory scheme for the administration of Medicare. In *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997), the court granted official immunity for employment decisions made by officials of the WMATA, a public entity described by this Court as "a quasi-governmental agency created by an interstate compact and approved by Congress." *Hancock Elecs. Corp. v. Wash. Metro. Area Transit Auth.*, 81 F.3d 451, 453 (4th Cir. 1996). In *Murray v. Northrop Grumman Information Technology*, 444 F.3d 169 (2d Cir. 2006), the court considered whether, in the context of a cross-cultural program administered under the Irish Peace Process Cultural and Training Program Act of 1998, absolute immunity attached to the program administrator's conveyance to the INS of complaints made by a host employer about two visiting participants'

The derivative sovereign immunity argument made by the Defendants in *Al-Quraishi v. L-3 Services*, Nos. 10-1891 & 10-1921, fares no better. Defendants rely on only one case that discusses derivative sovereign immunity, *Butters v. Vance International*, 225 F.3d 462 (4th Cir. 2000). But *Butters* concerned *foreign sovereign* immunity, a distinct doctrine that is plainly inapplicable here.[6] Defendants seize upon broad language in *Butters* and other cases, but the holdings of these decisions offer no support to Defendants' assertions of immunity.

In fact, the only case cited by Defendants that actually concerns the government function at issue is *Saleh*, 580 F.3d at 4. Yet *Saleh*, like *Boyle*, was decided on preemption grounds, not immunity. *Id.*[7] Regardless of one's opinion of the expansion of the preemption doctrine in that case, Defendants' pervasive reliance on it betrays the fact that their so-called immunity arguments are thinly-veiled reiterations of their primary defense under the government contractor

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alleged employment violations and political views. Like *Mangold*, the case turned on the traditional immunity that protects witness testimony.

[6] Moreover, Defendants have failed to assert that they were acting as common-law agents of the U.S. Government. *See* L-3 Services Br. at 31-38. The existence of a common-law agency relationship is "a limitation on derivative sovereign immunity, if it in fact exists." *McMahon v. Presidential Airways*, 502 F.3d 1331, 1343 (11th Cir. 2007) (noting that the circuit has "never upheld a claim of derivative sovereign immunity"). Defendants' failure to assert a common-law agency relationship illustrates that they have claimed derivative sovereign immunity in name only.

[7] Indeed, the CACI defendants in *Saleh* asserted sovereign immunity, which the court of appeals declined to consider, finding instead "that plaintiffs' common law tort claims are controlled by *Boyle*." *Saleh*, 580 F.3d at 5.

doctrine recognized in *Boyle*. *See, e.g.*, CACI Br. at 32. In light of the Supreme Court's sound rejection of absolute immunity for officials carrying out prison functions, and absent any authority supporting an entitlement to derivative sovereign immunity on grounds distinct from the government contractor defense, the Defendants' derivative "immunity" arguments should be viewed "with skepticism, if not a jaundiced eye," *Digital Equip. Corp*., 511 U.S. at 873, and addressed instead for what they are—preemption defenses supported, if at all, by *Boyle*, and not entitled to immediate appeal.

CONCLUSION

For the above reasons, *Amici* respectfully request that the Court decline Defendants' invitation to expand the collateral order doctrine. These appeals should be dismissed for lack of jurisdiction.

December 19, 2011

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2011, I caused a true copy of the foregoing Brief of Professors of Civil Procedure and Federal Courts as *Amici Curiae* in Support of Plaintiffs-Appellees to be filed through the Court's electronic case filing system and served through the Court's electronic filing system. I also caused a copy of the same Brief to be served by U.S. Mail on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that:

1. I am an attorney representing *Amici Curiae* Professors of Civil Procedure and Federal Courts.

2. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,721 words, excluding the parts of the brief exempted by the Rules.

3. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared in a proportional spaced typeface using Microsoft Word in 14-point Times New Roman font.

December 19, 2011

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