No. 19-1238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE CACI PREMIER TECHNOLOGY, INC., *Petitioner*

On Petition for Writ of Mandamus from the United States District Court for the Eastern District of Virginia at No. 1:08-cv-0827 (The Honorable Leonie M. Brinkema)

ON PETITION FOR A WRIT OF MANDAMUS

ASA'AD HAMZA HANFOOSH AL-ZUBA'E, TAHA YASEEN ARRAQ RASHID, SUHAIL NAJIM ABDULLAH AL SHIMARI, AND SALAH HASAN NUSAIF AL-EJAILI'S ANSWER TO CACI PREMIER TECHNOLOGY, INC.S PETITION FOR A WRIT OF MANDAMUS

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This petition by CACI Premier Technology, Inc. ("CACI")—which ignores the 2018 written opinion of the District Court dismissing CACI's political question doctrine ("PQD") defense based on record evidence—is a desperate and frivolous attempt to dislodge the April 23, 2019 trial date.

Nearly seven years ago, an *en banc* panel of the Court of Appeals for the Fourth Circuit rejected CACI's improvident interlocutory appeal in this action, concluding that this Court lacked jurisdiction to hear the appeal. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 212 (4th Cir. 2012) ("*Al Shimari II*"). The *en banc* panel rejected the notion that denial of a motion to dismiss on political question grounds constituted an immediately appealable collateral order. *Id.* at 215. Undeterred, CACI is once again attempting an improvident and interlocutory appeal of an adverse political question ruling, this time under the guise of seeking a writ of mandamus.

In 2016, the Court of Appeals reversed the dismissal of Plaintiffs' case by the District Court (Hon. Gerald Bruce Lee, J.) on PQD grounds. Explaining the standard for deciding PQD challenges involving government contractors, the Court made clear that the PQD does not protect contractors who have engaged in unlawful conduct, *regardless* of whether the military exercised control over them. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016) ("*Al Shimari IV*"). The level of military control, the Court explained, would only be

relevant for certain "grey area" conduct that is not clearly unlawful—an inquiry that, despite CACI's insistence, is no longer a necessary part of this case.

The Fourth Circuit then remanded the case to the District Court "to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review." That inquiry, in turn, would "require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subject." *Id.* at 160. The Court further noted that when disputed facts are intertwined with the merits of the case, the District Court should resolve the disputed jurisdictional facts along with the merits issues. *Id.* at 160-61.

CACI's baseless petition misconstrues the Fourth Circuit's mandate and ignores the extensive work done by the District Court (Hon. Leonie M. Brinkema, J.)—including careful evidence-based consideration of subject matter jurisdiction—that fully complied with the mandate. First, the District Court received extensive briefing from the parties on the sources of law that supplied the legal standards for unlawful detainee treatment that this Court instructed the District Court to apply. (Dkt. 576; 577.) Then, the District Court called for further briefing and issued a 17-page decision setting forth the content of the legal standards for torture, cruel, inhuman and degrading treatment ("CIDT"), and war crimes. (Dkt. 615 (reported as *Al Shimari v. CACI Premier Tech., Inc.*, 263 F.

Supp. 3d 595, 596 (E.D. Va. 2017)).) Only after that decision-making did the District Court receive briefing on PQD and reviewed the deposition transcripts of the Plaintiffs in which they described how they were abused while at Abu Ghraib.

On that evidentiary record, the District Court made evidence-based findings in a 2018 opinion that the PQD does not require dismissal because Plaintiffs had put forth evidence that CACI's conduct—conspiracy to commit and aiding and abetting torture, CIDT, and war crimes—was unlawful pursuant to applicable law and thus, per *Al Shimari IV*, was not subject to permissible military discretion. *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 688, 693 (E.D. Va. 2018).

This decision, which CACI ignores in its current petition and tried to ignore in its renewed political question challenge before the District Court, fully resolved the PQD question under the *Al Shimari IV* mandate. The additional discovery taken by CACI after that opinion did nothing to change that analysis, and in fact confirmed that CACI employees interrogated each of the three remaining Plaintiffs. The Court also, after reviewing "a foot of paper" of evidence submitted by the parties,[1] found that the three remaining Plaintiffs have sufficient evidence of their ATS claims to survive summary judgment (evidence that was also overlapping and relevant to the PQD defense CACI again raised) and proceed to

[1] CACI Ex. 11, Tr. at 14:22.

trial, but dismissed a fourth plaintiff, Taha Rashid, for lack of sufficient evidence connecting him to CACI's unlawful conduct.[2] CACI's focus in this petition on the level of military control—i.e., the "source of any direction under which the acts took place"—represents an attempt to relitigate the *Al Shimari IV* opinion and reflects its present frustration that, after 11 years, Plaintiffs will finally have their day in court. It is plainly insufficient to grant a writ of mandamus.

STATEMENT OF FACTS

Following the dismissal of Mr. Rashid, the three remaining Plaintiffs are Iraqi civilians who were tortured and otherwise seriously abused while detained at Abu Ghraib prison, before their eventual release without charge. Plaintiffs sued CACI, the only corporation hired by the U.S. government to provide interrogation services at Abu Ghraib, for conspiring with and aiding and abetting low-level U.S. military personnel to torture and abuse detainees at the Abu Ghraib "Hard Site" in 2003–2004. A number of CACI's co-conspirators, including Military Police Charles Graner and Ivan Frederick II, who provided testimony in this case implicating CACI, were convicted by U.S. courts martial for their role in abusing detainees. Despite six dispositive motions (and many other motions) filed by

[2] Unless otherwise specified, references to "Plaintiffs" in this answer refer to the three remaining plaintiffs in this action, Mr. Al Shimari, Mr. Al-Ejaili, and Mr. Al-Zuba'e.

CACI since the 2016 *Al Shimari IV* opinion, this decade-long litigation is finally set for trial starting April 23, 2019.

I. The Court of Appeal's Mandate Made Clear that Unlawful Conduct Is Not Shielded by the Political Question Doctrine Regardless of the "Source of Any Direction" by the Military

In 2016, the Court vacated the District Court's PQD decision, rejecting CACI's argument that its conduct is beyond the reach of the courts. *Al