RECORD NO. 09-1335

In The

United States Court Of Appeals

For The Fourth Circuit

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

Plaintiffs – Appellees,

v.

CACI INTERNATIONAL INC and
CACI PREMIER TECHNOLOGY, INC.,

Defendants – Appellants.

ON REHEARING *EN BANC* OF AN APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

A. ABU GHRAIB 4

B. CACI'S TORTURE AND ABUSE OF PLAINTIFFS 6

C. THE DISTRICT COURT DECISION 9

SUMMARY OF ARGUMENT 11

ARGUMENT 14

STANDARD OF REVIEW 14

DISCUSSION OF THE ISSUES 14

I. THIS COURT LACKS ANY BASIS TO ASSUME JURISDICTION OVER THE INTERLOCUTORY ISSUES CACI RAISES ON APPEAL 14

A. This Court Lacks Jurisdiction Over CACI's Claims of Law-of-War or Derivative Governmental Immunity 16

B. This Court Lacks Jurisdiction Over CACI's Political Question Claims 20

C. CACI's Preemption Claims are Not Inextricably Intertwined So As To Permit Exercising Pendant Appellate Jurisdiction 21

II. THE LAW OF WAR PROVIDES NO IMMUNITY FROM SUITS IN U.S. COURTS ARISING OUT OF ILLEGAL ACTIVITY 23

III. CACI IS NOT ENTITLED TO DERIVATIVE ABSOLUTE IMMUNITY BECAUSE THE TORTURE AND ABUSE OF PLAINTIFFS WAS NOT A DISCRETIONARY FUNCTION WITHIN THE SCOPE OF CACI'S GOVERNMENT CONTRACT....................28

IV. THE ENTIRE FIELD OF STATE TORT LAW CANNOT BE DISPLACED BY A DOCTRINE OF "BATTLEFIELD IMMUNITY," THE SUPREME COURT'S ANALYSIS IN *BOYLE* OR THE FTCA'S "COMBATANT ACTIVITIES" EXCEPTION TO SOVEREIGN IMMUNITY 33

A. *The Saleh*'s Judicially-Constructed "Battlefield Preemption" Theory Contravenes Supreme Court Field Preemption Jurisprudence 34

B. Because Holding CACI Liable Under State Law for Its Unauthorized Torture and Abuse of Civilians Does Not Undermine Any Discretionary Government Function, *Boyle*'s Narrow Preemption Defense Does Not Foreclose Plaintiffs' Claims....................39

C. Because CACI Is Not Subject to the Military Chain of Command and Engaged in Patently Unauthorized and Unlawful Torture and Abuse Against Civilians, It Cannot Claim to Have Engaged in "Combatant Activities." 42

V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS DAMAGES ACTION AGAINST CORPORATE DEFENDANTS 47

A. Plaintiffs' Damages Claims Are Constitutionally Committed to the Judiciary, Not the Executive or Legislative Branches....................49

B. Plaintiffs' Claims May Be Resolved by Judicially Discoverable and Manageable Standards 54

C. Plaintiffs' Claims Do Not Require the Court to Make Policy Decisions Because Official U.S. Policy Against Torture Is Clear......................................57

CONCLUSION...57

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

Al Marri v. Pucciarelli,
534 F.3d 213 (4th Cir. 2008) 49

Al Shimari v. CACI, Inc.,
658 F.3d 413 (4th Cir. Sept. 21, 2011),
vacated and *reh'g en banc granted*
(4th Cir. Nov. 8, 2011)..*passim*

Al-Quraishi v. Nakhla et al.,
658 F.3d 201 (4th Cir. Sept. 21, 2011),
vacated and *reh'g en banc granted*
(4th Cir. Nov. 8, 2011)..*passim*

Am. Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003)...37, 38

Baker v. Carr,
369 U.S. 186 (1962)...49

Barr v. Matteo,
360 U.S. 564 (1959)...28, 30

Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"
283 F.3d 208 (4th Cir. 2002) 14

Bellotte v. Edwards,
629 F.3d 415 (4th Cir. 2011) 22

Boumediene v. Bush,
553 U.S. 723 (2008)...49

Boyle v. United Technologies,
487 U.S. 500 (1988)...*passim*

Briscoe v. LaHue,
460 U.S. 325 (1983)...20

Butters v. Vance Int'l, Inc.,
225 F.3d 462 (4th Cir. 2000) 31, 32

CACI Premier Tech., Inc. v. Rhodes,
536 F.3d 280 (4th Cir. 2008) 9, 12, 29

Carmichael v. Kellogg, Brown, & Root Services, Inc.,
572 F.3d 1271 (11th Cir. 2009) 52, 53

Chappell v. Wallace,
462 U.S. 296 (1983)...43

City of Charleston v. A Fisherman's Best, Inc.,
310 F.3d 155 (4th Cir. 2002) 36

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949)...*passim*

Coleman v. Tennessee,
97 U.S. 509 (1979)..24, 25

Committee of United States Citizens Living in Nicaragua v. Reagan,
859 F.2d 929 (D.C. Cir. 1988)...50

Corr. Svcs. Corp. v. Malesko,
534 U.S. 61 (2001)..40

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000)...37, 38

Deutsch v. Turner Corp.,
324 F.3d 692 (9th Cir. 2003) 50

Digital Equipment, Corp. Corp. v. Desktop Direct*,
511 U.S. 863 (1994)...17, 18

Doe v. Exxon Mobile Corp.,
473 F.3d 345, 352 (D.C. Cir. 2007)..21

Dow v. Johnson,
100 U.S. 158 (1880)...*passim*

Dreher v. Budget Rent-A-Car System, Inc.,
272 Va. 390 (Va. 2006) 27-28

Freeland v. Williams,
131 U.S. 405 (1889)..17, 26

Gade v. Nat'l Solid Waste Mgmt. Ass'n,
505 U.S. 88 (1992)..36

Griggs v. WMATA,
232 F.3d 917 (D.C. Cir. 2000)..29

Hamdan v. Rumsfeld,
548 U.S. 557 (2006)...43, 49

Hamdi v. Rumsfeld,
542 U.S. 507 (2004)..49

Harris v. Kellogg, Brown & Root Servs.,
618 F. Supp. 2d 400 (W.D. Pa. 2009),
appeal dismissed for lack of collateral order jurisdiction,
618 F.3d 398 (3d Cir. 2010) 18, 19, 50

Hines v. Davidowitz,
312 U.S. 52 (1941)..37

Ibrahim v. Titan Corp.,
391 F. Supp. 2d 10 (D.D.C. 2005)...47

Japan Line, Ltd. v. County of Los Angeles,
441 U.S. 434 (1979)..37

Kadić v. Karadžić,
70 F.3d 232 (2d Cir. 1995) 50

Katrina Canal Breaches Litig. Steering Commm'n. v.
Wash. Group Int'l. Inc.,
620 F.3d 455 (5th Cir. 2010) 40

Kennedy v. Sanford,
166 F.2d 568 (5th Cir. 1948) 49

Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione,
937 F.2d 44 (2d Cir. 1991) 49

Koohi v. United States,
976 F.2d 1328 (9th Cir. 1992) 33, 46, 49, 51

Lane v. Halliburton,
529 F.3d 548 (5th Cir. 2008) 50, 55

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949)..31

Lauro Lines s.r.l. v. Chasser,
490 U.S. 495 (1989)..18

Leslie Miller, Inc. v. Arkansas,
352 U.S. 187 (1956)..32

Lessin v. Kellogg Brown & Root,
C.A. No. H-05-01853,
2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 12, 2006)............................50

Linder v. Portocarrero,
963 F.2d 332 (11th Cir. 1992) 50

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804) 26

Madsen v. Kinsella,
343 U.S. 341 (1952)..24

Mangold v. Analytic. Systems, Inc.,
77 F.3d 1442 (4th Cir. 1996) ....*passim*

Martin v. Halliburton,
618 F.3d 476 (5th Cir. 2010) 19, 56

McMahon v. Presidential Airways, Inc.,
460 F. Supp. 2d 1315 (M.D. Fla. 2006), *aff'd*
502 F.3d 1331 (11th Cir. 2007) 50-51, 55

McVey v. Stacy,
157 F.3d 271 (4th Cir. 1998) 19

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996)...36

Midland Asphalt Corp. v. United States,
489 U.S. 794 (1989)..16, 18

Miree v. DeKalb County,
433 U.S. 25 (1977)...41

Mitchell v. Forsyth,
472 U.S. 511 (1985)...19

Mitchell v. Harmony,
54 U.S. (12 How) 115 (1851) 26

Orem v. Rephann,
523 F.3d 442 (4th Cir. 2008) 29

Orloff v. Willoughby,
345 U.S. 83 (1953)...33

Rasul v. Bush,
542 U.S. 466 (2004)..26, 49

Rice v. Sante Fe Elevator Corp.,
331 U.S. 218 (1947)...36

Richardson v. McKnight,
521 U.S. 399 (1997)..32, 42

Rodriguez v. Lockheed Martin Corp.,
627 F.3d 1259 (9th Cir. 2010) 19

Rux v. Republic of Sudan,
461 F.3d 461 (4th Cir. 2006) 21

Saleh v. Titan,
580 F.3d 1 (D.C. Cir. 2009)..*passim*

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984)...39

Skeels v. United States,
72 F. Supp. 372 (W.D. La. 1947) 11, 46

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004)...57

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998)...20

Swint v. Chambers County Comm'n,
514 U.S. 35 (1995)...*passim*

Taylor v. Kellogg Brown & Root Services,
658 F.3d 402 (4th Cir. 2011) 52

Terry v. June,
420 F. Supp. 2d 493 (W.D. Va. 2006)...28

The Paquete Habana,
175 U.S. 677 (1900)...26

Tiffany v. United States,
931 F.2d 271 (4th Cir. 1991) 51, 52

United States v. Cisneros,
169 F.3d 763 (D.C. Cir. 1999)...19

United States v. Graner,
69 M.J. 104 (C.A.A.F. 2010)...56

United States v. Harman,
68 M.J. 325 (C.A.A.F. 2010)...56

United States v. Passaro,
577 F.3d 207 (4th Cir. 2009) 12, 29, 46

United States v. Smith,
68 M.J. 316 (C.A.A.F. 2010)...56

United States v. Virginia,
139 F.3d 984 (4th Cir. 1998) 32

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988)...18

Velasco v. Gov't of Indonesia,
370 F.3d 392 (4th Cir. 2004) 14

Westfall v. Erwin,
484 U.S. 292 (1988)..28, 30

Will v. Hallock,
546 U.S. 345 (2006) 16

Wyeth v. Levine,
555 U.S. 555 (2009)...38

Yearsely v. W.A. Ross Constr. Co.,
309 U.S. 18 (1940)...31

Zschering v. Miller,
389 U.S. 429 (1968)...37

Statutes and Regulations:

10 U.S.C. §§ 881, 892, 893, 928...40

10 U.S.C. § 2734..39

18 U.S.C. § 2340A (Anti-Torture statute) 26, 49

18 U.S.C. § 2441 (War Crimes Act)...26, 49

18 U.S.C. §§ 3261-65 (Military Extraterritorial Jurisdiction Act) 26, 49

28 U.S.C. § 1291 21

28 U.S.C. § 1292(b) 4, 14

28 U.S.C. § 1331 1

28 U.S.C. § 1332 1

28 U.S.C. § 1350 (Alien Tort Statute) 1, 3, 26

28 U.S.C. § 1367 1

28 U.S.C. § 2241(e)(2) 27

28 U.S.C. § 2671 36

28 U.S.C. § 2679 (“the Westfall Act”) 30

48 C.F.R. § 252.225-7040(e)(2)(ii) 56

Constitutional Provision:

U.S. Const. Art. I, § 7, cls. 2-3; Art. VI, cl. 2; Amdt. 10 39

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Army Reg. 715-9, Contractors Accompanying The Force § 3-2(f) (1999) 44

CPA Order Number 17 (Revised) (signed on June 27, 2004 by L. Paul Bremer, U.S. Ambassador and CPA Administrator), Sec. 4(7) 27

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FM 3-100.21 §4-45 (2003) 44

Fourth Geneva Convention, arts.. 3, 27, 31, 32, 37, 100, 147 40

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(Third Geneva Convention), art. 4.A(4), Aug. 12, 1949,
6 U.S.T. 3316 ....25, 43

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8 June 1977 to the Geneva Conventions of 12 August 1949,
art. 43 (Yves Sandoz, et al. eds., 1989) 43

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Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners,
May 7, 2004 (*available at* armed-services.senate.gov/statement/
2004/May/Rumsfeld.pdf) 5

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Practice of Belligerent Occupation*
112 (1957) 24

White House, Press Release, President Bush Meets with
Al Arabiya Television, 2004 WLNR 2540883
(May 5, 2004) 5

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction for the reasons set forth fully below in Argument, Section I.

The District Court properly exercised jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity); 28 U.S.C. § 1350 (Alien Tort Statute), and 28 U.S.C. § 1367 (supplemental jurisdiction).

On March 18, 2009, the Honorable Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia denied in part and granted in part a motion to dismiss filed by CACI Premier Technology, Inc. and CACI International, Inc. (collectively, "CACI" or "Defendants"). JA–403-473 (opinion reported at 657 F. Supp. 2d 700 (E.D. Va. 2009)).

CACI filed a notice of appeal on March 23, 2009. JA–474. Plaintiffs moved to dismiss CACI's appeal. Motion to Dismiss CACI's Appeal, Apr. 28 (2009) (4th Cir. 09-1335, Dkt # 11-1). A divided panel found that this Court has jurisdiction over the appeal pursuant to the collateral order doctrine. 658 F.3d 413 (4th Cir. Sept. 21, 2011), *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011). Plaintiffs filed a timely petition for rehearing *en banc* pursuant to Rule 35 of Federal Rules of Appellate Procedure, and on November 8, 2011, this Court issued an Order granting Plaintiffs' petition. This case has been consolidated for *en*

banc argument with *Al-Quraishi v. Nakhla et al.*, 658 F.3d 201 (4th Cir. Sept. 21, 2011), *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011).

STATEMENT OF ISSUES

1. May a party manufacture appellate jurisdiction over interlocutory rulings under the narrow collateral order by characterizing what are mere defenses to liability and to a court's jurisdiction as "immunities," when they were litigated by the party as a defense to jurisdiction in the proceedings below, and are otherwise plainly reviewable after final judgment?

2. Are corporate defendants entitled to categorical "law of war" immunity for their alleged torture and war crimes when such a proposed immunity runs counter to settled understandings of the law of war and centuries of Supreme Court precedent, and would give for-profit contractors more protection from suit than genuine members of the U.S. Armed Forces?

3. Can these corporate defendants claim the mantle of derivative absolute official immunity when their alleged torture and abuse were not "discretionary acts," were plainly not authorized by the United States, and would contravene the public interest in promoting accountability for atrocities at Abu Ghraib?

4. May this Court expand the limited government contractor defense set forth in *Boyle v. United Technologies*, 487 U.S. 500 (1988), to give protection to

contractors who are acting contrary to the government's wishes and whose torture and abuse of civilian detainees cannot be properly analogized to "combatant activities"?

STATEMENT OF THE CASE

Plaintiffs are four Iraqi citizens who brought this suit on June 30, 2008 in the Eastern District of Virginia against CACI, a publicly-traded company hired to provide translation and interrogation services to the U.S. military in Iraq. On September 15, 2008, Plaintiffs filed their Amended Complaint. JA–16-41. Plaintiffs asserted a range of state law claims and claims for war crimes under the federal Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for sadistic and gratuitous beatings by CACI employees, that were disconnected from any lawful interrogations, contrary to U.S. law and military policy, and prohibited by CACI's contract.

The District Court denied CACI's motion to dismiss Plaintiffs' state law claims, but granted its motion to dismiss Plaintiffs' ATS claims. On appeal, a majority of the panel (Niemeyer and Shedd, JJ.) concluded that this Court has jurisdiction over the interlocutory appeal, finding that preemption of state law claims satisfied the requirements of the collateral order doctrine; reaching the merits, the panel majority adopted wholesale the battlefield preemption theory constructed by the majority in *Saleh v. Titan,* 580 F.3d 1 (D.C. Cir. 2009). *See*

658 F.3d 413, 414-20. Judge King dissented both from the finding that the Court had jurisdiction over the appeal and that Plaintiffs' state law claims could be preempted. *Id.* at 427-36.

Almost immediately after this Court granted Plaintiffs' petition for rehearing *en banc*, CACI sought the District Court's certification of this interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), in order to put this appeal on sound jurisdictional footing – *i.e.*, two and a half years after it could have sought such certification. Because the District Court was deprived of jurisdiction as soon as CACI sought an interlocutory appeal, it denied CACI's motion. *See* Order Den. Defs.' Mot. § 1292(b) Certif. (E.D. Va. Dkt # 135).

STATEMENT OF FACTS

A. ABU GHRAIB

Abu Ghraib maintains an iconic and disgraceful status as a torture prison. Images taken there of naked, bloodied and contorted Iraqi bodies and terrified, humiliated and anguished Iraqi faces – alongside civilian and military tormentors – spread quickly around the world, prompting considerable shock and anger towards the United States. These images also produced universal condemnation among U.S. political and military leaders.

Former President Bush consistently affirmed that the acts of torture at issue in this case violated U.S. law and policy, and our international obligations. Explaining that "the practices that took place in that prison are abhorrent and they don't represent America," President Bush called for "justice to be served."[1] Former Secretary of Defense likewise condemned the abuse of detainees, testifying that such brutality was "inconsistent with the values of our nation," and calling for accountability on behalf of the victims.[2]

Military investigations revealed that a group of military personnel and CACI and L-3 employees systemically and illegally abused prisoners at Abu Ghraib. Major General Antonio Taguba's thorough report concluded that between October and December 2003, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib prison. Major General Antonio Taguba, Investigating Officer, AR 15-6 Investigation of the 800th Military Police Brigade 16 (2004). General Taguba specifically found that CACI employee Steven Stefanowicz directed military police to engage in physical abuse of prisoners, and that his instructions were not authorized or permitted by the military. *Id*. at 48. General Taguba found that Stefanowitz lied to investigators and

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[1] White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004).

[2] Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004. (*available at* armed-services.senate.gov/statement/2004/May/Rumsfeld.pdf)

recommended that he be reprimanded, fired, and have his security clearance revoked. *Id.*

Major General George Fay found after further investigation that Stefanowicz (referred to as "CIVILIAN 21") abused prisoners and lied to government investigators, and that that CACI employees Timothy Dugan ("CIVILIAN-05") and Daniel Johnson ("CIVILIAN-11") violated military law, policy and standing orders by mistreating prisoners, including placing a prisoner in an "unauthorized" stress position, and using military dogs in a manner that was "clearly abusive and unauthorized." General Fay corroborated the testimony of convicted soldier Frederick, finding that Johnson had directed and encouraged him to abuse prisoners. Major General George Fay, Investigating Officer, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. 82, 84, 132 (2004).

Despite CACI's full presence and participation in these gratuitous acts of torture, humiliation and abuse, it has yet to compensate or apologize for its conduct.

B. CACI'S TORTURE AND ABUSE OF PLAINTIFFS

Plaintiff Suhail Najim Abdullah Al Shimari was imprisoned at Abu Ghraib for two months after being arrested in November 2003. At Abu Ghraib, CACI and its co-conspirators, low-level military personnel, beat Mr. Al Shimari, threatened

him with dogs, subjected him to electric shocks, stripped him naked, deprived him of food and sleep and kept him in a cage. He was released in March 2008 without ever being charged with a crime. JA–17-19.

Plaintiff Taha Yaseen Arraq Rashid was imprisoned at Abu Ghraib for two months after being arrested in September 2003. CACI and its co-conspirators dragged Mr. Rashid by a rope tied tightly to his penis and forced him to watch the rape of a female prisoner by conspirators. Mr. Rashid was forcibly subjected to humiliating sexual acts by a female as he was shackled to cell bars. Defendants tasered Mr. Rashid in the head, subjected him to electric shocks and mock execution, hung him from the ceiling by a rope tied around his chest, and beat him so badly that they broke his bones and caused loss of vision; his condition was so grave and revealing, he was hidden from the International Committee of the Red Cross during its visit to Abu Ghraib. Mr. Rashid was released in May 2005 without being charged with a crime. JA–19-20.

Plaintiff Sa'ad Hamza Hantoosh Al Zuba'e was imprisoned at Abu Ghraib for one year after being arrested in November 2003. CACI and its co-conspirators repeatedly beat Mr. Zuba'e, stripped him and kept him naked, subjected him to extreme temperatures and poured cold water poured over his naked body; Defendants hooded him, chained to the bars of his cell, and while keeping him in solitary confinement, subjected him sensory deprivation for almost a year. Mr.

Zuba'e was released from Abu Ghraib in October 2004, without ever being charged with a crime. JA–20-21.

Plaintiff Salah Hasan Nusaif Jasim Al-Ejaili was imprisoned at Abu Ghraib after being arrested on November 3, 2003. CACI and its co-conspirators beat Mr. Al-Ejaili repeatedly, stripped him and kept him naked, subjected him to extreme temperatures by dousing hot and cold water over his naked body, placed him in stress positions for extended periods of time, threatened to unleash attack dogs on him and deprived him of food and sleep. Mr. Al-Ejaili was released from Abu Ghraib in February 2004 without ever being charged with a crime. JA–21.

Plaintiffs Al Shimari, Rashid, Al Zuba'e and Al-Ejaili were all tortured by a conspiracy of CACI employees, L-3 employees and soldiers. JA–21-23. One member of this conspiracy, a former military police officer named Charles Graner, served a prison sentence at Fort Leavenworth. When interviewed by the United States military investigators after his conviction, Graner identified CACI employees Steven Stefanowicz and Daniel Johnson as among the ringleaders in the Abu Ghraib torture scandal. JA–16-17, 21-22.

Plaintiffs' Complaint expressly alleges that Stefanowicz (known as "Big Steve") and Johnson (known as "DJ") personally instigated, directed, participated in, and aided and abetted conduct towards Plaintiffs that is in clear and direct violation of international and federal laws. JA–16-17, 21-27. Based on

statements obtained from a former CACI employee, Plaintiffs allege that CACI employee Timothy Dugan physically harmed Plaintiffs and otherwise participated in the ongoing conspiracy to torture Plaintiffs and other prisoners. JA–21-25.

In addition to direct physical cruelty by Stefanowicz, Johnson and Dugan, other evidence reveals that CACI and its employees participated in the torture conspiracy, including the creation and employment of code words for specific types of torture. JA–22. Aware of its and potential liability, CACI attempted to cover up its role in the torture conspiracy by destroying documents, videos and photographs. JA–22-25. And, obviously unconcerned by the asserted harms to national security it asserts will surely ensue if litigation in *this* case proceeds, CACI filed a meritless defamation lawsuit against a radio station seeking to stifle public debate over its prominent role in the Abu Ghraib scandal. *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008).

C. THE DISTRICT COURT DECISION

The District Court thoroughly rejected all the arguments CACI raises on appeal. Regarding CACI's claim that this case presents nonjusticiable political questions, the District Court rejected the claim that CACI's actions, even if taken in concert with low-level military officials, were carried out with "the authorization or oversight of higher officials," such that the actions could be attributable to a coordinate branch of government. JA–416. The District Court

also underscored the critical distinction between challenges to the "conduct of government contractors carrying on a business for profit," such as CACI, and challenges to "the government itself or the adequacy of official government policies" – the latter of which are not implicated in this suit. *Id*. The District Court further observed that CACI's assertion that decisions relating to payment of wartime claims reserved only for the political branches, "ignores the long line of cases where private plaintiffs were allowed to bring tort actions for wartime injuries." JA–420-21 (citing cases).

Next, the District Court rejected CACI's claim to derivative absolute official immunity, because it was unlikely CACI could prove, as it had to under this defense, that its actions were "discretionary" in light of the plausible allegations that CACI violated "laws, regulations and Defendants' government contract." JA–435. In any event, the court was "bewildered" by CACI's assertion that its actions were well within the scope of its government contract "when the contract is not before the Court" at this, the pleading stage. Accordingly, discovery would be necessary to fully evaluate this defense. JA–436.

Finally, the court rejected the claim that Plaintiffs' state law claims could be preempted by the asserted federal interests embodied in the Federal Tort Claims Act ("FTCA"). The District Court could not simply accept CACI's characterization that it had been engaging in "combatant activities" where

prevailing law (*e.g.*, *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D.La. 1947)), demonstrates that interrogation is not tantamount to "combat." JA–443-46. As such, it was "too early" to conclusively resolve this defense, without discovery. JA–444-45. Even if Defendants could classify their conduct as "combatant activities," the court concluded preemption would still be inappropriate under the framework set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), because potential liability would advance the federal government's interest in displacing ineffective contractors and would further a shared federal-state interest in prohibiting torture of prisoners. JA–447-51. Additionally, because Plaintiffs allege CACI acted contrary to their contract and U.S. prohibitions on torture, there would be no inconsistency in complying with both state tort law and federal policy interests. JA–450-52.

SUMMARY OF ARGUMENT

The entirety of CACI's appeal rests on a manifestly false premise: that this case challenges military policy, executive judgments, or the federal government's warfighting prerogatives. It is hard to overstate the number of times CACI raises the specter of judicial interference with the "conduct of war" or "battlefield interrogations," or "actual military decisions"; CACI also reads into the Complaint a surreptitious attempt to "run[] the army," *see* CACI Br. 34 (citation omitted), and to subpoena "high-level Defense Department and White House sources." *Id*. at 54.

Yet, aside from one contextual allegation in the 205-paragraph Complaint noting that the abuses occurred "during a period of armed conflict," CACI Br. 40, CACI cannot identify a single concrete instance in which Plaintiffs seek to call into question the military's warfighting prerogatives.

Quite to the contrary, Plaintiffs eagerly assume the correctness of military law, policy and judgment – all of which prohibit the torture and abuse of detainees – to challenge "sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law." *CACI v. Premier Tech.*, 536 F.3d at 285-86. As with the appellant in *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), "No true 'battlefield interrogation' took place here;" rather, CACI "administered a beating in a detention cell." Once CACI's flawed premise is rejected as it must be based on the Complaint's well-pled allegations, each of its arguments on appeal falls apart.

First, this Court lacks jurisdiction over the District Court's interlocutory rulings. As CACI fully conceded in the proceedings below, what it now labels "*Dow* immunity" is nothing more than a defense to jurisdiction and thus not immediately appealable under the collateral order doctrine. The preemption and political question rulings are not "inextricably intertwined" to any properly appealable issue, so this Court cannot assume pendant appellate jurisdiction over them.

Second, there is no immunity for CACI's outrageous conduct. Given the centuries in which U.S. courts have adjudicated civil and criminal actions arising out of illegal wartime conduct, *Dow v. Johnson*, 100 U.S. 158 (1880), says little more than that U.S. forces may not be subjected to proceedings in Iraqi courts under Iraqi law. CACI cannot claim derivative absolute immunity because it had no discretion to undertake unauthorized, illegal actions.

Third, there are no federal interests embodied in the FTCA that can preempt the entire field of state tort law. Because observance of state tort law would advance the federal government's interests in encouraging effective and efficient contracting – not to mention its interests in prohibiting torture – the expressly limited preemption rationale of *Boyle* does not apply here. CACI, as a for-profit corporation, is not subject to the training, discipline and duty of the military chain of command, and cannot claim that gratuitous and illegal brutality it used against detainees can be considered a "combatant activity" under the FTCA.

Finally, rather than question the executive's warfighting or interrogation prerogatives, this case seeks to enforce pre-existing executive and military policy judgments prohibiting torture, through the most judicially-manageable standards existing – tort law. As such, nothing in this case raises a nonjusticiable political question.

ARGUMENT

STANDARD OF REVIEW

This Court reviews the District Court's order for discovery for abuse of discretion. *See Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208, 216 n.3 (4th Cir. 2002). It reviews findings of jurisdictional fact for clear error and "the legal conclusion that flows therefrom *de novo*." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004).

DISCUSSION OF THE ISSUES

I. THIS COURT LACKS ANY BASIS TO ASSUME JURISDICTION OVER THE INTERLOCUTORY ISSUES CACI RAISES ON APPEAL.

CACI, like L-3, ignored a proper mechanism for review of the district court's decision, via certification under 28 U.S.C. § 1292(b), to instead take a shot at a direct, immediate appeal with this Court. CACI perhaps finally appreciates the weakness of the jurisdictional basis of this appeal for, as soon as this Court granted Plaintiffs' petition for rehearing *en banc*, CACI finally did move in the District Court for §1292 certification of issues on appeal – *i.e.*, two-and-a-half *years after* the district court's ruling. Because, as the very result of CACI's interlocutory gamble, the District Court currently lacks jurisdiction over this case, it properly denied CACI's motion. Order Denying Defendants' Motion for 28 U.S.C. § 1292(b) Certification of the Court's Order on Defendants' Motion to

Dismiss. Nov. 22 (2011) (E.D. Va. 08-cv-827, Dkt # 135). CACI is right to be concerned about this Court's jurisdiction.

CACI invents a claim of "immunity" largely out of whole cloth and then equates, in conclusory fashion, such an immunity to the handful of well-settled immunity doctrines automatically subject to collateral order review under the criteria set forth in *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 546 (1949), even as CACI fails to cite, let alone apply, the *Cohen* factors. Yet, one scratch beneath the surface of CACI's claimed entitlement to law-of-war immunity (an argument it did not make in the District Court), and derivative official immunity reveals that they lack precedent or limiting principle, and thus run headlong into numerous Supreme Court cases rejecting similar claims that, absent immediate appellate review, a "right to avoid trial" would be "effectively lost." *See infra* Section I(A).

And, while CACI wisely chooses not to defend the collateral order doctrine as a basis to review the preemption questions, it cannot demonstrate, as it must, that preemption issues are necessary to decide the immunity issues or that the two questions are otherwise "inextricably intertwined" to justify asserting pendant appellate jurisdiction. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995).

A. This Court Lacks Jurisdiction Over CACI's Claims of Law-of-War or Derivative Governmental Immunity.

Under the collateral order doctrine each of the three *Cohen* criteria must be satisfied, *i.e.*, that the district court rulings on appeal: "[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." *Will v. Hallock,* 546 U.S. 345, 349 (2006). As more fully discussed in Plaintiff's L-3 Opposition Brief, Section I, CACI's asserted law-of-war immunity and derivative governmental immunity cannot meet the stringent *Cohen* factors.

First, the law-of-war and derivative government immunity claims are not "unreviewable on appeal from final judgment." *Swint*, 514 U.S. at 40. Despite labeling each of these claims an "immunity," CACI cannot demonstrate that this claim provides it a right "not to be tried," of the kind required by *Cohen* – *i.e*. one that "rests upon an *explicit statutory or constitutional guarantee* that trial will not occur." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (emphasis added). Nor can CACI demonstrate, as it must, that some "substantial public interest" would be "effectively lost" if it awaited final judgment. *See Will*, 546 U.S. at 351-53 (doctrine requires existence of "some particular value of a high order"). *See also* Pl.'s Opp'n to L-3 Mot. to Dismiss16-28, No. CV-01696-PJM ("Plf's L-3 Opp."). Whatever protection might conceivably exist to insulate

CACI from accountability for its alleged role in torture, rape and abuse, there is certainly no reason that protection could not be vindicated after awaiting final judgment.

Indeed, CACI concedes what is equally true for L-3: what it now characterizes as an "immunity," in fact amounts to little more than "an exemp[tion] from civil and criminal *jurisdiction*." CACI Br. 2 (quoting *Dow*, 100 U.S. at 165 (alterations in original) (emphasis added). Alternatively, CACI admits that the "immunity" identified in *Dow* is one that "protects parties 'from civil *liability*'." CACI Br. 26 (quoting *Freeland v. Williams*, 131 U.S. 405, 417 (1889)) (emphasis added).[3] Indeed, in the District Court proceedings, CACI repeatedly framed *Dow* as offering a choice-of-law or jurisdictional defense. JA–71-72 (arguing "occupying powers" are exempt "from application of *Iraq law*") (emphasis added); *see id*. ("*local law* of the occupied territory does not apply to occupying personnel.") (emphasis added).

CACI thus catches itself in its own word games, underscoring the importance of the Supreme Court's admonition to view such claims of immunity or a right "not to be tried, with skepticism, if not a jaundiced eye." *Digital Equipment*, *Corp. Corp. v. Desktop Direct*, 511 U.S. 863, 873 (1994) (internal

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[3] This is precisely the proper characterization of CACI and L-3's law-of-war arguments – *i.e.*, as a *defense* to the jurisdiction of a foreign court and a defense to prevent imposition of financial *liability* on members of the U.S. army. *See* Plf's L-3 Opp. 21-22; 33-38.

quotations omitted); *see also Midland Asphalt*, 489 U.S. at 801 ("[o]ne must be careful, however, not to play word games with the concept of a 'right not to be tried.'"). Framed, as it should be, as a right to avoid the "jurisdiction" of a foreign court or to be free from "civil liability," CACI's so-called law-of-war immunity clearly cannot support collateral order review. *See, e.g. Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500, 502-503 (1989) (Scalia, J., concurring) (no collateral order review of company's asserted immunity from suit in a U.S. jurisdiction even where such right would actually be "positively destroyed . . . by permitting trial to occur and reversing its outcome."); *Digital Equipment*, 511 U.S. at 880-82 (refusal to enforce settlement agreement not appealable, even if waiting for appeal after trial would render benefits of enforceable settlement agreement irretrievable); *Van Cauwenberghe*, 486 U.S. 517, 525 (1988) (no collateral review of decision denying treaty-based immunity from civil process). *See also* Br. Amicus Curiae, Professors of Civil Procedure and Federal Jurisdiction in Support of Plaintiffs.

Second, the District Court's ruling on CACI's derivative official immunity claim (just as with L-3's derivative immunity claim) was "tentative," and "subject to revision," *Swint*, 514 U.S. at 42, and thus was not "conclusively determined" as required by the first prong of the *Cohen* test. *Harris v. Kellogg Brown & Root Servs.*, 618 F.3d 398, 401 (3d Cir. 2010). *See* JA–428-29 (denying motion to dismiss on immunity grounds "because the Court cannot determine the scope of

Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place"); *id*. at JA–436 ("There are many ways in which discovery will answer unresolved questions that must be answered before the Court can reasonably determine whether Defendants are entitled to immunity. . . . The scope of Defendants' contract is thus an open issue that requires discovery.").[4]

In sum, appellate intervention over the kinds of questions raised in this appeal – where there is still a chance the district court could itself conclusively resolve them upon further consideration – is wholly inappropriate. *See Martin v. Halliburton*, 618 F.3d 476, 487 (2010); *Rodriguez v. Lockheed Martin Corp*., 627 F.3d 1259, 1266 (9th Cir. 2010). *Harris*, 618 F.3d at 400-402; *see also United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999).

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[4] CACI's heavy reliance on *McVey v. Stacy*, 157 F.3d 271, 274-76 (4th Cir. 1998), is misplaced. *McVey* involved qualified immunity, which the Supreme Court had already concluded can meet *Cohen*'s "conclusively determined" prong. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (qualified immunity is "conclusively determined" under *Cohen* where it raises pure legal questions). CACI's novel derivative immunity claim, unlike a typical qualified immunity claim, cannot be evaluated without development of factual record. *See Al-Quraishi*, 657 F.3d at 214 n. 10 (King, J., dissenting). Indeed, while *McVey* reviewed a record that did "not raise factual questions," thus making the question there "conclusively determined," *McVey* itself expressly instructs that, "when a trial court concludes that it has insufficient facts before it on which to make a ruling," such conclusion would not be directly appealable. *McVey*, 157 F.3d at 275-276.

Even if review of the derivative official immunity claim were not premature, this Court's fact-bound decision in *Mangold v. Analytic. Systems, Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996), does not support collateral order review here. *See* Pl.'s L-3 Opp. 20-24. In *Mangold*, the "full justification" for immediate review of the particular immunity turned on a concern about protecting the "long-standing" and "well established" "common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators." *Id*. at 1448-1449. Those interests are not only far weightier and well-grounded than any CACI asserts, they would be effectively lost if review waited until final judgment. *Id*. at 1448-1449 (4th Cir. 1996) ("[Witnesses might be reluctant to come forward to testify. . .") (quoting *Briscoe v. LaHue*, 460 U.S. 325, 332-33 (1983)). Absent such a distinctive and substantial public interest, collateral order review is not appropriate over asserted claims for derivative immunity.

B. This Court Lacks Jurisdiction Over CACI's Political Question Claims.

CACI appears to argue that because courts in general should resolve justiciability questions prior to reaching the merits of a particular case, this Court must assume jurisdiction over an otherwise unappealable order relating to justiciability. CACI Br. 6-7. This is confused and mistaken. It may be true, as it was in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), that when a set of questions are *already* properly before a court of appeals after final judgment,

a court should resolve lingering justiciability questions ahead of the merits questions raised in that appeal. It certainly does not follow from this limited principle that an appellate court would have authority to transgress jurisdictional limits set by Congress via § 1291 and the final judgment rule, to reach out to decide a justiciability question that is otherwise not properly before the court. To be sure, it is not disputed that political question rulings are not properly before this Court under the collateral order doctrine. *Doe v. Exxon Mobile Corp.*, 473 F.3d 345, 351, 352 (D.C. Cir. 2007) ("Simply invoking a separation of powers defense does not permit [an appellant] to pursue an otherwise impermissible appeal"); *see also* Br. of United States as Amicus Curiae, *Doe v. Exxon Mobile Corp.*, No. 07-81 (S.Ct. May 2008) at 10 (opposing certiorari over D.C. Circuit's decision and explaining , "[t]here is no doubt that a political question claim can be reviewed in an appeal from final judgment"). As such, this Court has no power to reach the political question issue. [5]

C. CACI's Preemption Claims are Not Inextricably Intertwined So As To Permit Exercising Pendant Appellate Jurisdiction

The doctrine of pendant appellate jurisdiction is exceedingly narrow, permitting review of a pendant question only if it is "inextricably intertwined," with an issue properly on appeal. *Swint*, 514 U.S. at 51. "Inextricably intertwined" in

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[5] CACI does not defend the collateral order doctrine as a basis for interlocutory review of the preemption questions. In any event, that issue is fully addressed in Plf's L-3 Opp. 24-28. *See also Al-Quraishi*, 657 F.3d at 209-213 (King, J., dissenting).

this Circuit requires a necessary, logical interdependence. *See Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir. 2006) (pendant jurisdiction available only where issues are "(1) so intertwined that we *must* decide the pendent issue in order to review the claims properly raised on interlocutory appeal or (2) resolution of the issue properly raised on interlocutory appeal *necessarily resolves* the pendent issue.") (emphasis added).[6]

CACI observes that immunity, political question and preemption, at some level of abstraction, share the "same underlying determinations," that analysis of one aspect of one broad issue (textual commitment of war powers to the executive) "bears equally" and "bears heavily" on all three questions; it further suggests that the preemption question is "directly implicated by" the immunity questions. CACI Br. 9-10. Every case arising from a common nucleus of facts will produce this level of thematic similarity and theoretical overlap among a set of legal issues; this is simply not enough to override congressional limits on this court's jurisdiction. Even where issues "shar[e] certain wholesale commonalities of fact … and law," pendant appellate jurisdiction is inappropriate where they "nevertheless present quite distinct factual and legal issues at the retail level." *Bellotte v. Edwards*, 629 F.3d 415, 427 (4th Cir. 2011). These tight limits are necessary to prevent parties

[6] CACI omits the material term "necessarily" before "resolves" in its articulation of the test. CACI Br. 8.

from doing precisely what CACI attempts here: "parlay[ing] *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets," *Swint*, 514 U.S. at 49-50.

It is not the case that this Court "must" logically or "conclusively resolve" the issues raised by the preemption defense (such as congressional intent and scope of federal versus state interests) or political question defense (such as whether CACI's actions were directly authorized by the federal government) in order to resolve the questions raised by the immunity defense (such as whether *Dow* is a jurisdictional rule or a rule of immunity). *See* Plfs' L-3 Opp. 28-30. Accordingly, even assuming any of the immunity issues are properly appealable, this Court should not exercise pendant appellate jurisdiction over the preemption or political question issues.

II. THE LAW OF WAR PROVIDES NO IMMUNITY FROM SUITS IN U.S. COURTS ARISING OUT OF ILLEGAL ACTIVITY.

CACI argues that what it now calls *"Dow* immunity," CACI Br. 26, compels dismissal of this suit. However, CACI plainly failed to argue in the District Court that *Dow v. Johnson* creates blanket immunity under the law of war, for its unauthorized and egregious conduct. *See* JA–69-73. At most, CACI contended that the law of war created certain presumptions about the choice of law, which when applied to this case, would free them from liability. *Id.* As such, CACI cannot now rely on this argument on appeal.

In any event, there is no such blanket immunity available pursuant to the law of war, nor can stray dicta from *Dow* be read, as CACI now imagines, *see* CACI Br. 25 (quoting dicta in *Dow*, 100 U.S. at 166), to displace over 100 years of statutory and common law holding soldiers and civilians alike accountable for unlawful conduct abroad. *See* Plfs' L-3 Opp. 30-39. Indeed, CACI actually conceded in briefing below that *Dow* stands for little more than a jurisdictional rule, limiting the power of foreign tribunals to adjudicate claims under the enemy's laws. *See* JA–72 ("local laws have no application to occupying personnel"); *id*. (stating *Dow*'s holding simply as the "civil laws of occupied state continue to apply only as permitted by occupying power"); *id*. n. 15 (stating that the holding of *Coleman*, 97 U.S. 509, 517 (1878), is only that "members of occupying force immune from application of occupied territory's criminal laws").[7] This is, in fact, the narrow, uncontroversial principle for which *Dow* actually stands. *See Dow*, 100 U.S. at 165 ("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

[7] CACI makes many more concessions in this regard. It quotes Gerhard von Glahn for the proposition that "*indigenous* courts have no right whatsoever (during belligerent occupation) to try enemy persons (that is, individuals of the occupant's nationality or of that of any of his allies in the war) for any and all acts committed by them in the course of hostilities in the broadest sense of the term." *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 112 (1957). *See* JA–72. Likewise, it explains the holding of *Madsen v. Kinsella*, 343 U.S. 341, 345 n.6 (1952), as "recognizing immunity of dependent of American servicemember to *jurisdiction of local courts* in occupied post-war Germany." *Id.* (emphasis added).

army.") (emphasis added); *see also id.* at 169 (describing its holding as reflecting the "doctrine of non-liability to the tribunals of the invaded country for acts of warfare").

While this narrow principle may insulate a U.S. serviceperson from answering to "enemy" courts for violating "enemy" laws, neither *Dow* nor its progeny take power away from U.S. courts to hear claims brought against U.S. individuals and corporations. *Dow*, 100 U.S. at 165 (military members of "loyal States" were "subject only to their own government, and only by its laws, administered by its authority, could they be called to account."); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1979) (Union soldiers during Civil War "were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.").[8]

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[8] *Dow* primarily reflects the international law principles which grant a privilege of combatancy or belligerency (*i.e.*, immunity to kill or seize from other enemy belligerents) to members of a state's armed forces. As the Court found, "there could be no doubt of the right of the army to appropriate any property there…which was necessary ... *This was a belligerent right* […]." *Dow*, 100 U.S. at 167 (emphasis added). *See also id*. at 169 (describing the "hostile seizure" of property as made "in the exercise of a belligerent right"). As described *infra*, the Defendants are decidedly not combatants or belligerents (or, therefore an "occupying force") under the law of war, as they are not *bona fide* members of a state's armed forces subject to a military chain of command. The law of war does not equate contractors doing business in a war zone with actual combatants or the "occupying force." *See* Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4.A(4), Aug. 12, 1949, 6 U.S.T. 3316 (classifying Defendants' status as "civilian," and "person who accompany the armed forces.")

Of course, contrary to CACI's recently adopted blanket-immunity theory, Congress has long assumed U.S. courts could punish U.S. personnel for crimes committed abroad. *See* 18 U.S.C. § 2340A (Anti-Torture statute), 18 U.S.C. § 2441 (War Crimes Act); 18 U.S.C. §§ 3261-65 (Military Extraterritorial Jurisdiction Act); *see also* 28 U.S.C. § 1350 (Alien Tort Statute). And, U.S. courts for centuries have adjudicated civil damages claims brought against U.S. military personnel for actions undertaken in foreign countries contrary to the laws of war. *See Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that "enemy" combatants enjoyed "privilege of litigation" in U.S. courts including damages claims under the ATS); *The Paquete Habana*, 175 U.S. 677, 708 (1900) (ordering restitution to enemy alien for seizure of his fishing boats during Spanish-American war because "an established rule of international law" exempted civilian vessels from capture as war prizes); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (U.S. Navy Captain liable for illegally seizing a ship during wartime even though the Captain had acted on a Presidential order). *Mitchell v. Harmony,* 54 U.S. (12 How) 115 (1851) (U.S. soldier can be sued for wrongfully seizing a Mexican citizen's goods in Mexico during the Mexican War); *Compare Freeland v. Williams*, 131 U.S. 405, 416 (1889) (immunity from civil suits exists only for "an act done in accordance with the usages of civilized warfare under and by military authority.").

This is why Congress took the affirmative step, by statute, to attempt to eliminate an "enemy combatant's" default entitlement to sue in U.S. courts. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 7, 28 U.S.C. § 2241(e)(2) (stripping courts of jurisdiction over damages cases brought by alien detainees against U.S. officials arising out "any aspect of the detention, transfer, treatment, trial, or conditions of confinement"). Under Defendants' theory, an uninformed Congress appears to have wasted a great deal of time and effort.

Finally, CACI makes a stray choice-of-law argument, claiming that the protection from being haled into Iraqi courts previously enjoyed by contractors under Coalition Provisional Authority ("CPA") 17, functions as an immunity from suit in Virginia under the rule of *lex loci delicti*. CACI Br. 29. The argument is misconceived. CPA 17 explicitly contemplates the "exercise of jurisdiction by the Sending State and the State of nationality of a Contractor in accordance with applicable laws." CPA Order Number 17 (Revised) (signed on June 27, 2004 by L. Paul Bremer, U.S. Ambassador and CPA Administrator), Sec. 4(7).[9] In addition, courts in Virginia have declined to apply *lex loci* if it is contrary to public policy. *See Dreher v. Budget Rent-A-Car System, Inc.*, 272 Va. 390, 400 (Va.

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[9] Mirroring the principle in *Dow*, CPA 17 protected contractors from being haled into Iraqi courts and prohibited the use of Iraqi law to interpret contractual obligations. Sec. 4(2); *see id*. Sec. 4(3) (providing immunity from Iraqi legal process for "acts performed by them *pursuant to the terms and conditions of a Contract*") (emphasis added).

2006) (recognizing public policy exception to *lex loci* doctrine); *Terry v. June*, 420 F. Supp. 2d 493, 506 (W.D. Va. 2006) ("It is well established that although Virginia courts will frequently apply foreign substantive law as a matter of comity, they will not do so if this would contravene fundamental policy interests of the forum"). Allowing contractors to evade jurisdiction (and liability) in *all* forums for the acts at issue in this case is contrary to public policy.

III. CACI IS NOT ENTITLED TO DERIVATIVE ABSOLUTE IMMUNITY BECAUSE THE TORTURE AND ABUSE OF PLAINTIFFS WAS NOT A DISCRETIONARY FUNCTION WITHIN THE SCOPE OF CACI'S GOVERNMENT CONTRACT.

CACI contends that it is entitled to derivative absolute immunity for the torture and abuse of Plaintiffs because "[i]nterrogations and investigations are classic discretionary functions of government." CACI Br. 32. Absolute immunity only protects federal contractors from state tort liability arising from their exercise of discretion while acting within the scope of their employment, *see Westfall v. Erwin*, 484 U.S. 292 (1988); *Barr v. Matteo*, 360 U.S. 564 (1959), and is afforded only where the benefits of immunity outweigh the substantial costs to individuals and accountability. *Mangold*, 77 F.3d at 1447. CACI satisfies none of these requirements.

First, as the District Court correctly concluded, CACI's derivative immunity claim is premature because it is not possible to determine: (1) whether CACI acted within the scope of its government contract; (2) the amount of discretion afforded

to CACI under to the contract; or (3) the costs and benefits of affording CACI immunity, without examining the actual contract in discovery. JA–428-29.

Second, based on the well-pled allegations in the Complaint, CACI was outside the military chain of command; its conduct was not authorized by the military at any level; and its beatings, torture and abuse of Plaintiffs violated U.S. law and military regulation and policy. *See* Plfs.' L-3 Opp. 43. Third, no public interest is served by providing CACI immunity for its role in what this Court has recognized as "sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law" and "stunned the U.S. military, public officials in general, and the public at large." *CACI Premier Tech.*, 536 F.3d at 285-86. *See also* Plfs.' L-3 Opp. 43-44.

Indeed, to accept CACI's contention that it should be immune because "[t]he United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law," CACI Br. 33, would "equate [ ] violent and unauthorized 'interrogation[s]' of [ ] bound and guarded [Iraqi civilians] with permissible battlefield conduct. To do so would ignore the high standards to which this country holds its military personnel." *Passaro*, 577 F.3d at 218; *cf. Orem v. Rephann*, 523 F.3d 442, 449 (4th Cir. 2008) (police officer not immune for tazing handcuffed suspect); *Griggs v. WMATA*, 232 F.3d 917, 921 (D.C. Cir. 2000) (no

immunity for conduct that "crossed the line from official duty to illicit brutality").[10]

CACI alternately claims that the District Court erred in concluding that it must show that its employees were performing a "discretionary function," rather than merely a "government function" over which the United States enjoys immunity. CACI Br. 31. CACI fundamentally misread this Court's decision in *Mangold*. In *Mangold*, this Court actually *affirmed* the discretionary function requirement, concluding that, "the rationale for the protections articulated in *Barr*, *Westfall*, and *Boyle* also applies to the case before us to the extent that this case involves a discretionary government function which has been delegated to the private sector." *Mangold*, 77 F.3d at 1448.[11] *Mangold* simply recognized that where the government performs a discretionary function (in that case, investigating fraud and abuse), that function may be delegated "through contracting with private

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[10] Significantly, the government has not intervened in this case or in *Al-Quraishi*, and has not certified, pursuant to the Westfall Act, 28 U.S.C. § 2679, that misconduct by military personnel who conspired with CACI and L-3 was authorized or within the scope of government employment. Rather, the government has court-martialed military personnel for the abuses at Abu Ghraib. It would therefore defy common sense to extend the absolute immunity reserved for government officials to CACI and L-3, where the relevant government officials themselves have been denied such immunity.

[11] The Supreme Court has rejected the notion that a government contractor automatically performs a discretionary function merely by virtue of its status as a government contractor. *Westfall v. Erwin*, 484 U.S. 292, 296 n.3 (1988) ("[I]mmunity attaches to particular official functions, not to particular offices.").

contractors" to protect the government's interest in the integrity of its investigation. *Id.*; *see also Al Shimari*, 658 F.3d at 426 (Niemeyer, J., concurring) (concluding that *Mangold* merely applied, but did not eliminate, the discretionary function requirement).

CACI further contends that "this Court, in the related context of derivative foreign sovereign immunity, described *Mangold* as extending immunity to delegated 'government functions' for which the United States is immune, and not solely to discretionary functions." CACI Br. 31-32 (citing *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000)). This is unpersuasive. First, unlike L-3, CACI has not asserted a defense of derivative sovereign immunity. Second, *Butters* did not "describe" *Mangold* or otherwise interpret *Mangold* to eliminate the discretionary function requirement for absolute immunity. *Butters* was a sovereign immunity case, not a case like *Mangold* involving a combination of absolute immunity and common-law witness immunity, and the standards for absolute and sovereign immunities are different.[12] This Court merely cited the

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[12] Contractors (and other common law agents) of the United States are entitled to derivative sovereign immunity only where their authority to act is "validly conferred" by the government, and their actions are within and consistent with that conferred authority. *See Yearsely v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). A contractor may not claim sovereign immunity for conduct which is prohibited by law or otherwise forbidden because the contractor "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *see also Butters*, 225 F. 3d at 466.

Mangold decision in *Butters* – once, without discussion or elaboration – in support of the uncontroversial proposition that courts have extended immunity to contractors in order to facilitate delegation of government functions. *See Butters*, 225 F.3d at 466. Finally, even if CACI had asserted a defense of sovereign immunity, that argument would fail because CACI violated U.S. law and military regulation and policy. *See* Plfs.' L-3 Opp. 43-44.[13]

None of the other cases cited by CACI supports its claim of derivative absolute immunity. Some actually recognize the continuing discretionary function requirement for derivate absolute immunity. *See* CACI Br. 30 n.30. In addition, unlike *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 188 (1956), and *United States v. Virginia*, 139 F.3d 984, 988 (4th Cir. 1998), Plaintiffs do not invoke state law in order to interfere with the government's ability to hire contractors, or to frustrate federal procurement objectives. Indeed, as the District Court observed, federal procurement objectives are *advanced* by shifting costs onto reckless contractors, because liability incentivizes good behavior and creates competitive opportunities for more effective companies to bid on government contracts. JA–449-450 (discussing *Richardson v. McKnight*, 521 U.S. 399 (1997)). Nor can CACI's

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[13] CACI's claim that the" combatant activities" exception to FTCA liability provides an alternate basis for derivative absolute immunity is, as the District Court observed, utterly unsupported. JA–433 n.5.

suggestion that Plaintiffs ask this Court to "run[] the Army" be taken seriously. *Cf. Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

Finally, nothing legally relevant follows from CACI's assertion that "[t]he vast majority of persons injured in war are entitled to no recovery whatsoever." CACI Br. 35. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) (wartime claims easily capable of judicial resolution). *See also infra* Section II; Plfs.' L-3 Opp. 35-37 (discussing cases adjudicating civilian damages claims from wartime misconduct).

IV. THE ENTIRE FIELD OF STATE TORT LAW CANNOT BE DISPLACED BY A DOCTRINE OF "BATTLEFIELD IMMUNITY," THE SUPREME COURT'S ANALYSIS IN *BOYLE* OR THE FTCA'S "COMBATANT ACTIVITIES" EXCEPTION TO SOVEREIGN IMMUNITY.

CACI argues that the Constitution itself, through its general delegation of warmaking powers to the federal government, displaces the entire corpus of state tort law that remotely touch this federal sphere. CACI Br. 36-39. This unprecedented claim actually gets constitutional presumptions backwards: in our federal system, state tort law cannot be categorically preempted without evidence of clearly expressed Congressional intent, which is plainly lacking here. *See infra* Section IV(B).

Like L-3, CACI relies on an alchemy of *Boyle* preemption, the FTCA's exception to sovereign immunity for "combatant activities," and a self-serving (and

grossly exaggerated) articulation of the military interests implicated here, to argue for displacement of Plaintiffs' state law claims. The government contractor defense set forth in *Boyle* is unavailable because the conduct alleged here actually contravenes federal interests (and, as discovery should likely reveal if it is ultimately permitted, contravenes the terms of CACI's military contract). *See* Plfs. L-3 Opp., Sec. IV. Finally, CACI cannot be permitted to invoke the sovereign's statutorily-preserved immunity for "combatant activities," where CACI – a private corporation not subject to duty or discipline under the military chain of command – was neither a "combatant" in any proper sense of the term, nor was it engaged in any "activities" conceivably authorized by the military. *See infra* Section IV(C).

A. *Saleh*'s Judicially-Constructed "Battlefield Preemption" Theory Contravenes Supreme Court Field Preemption Jurisprudence.

In *Saleh*, the majority concluded that, despite the deliberate exclusion of contractors from the scope of the FTCA, Congress nevertheless impliedly intended to preempt all state law tort actions related to occurrences on a battlefield. *Saleh,* 580 F.3d at 7-9. CACI takes a giant, unprecedented step further, suggesting that the Constitution itself impliedly preempts the entire corpus of state law claims merely touching on the "conduct of war," CACI Br. 38 – an argument that essentially repackages CACI's flawed political question defense.

Critically, as an initial matter, even if Congress or the Constitution broadly intended to exclude states from regulating upon any aspects "military policy," *Saleh*, 580 F.3d at 11, or the "conduct of war," CACI Br. 38, that proposition would do nothing to foreclose the *actual* claims before this Court. As Plaintiffs repeatedly stress, this litigation does not question the wisdom or legality of military policy or its interrogation program, nor do Plaintiffs allege CACI's conduct was part of military policy. *See Saleh*, 580 F.3d at 30 (Garland, J., dissenting) (there is "nothing in the pleadings or the record to suggest that the abuse alleged here was part of any 'military policy.'").

Indeed, respecting the sovereign's prerogatives in this area, Plaintiffs actually take those policies as a *given*, and contend CACI acted in gross violation of them. CACI repeatedly seizes on Plaintiffs' allegation that CACI's conduct "took place during a period of armed conflict," as if it constituted some kind of admission. *See, e.g.*, CACI Br. 40. Yet, that innocuous, contextual allegation in no way supports CACI's extravagant assertions that documenting the brutality of CACI's unauthorized conduct – *i.e.*, the actual substance of this litigation – interferes with the federal government's "warfighting prerogatives," or that it somehow undermines the federal government's role as the "sole voice on war and foreign affairs." CACI Br. 38. If there is analysis behind this consistent hyperbole, CACI has yet convincingly to supply it.

Equally important, there is no legal precedent that properly supports the judicially constructed "battlefield preemption" theory. The central inquiry in any preemption analysis is the intent of Congress. *Gade v. Nat'l Solid Waste Mgmt. Ass'n,* 505 U.S. 88, 96 (1992). To find field preemption, as the *Saleh* majority purported to do, there must be a scheme of actual federal regulation – *i.e.*, "a multiplicity of federal statutes or regulations govern and densely criss-cross a given field," *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 169 (4th Cir. 2002) (citations omitted) – which is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Sante Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

One will find no such clear congressional intent to preempt all of state tort law, especially as it relates to corporate misconduct. *See Saleh*, 580 F.3d at 26 (Garland J., dissenting) ("it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says.") (emphasis in original). Indeed, Congress expressed the opposite intention, by expressly excluding contractors from the FTCA's protections. 28 U.S.C. § 2671. *Compare Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (congressional intent for preemption purposes "primarily is discerned from the language of the pre-emption statute"). Accordingly, the novel

"battlefield preemption" theory *Saleh* created contravenes the FTCA and the well-settled Supreme Court field-preemption framework.

Moreover, there is no precedent for preempting an entire body of generally applicable state law, particularly absent a sharp conflict with a federal statute or express and targeted federal policy (as implied from congressional enactments). None of the cases *Saleh* relied upon to construct such a broad field preemption theory displaced an entire field of tort law; rather, in all of the cases, a specific and narrowly-drawn state law directly conflicted with a congressional or executive pronouncement involving foreign affairs. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (preempting state legislation that forced insurance companies to pay Holocaust survivors, as it was contrary to an executive agreement); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (preempting state law placing sanctions on doing business with Burma because it exceeded of limitations enacted in federal statute).[14] These specific state legislative forays into foreign or international policymaking each conflicted with particular congressional or

[14] *See also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 454-55 (1979) (state legislation that levied a property tax on Japanese vessels engaged in international trade was preempted because it resulted in the multiple taxation of instrumentalities of foreign commerce); *Zschering v. Miller*, 389 U.S. 429, 440-41 (1968) (Oregon inheritance statute that would dispense property to heirs abroad only if foreign government afforded Americans reciprocal right to inheritance and would not confiscate property was preempted because the statute required a state court to pass judgment on policies of foreign nations); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state alien registration statute preempted by comprehensive congressional registration statute).

executive lawmaking in a manner that threatened to disrupt relations with particular foreign sovereigns. *See Crosby*, 530 U.S. at 373 (state law at issue sought to regulate foreign commerce with Burma in a manner that "undermine[d] the intended purpose and 'natural effect'" of detailed congressional sanctions regime and particular Executive Order). They do not support the displacement of an entire body of state common law. *See Garamendi,* 539 U.S. at 425-26 (observing the state legislation it deemed displaced was "quite unlike a generally applicable "blue sky" law"). Indeed, consistent with this understanding of preemption, *Boyle* itself recommends at most "selective preemption of 'only particular elements' of the state's law" – not the entire body of state law. *Saleh*, 580 F.3d at 30 (Garland J., dissenting) (quoting *Boyle*, 487 U.S. at 508).

Limitations on the court's ability to preempt whole bodies of state law is not some procedural nicety. "Congress does not cavalierly pre-empt state-law causes of action." *Wyeth*, *v. Levine*, 555 U.S. 555, 565 n. 3. The limitations on judicially-constructed preemption are constitutionally compelled. *Wyeth*, 555 U.S. at 565, ("the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *see also id.* at 583 (Thomas, J., concurring in judgment) ("implied pre-emption doctrines that

wander far from the statutory text are inconsistent with the Constitution."); U.S. Const. Art. I, § 7, cls. 2-3; Art. VI, cl. 2; Amdt. 10.[15]

B. Because Holding CACI Liable Under State Law for Its Unauthorized Torture and Abuse of Civilians Does Not Undermine Any Discretionary Government Function, *Boyle*'s Narrow Preemption Defense Does Not Foreclose Plaintiffs' Claims.

As fully set forth in Plaintiffs' L-3 Opposition Brief, Section IV, and explained in the thoughtful dissents of Judge Garland in *Saleh*, 580 F.3d at 20-26, and Judge King in the vacated panel opinion, 658 F.3d at 429-436, *Boyle* itself does not support the displacement of state law claims that are utterly consistent with federal interests. *Boyle*'s narrow, judicially implied preemption only displaces a particular state law which directly interferes with a discretionary government function – i.e. only when "the state imposed duty of care that is the asserted basis of the contractor's liability . . . is *precisely contrary* to the duty imposed by the Government contract." *Boyle*, 487 U.S. at 509 (emphasis added).

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[15] CACI's half-hearted argument, CACI Br. 35, that an administrative compensation system through which claims *may* be paid is evidence of a congressional intent to preempt tort claims is unavailing. 10 U.S.C. § 2734. The salutary, non-preemptive function of § 2734 is, "[t]o promote and to maintain friendly relations through the prompt settlement of meritorious claims . . . of [a] inhabitant of a foreign country." Moreover, the Supreme Court has long recognized that state tort remedies often serve to further such federal interests. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253 (1984) (even though standards of care as to nuclear safety had been preempted by the federal government, state tort remedies were not foreclosed for those injured in nuclear incidents).

Or, as the Supreme Court more recently explained, Boyle's government contractor defense applies only where "the government has directed a contractor to do the very thing that is the subject of the claim." *Corr. Svcs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001); *Katrina Canal Breaches Litig. Steering Commm'n. v. Wash. Group Int'l. Inc.*, 620 F.3d 455, 465 (5th Cir. 2010) ("[t]he government contractor defense in *Boyle*, 'stripped to its essentials,' is fundamentally a claim that 'the Government made me do it.'") (internal citations omitted). There is no preemption where the "contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Boyle*, 487 U.S. at 509; *see also Saleh*, 580 F.3d at 22-23 (Garland, J., dissenting) (explaining how the *Boyle* Court would view these government contractors precisely as the kind of agents *not* entitled to invoke discretionary function defense).

Plaintiffs have not yet undertaken discovery, but surely the United States did not write its contracts to permit, let alone *require*, contractors to torture and abuse detainees. Of course, in Abu Ghraib and other military prisons, the United States forbade the torture of prisoners. *See* Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5; U.S. Army Field Manual 34-52 at 1-8-9; Fourth Geneva Convention, arts.. 3, 27, 31, 32, 37, 100, 147; 10 U.S.C. §§ 881, 892, 893, 928. Thus, requiring CACI to abide by tort law duties that prevent it from beating and sexually assaulting defenseless civilian

detainees would promote, not interfered with, legal and contractual compliance. *See Miree v. DeKalb County*, 433 U.S. 25, 32 (1977) (lawsuit premised on breach of duties to federal government "might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions.") *See also Al Shimari*, 658 F.3d at 430 (King, J., dissenting opinion) ("it is quite plausible that the government would view private tort actions against the perpetrators of [torture] as *advancing* the federal interest in effective military activities") (emphasis in original).

CACI cherry-picks stray, uncontextualized comments from *Boyle*, such as the federal government's interest in saving money or "getting the Government's work done," CACI Br. 44 (quoting *Boyle*, 587 U.S. at 505), to support its remarkable claim that, "the mere fact that Plaintiffs are suing a government contractor based on the performance of its work for the government is sufficient under *Boyle* to constitute a 'uniquely government interest.'" CACI Br. 44. This reading of *Boyle*, completely unmoored from its reasoning or facts – let alone its holding – is quite obviously incorrect. *See Boyle*, 487 U.S. at 505 n.1 (1988) (declining to extend official immunity to all government contractors).

Indeed, in presuming the federal government would somehow prefer all contractors be freed from the costs associated with liability, CACI has the federal interests precisely backwards. The Supreme Court concluded that it would be

contrary to federal interests to grant qualified immunity to private prison-guard companies because limiting the threat of liability might improperly reduce the "competitive pressures" placed on contractors whose "guards are too aggressive" and thereby stick the federal government with poorly performing contractors that have little incentive to improve. *Richardson v. McKnight*, 521 U.S. 399, 409 (1997). Thus, the Court views liability rules as *advancing* the federal interest in low-cost, high-quality contractors by forcing poorly performing contractors such as CACI to "face threats of replacement by other firms that demonstrate their ability to do both a safer and more effective job." *Id*.

C. Because CACI Is Not Subject to the Military Chain of Command and Engaged in Patently Unauthorized and Unlawful Torture and Abuse Against Civilians, It Cannot Claim to Have Engaged in "Combatant Activities."

CACI urges this Court to expand the *Boyle* doctrine beyond its application to discretionary government functions, in order to preempt lawsuits that arise from "combatant activities." CACI Br. 40-42. The exemption the sovereign has from liability for "combatant activities" does not apply to for-profit contractors that committed unauthorized and unlawful acts against detainees who, under the laws of war, were actually owed a duty of care. *See* Br. Am. Curiae International Human Rights Organizations and Experts in Support of Plaintiffs. Should this Court find that, as a matter of law, the defense could apply to Defendants, it should remand for discovery.

CACI cannot be considered a “combatant” under the laws of war, a body of international law that is highly relevant to understanding the status of parties to an armed conflict. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). A combatant is a member of a state’s armed forces who is subject to a military chain of command – and its attendant obligations of training, command and discipline. *See* Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4.A, Aug. 12, 1949, 6 U.S.T. 3316; ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, art. 43, at ¶1677 (Yves Sandoz, et al. eds., 1989) (“only members of the armed forces are combatants.”). *See also* Br. of U.S. as Amicus Curiae at 15, *Saleh v. Titan Corp*., No. 9-1313 (U.S. May 2011); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

Bona fide members of the armed forces have a duty to represent this country and to abide by a binding chain of command; they face serious discipline, including imprisonment for derelictions of these duties such as the commission of torture and war crimes. In obvious contrast, CACI’s duty is solely to its shareholders and maximizing profits (which may include abiding by its contract). This is in large part why the U.S. military itself dismisses CACI’s imagined status as combatants. Relevant DoD regulations provide:

> The commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command.

Army, Reg. 715-9, Contractors Accompanying The Force § 3-2(f) (1999). The U.S. Army Field Manual on the use of contractors states that:

> Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct.

FM 3-100.21 §4-45 (2003); *id.* at §1-22 ("Commanders do not have direct control over contractors or their employees (*contractor employees are not the same as government employees*); only contractors manage, supervise, and give directions to their employees.) (emphasis added).

Indeed, in attempting clothe their misconduct with military imprimatur, CACI seeks an immunity from liability the Defense Department believes should not exist. The DoD regulations provide:

> The public policy rationale behind *Boyle* does not apply when a performance based statement of work is used in a services contract, *because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors*. Asking a contractor to ensure it employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions.

See Federal Acquisition Regulation, Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (emphasis added). Notably, after contractors expressed concern about a DoD rulemaking which affirmed that contractors who accompany U.S. forces abroad would be subject to "civil liability" for "inappropriate use of force," 73 Fed. Reg. 16,767., DoD specifically rejected a suggestion that it "invite courts" to expand the reach of *Boyle* by adopting "language that would immunize contractors from tort liability." *Id.* The Department stated:

> [T]he clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors....However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties.

Id. This Court need not upset the expectations and expert judgment of the United States military.

Even if a private contractor could, in theory, benefit from the FTCA's waiver of sovereign immunity for "combatant activities," CACI's (as well as L-3's) actions here would not qualify as "combatant *activities*."[16] As the District

[16] Contrary to CACI's claim, CACI Br. 40, Plaintiffs have consistently contested that Defendants' acts of wanton cruelty and brutality against civilian detainees in a prison away from the battlefield constitute "combatant activities." *See, e.g.,* JA–293-94. In any case, as Appellees, Plaintiffs may present any arguments that would support the District Court's Judgment.

Court explained, unlike soldiers engaging in actual combat, the amount of physical contact available to civilian interrogators against captive detainees in a secure prison facility is largely limited by law, and, as alleged by Plaintiffs, by contract. JA–446 (applying *Skeels v United States*, 72 F. Supp. 372, 374 (W.D. La. 1947)). Indeed, this Court has affirmed precisely this reasoning in *United States v. Passaro*, by finding that torture and abuse of unarmed detainees in a prison outside the battlefield does not constitute a combatant activity. 577 F.3d at 218 ("No true 'battlefield interrogation' took place here; rather, Passaro administered a beating in a detention cell. Nor was this brutal assault 'conducted by the CIA' – rather, Passaro was a civilian contractor with instructions to interrogate, not to beat.").

Additionally, in *Koohi v. United States*, 976 F.2d 1328, 1329-30 (9th Cir. 1992), a products-liability case like *Boyle*, the "combatant activity" at issue was that of the *United States military* during the "tanker war." The Ninth Circuit held that a manufacturer of a weapons detection system, built to the *military's* specifications, could not be held liable when the *military* negligently used that system to shoot down a civilian plane. *Koohi*, 976 F.2d at 1337. The Ninth Circuit essentially imposed a government-discretion requirement onto its definition of "combatant activities" by looking at whether "force is directed as a result of *authorized military action*." *Id.* (emphasis added). As in *Boyle*, and unlike CACI, the contractor in *Koohi* could not comply with both military orders and tort

standards of care. Because CACI acted contrary to military direction, it cannot show that preemption is needed to protect any discretionary decisions.

Moreover, as Judge King explained, *Boyle* is not satisfied by merely pointing to a "conspiracy" between certain soldiers and Defendants, because the conspiracy to torture civilian prisoners was likely contrary to any properly delegated authority by the government. *See Al Shimari*, 658 F.3d at 433 n.6 ("That relatively low-level military personnel may have violated their orders and encouraged their civilian counterparts to act outside the bounds of the contract – and settled legal principles – in no way translates into a conclusion that CACI should escape liability.").

Finally, invocation of the government contractor defense, and reliance on *Saleh* at this stage of the proceedings is premature. In *Saleh*, the court could decide whether the defendants were "fully integrated" into military activities, only after reviewing a factual record, developed after limited discovery. *See Saleh* 580 F.3d at 4; *see also Ibrahim v. Titan Corp*., 391 F. Supp. 2d 10, 17-19 (D.D.C. 2005) (in companion case, describing why discovery was necessary to evaluate contractor defense).

V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS DAMAGES ACTION AGAINST CORPORATE DEFENDANTS .

CACI contends that this case is not justiciable because "the adoption of interrogation techniques, and their use by the military and contractors performing interrogation during war, are matters committed exclusively to the political

branches." CACI Br. 47. Consistent with its pattern of hyperbole, CACI claims that allowing this case to proceed would require the district court to review "*actual* military decisions made by soldiers in Iraq," *id*. at 50 (emphasis in original), and determine "whether military personnel, performing a military mission in a combat theater, acted in a tortious manner," *id*. at 50, and to adjudicate the propriety of "interrogation techniques specifically approved at the highest levels of the Executive Branch," *id*. at 51-52.

Attempting to shift responsibility for CACI's gross misconduct at Abu Ghraib to U.S. government officials not only insults the thousands of men and women in uniform who served honorably in Iraq and without the personal profit enjoyed by private contractors such as CACI, it is also utterly unresponsive to the Complaint's allegations – accepted as true – that CACI was not carrying out a military function or acting under military supervision when it tortured and abused Plaintiffs. JA–25-27.[17] Had CACI actually followed U.S. law and military regulation and policy, its employees would not have tortured Plaintiffs. *Id*.

[17] Contrary to CACI's insinuation, the military has clearly and unambiguously condemned the atrocities at Abu Ghraib, and denied that it authorized CACI to commit the acts of torture and other unlawful abuse alleged by Plaintiffs. JA–25-27.

A. Plaintiffs' Damages Claims Are Constitutionally Committed to the Judiciary, Not the Executive or Legislative Branches

Plaintiffs' tort claims do not arise out of actions by a coordinate political branch. To state the obvious, a private corporation is not a branch of the United States government, let alone one that is coordinate or equal to the Judiciary and thus deserving of any special solicitude from the courts.

Damages claims against private actors are constitutionally committed to the Judiciary, not the Executive or Legislative Branches. *See*, *e.g.*, *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991) (concluding tort issues "constitutionally committed" to the Judiciary); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). The Judiciary has a prominent role in enforcing criminal laws during wartime. *See*, *e.g.*, 18 U.S.C. § 2340A (Anti-Torture Statute); 18 U.S.C. § 2441 (War Crimes Act); 18 U.S.C. §§ 3261-65 (Military Extraterritorial Jurisdiction Act); *Kennedy v. Sanford*, 166 F.2d 568 (5th Cir. 1948). Thus, the Supreme Court warned in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 211 (1962). This admonition applies equally in peacetime and wartime. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Al Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). There is also ample precedent for civil liability for wartime

violations. Indeed, as discussed *supra*, Section II, the Supreme Court has repeatedly permitted damages actions arising out of battlefield conduct to proceed directly against military officials. *See also* Plfs. L-3 Opp. 35-36 (discussing this line of authority). CACI fails now, as it did below, to address these authorities.[18]

Thus, it is not surprising that other courts, presented with tort claims against contractors working for the U.S. military in Iraq, have found such actions justiciable. For example, in *Lane v. Halliburton*, 529 F.3d 548, 558-60 (5th Cir. 2008), the Court rejected the applicability of political question doctrine in a case "set against the backdrop of United State military action in Iraq" because it did not necessarily implicate any decisions textually committed to the Executive, nor did it constitute a "direct challenge[] to actions taken by a coordinate branch of the federal government." *See also Harris v. Kellogg, Brown & Root Servs.*, 618 F. Supp. 2d 400, 424 (W.D. Pa. 2009) (rejecting political question arguments by contractor in Iraq), *appeal dismissed for lack of collateral order jurisdiction,* 618 F.3d 398 (3d Cir. 2010); *Lessin v. Kellogg Brown & Root*, C.A. No. H-05-01853, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 12, 2006) (same). *McMahon v.*

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[18] *See also Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988); *Kadić v. Karadžić*, 70 F.3d 232, 249-50 (2d Cir. 1995); *Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n. 11 (9th Cir. 2003) (in wartime reparations case, holding "[n]o political question [ ] is raised by the simple application of the requirements of a treaty to which the United States is a party").

Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1323 (M.D. Fla. 2006) (rejecting political question by recognizing the "basic difference between questioning the military's execution of a mission and questioning the manner in which a contractor carries out its contractual duties." *Aff'd* 502 F.3d 1331 (11th Cir. 2007).

Nor do the cases cited by CACI support dismissal under the political question doctrine. *Koohi*, which CACI relies upon extensively, states:

> Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.

976 F.2d at 1331. Other cases cited by CACI are also distinguishable in several respects – not least because they involve political question rulings based on factual records developed through discovery.

In *Tiffany v. United States*, 931 F.2d 271, 273-75 (4th Cir. 1991), plaintiffs sued government employees operating the national air defense system, when their alleged negligence resulted in the collision between a U.S. fighter jet and a passenger plane the employees believed should be intercepted. This Court held that the Judiciary should not second-guess military personnel's split-second professional judgments regarding whether aircraft invading U.S. airspace were hostile or not. Indeed, dismissing the very argument CACI here makes, the Court highlighted that its analysis would be wholly different if the plaintiffs were arguing

"that the government violated any federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations." *Id.* at 280.

In *Taylor v. Kellogg Brown & Root Services*, 658 F.3d 402 (4th Cir. 2011), this Court considered an appeal by a U.S. marine (following jurisdictional discovery), who was electrocuted as a result of a contractor's negligent work on an assault vehicle ramp at a military base near Fallujah, Iraq. The Court observed that, even though the contractor responsible for the victim's injuries "was acting under orders of the military [that] does not, in and of itself, insulate the claim from judicial review." *Id.* at 411. The Court nonetheless upheld the district court's dismissal because resolution of the negligence claims would question sensitive military judgments, including the propriety of the Marines' decisions about how to wire and power the assault vehicle ramp, and whether they were authorized and properly trained by to do so. *Id.* at 411-12. This case involves no such sensitive judgments as Plaintiffs do not challenge the conduct or decisions of the U.S. military.

Carmichael v. Kellogg, Brown, & Root Services, Inc., 572 F.3d 1271 (11th Cir. 2009), is also readily distinguishable. That case arose from a contractor's negligence, which caused injuries to a soldier during a "highly dangerous" and "heavily militarized" fuel convoy in Iraq. *Id.* at 1276. The Court explained that

the "military's control over fuel-supply convoys was 'plenary,' thus ensuring that virtually any question concerning the convoy's mission would inevitably implicate military judgments." *Id.* at 1290 (citation omitted). There was "not the slightest hint in the record suggesting that [the contractor] played even the most minor role in making any of these essential decisions." *Id.* at 1282; *see also id* at 1284 (the contractor "was operating at all times under the orders and determinations made by the military"). Here, the CACI and its employees played a direct role in unlawful beatings and abuse.

Finally, Plaintiffs' contention that CACI conspired with military personnel does not require dismissal because the involvement of low-level military personnel in gross misconduct does not necessarily touch high-level political or military judgments. As the District Court explained, although "CACI would have the Court blindly accept its premise that the activities at Abu Ghraib were so heavily monitored that, but for the involvement and approval of high-level government officials, the atrocities could not have occurred," it is "completely within the realm of possibility that a conspiracy of the type Plaintiffs complain of was carried out absent the authorization or oversight of higher officials." JA–415-16. It is, in fact, more than a possibility. "[T]orture has an existence all its own. . . . private actors can and do commit similar acts on a regular basis." JA–419. Where that existence

is separate and distinct from government actions, separation of powers is not substantially implicated.[19]

B. Plaintiffs' Claims May Be Resolved by Judicially Discoverable and Manageable Standards

CACI argues that there are no judicially manageable standards for evaluating Plaintiffs' claims because the District Court would be required to adjudicate the proper standard of care for detainees and extensively review classified material and, yet again engaging in high-level hyperbole, CACI claims the parties would need to obtain discovery from "high-level Defense Department and White House sources." CACI Br. 54 [20] Such claims ultimately challenge the

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[19] Concurring in the vacated panel decision, Judge Niemeyer concludes this case should be barred by the political question doctrine because it would implicate judgments about "whom to interrogate, what to inquire about, and the [interrogation] techniques to use," which fall within the President's commander-in-chief powers. *Al Shimari,* 658 F.3d at 422. Judge Niemeyer also states that CACI's conduct was "undertaken grossly in the course of prosecuting war and advancing the strategy of the military adopted by upper level commanders for carrying out the war." *Id.* at 423. It is hard to discern the basis for these assertions absent supporting citations in the concurring opinion, and because there was no discovery in this case that would establish these propositions as matters of fact. In any event, Plaintiffs do not challenge the decision to detain and interrogate them in the first instance. They claim that the military did not authorize or supervise CACI's misconduct, and that allegation must be accepted as true at the motion to dismiss stage.

[20] CACI's claim that Plaintiffs seek to hold it liable for the CIA's "ghost detainee" program, CACI Br. 52, thus drawing this case into a morass of classified information, is dishonest given the District Court's determination that "Plaintiffs made clear to this Court that they do not intend to delve into" that program. JA–423.

very competence of our district courts to manage discovery and trials in hundreds of ongoing cases in a manner that protects national security interests.

This case raises traditional tort claims that "are uniquely suited for judicial resolution." *Lane*, 529 F.3d at 561; *see also McMahon*, 502 F.3d at 1364 ("The flexible standards of negligence law are well-equipped to handle varying fact situations. This case does not involve a *sui generis* situation such as military combat or training."). And as the District Court noted, discovery had occurred without incident or burden in the *Saleh* proceedings. It also astutely recounted that CACI brought an affirmative defamation suit against a radio-host who criticized CACI for its torture at Abu Ghraib. In that self-interested context, CACI was unconcerned about aggressively litigating the correctness of the very same factual allegations arising in this case. This prompted the District Court to observe that it "finds it ironic that CACI argues that this case is clouded by the 'fog of war,' yet CACI saw only clear skies when it conducted discovery to develop its defamation case." JA–422.

Ultimately, the rules and standards applicable in this case are well-established. For example, as the District Court expressed, "CACI's government contract is likely to be highly instructive in evaluating whether CACI exercised the

appropriate level of care in its dealings with Abu Ghraib detainees." JA–424.[21] The other critical evidence consists of eyewitness testimony. There are scores of American and Iraqi eyewitnesses to the conduct described in the Complaint, many of whom are in the United States and available to testify. To the extent there are documents, the military has already collected much of the documentation that will be needed to go forward in this case, and that material has been used to court martial and convict several of the Abu Ghraib co-conspirators. *See United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010); *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010); *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010). Other witnesses are also likely to have completed their military service.

Moreover, should discovery at some future date and circumstance impose a burden on military officials, the District Court retains an arsenal of tools to limit potential disruption to the military. *See Al-Quraishi*, 657 F.3d at 213 (King, J., dissenting); *Martin v. Halliburton*, 618 F.3d 476, 487 (5th Cir. 2010) (district courts know how to take steps that show "respect for the interests of the Government in military matters"); "); *Saleh*, 580 F.3d at 29 (Garland, J., dissenting); *see also* U.S. Army Regulation 27-10, Litigation §§ 7-8, 7-9, 7-11

[21] CACI was required to expressly agree to abide by U.S. laws and regulations in return for being paid handsomely for its services, including the requirement that CACI supervise and manage its own employees. *See supra* at 43-45 (citing military regulations and manuals). Further, CACI was required to notify its U.S.-citizen employees that they are subject to prosecution under the War Crimes Act for violations of the laws of war. *See* 48 C.F.R. § 252.225-7040(e)(2)(ii).

(authorizing soldiers to testify only if it will not "interfere seriously with the accomplishment of a military mission.

C. Plaintiffs' Claims Do Not Require the Court to Make Policy Decisions Because Official U.S. Policy Against Torture Is Clear

Plaintiffs' claims do not require the Court to make sensitive policy decisions. As the District Court explained, "the policy determination central to this case has already been made; this country does not condone torture, especially when committed by its citizens." JA–426. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind."). Because the political branches have already condemned torture in general and against the detainees at Abu Ghraib specifically, adjudication of this case "in no way countermands a need for adherence to a political question already made." JA–425-427. Accordingly, allowing this case to proceed will vindicate the policies of the political branches rather than question or disrespect them.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' L-3 Opposition Brief, the appeal should be dismissed for lack of jurisdiction, or the District Court's judgment should be affirmed on the merits.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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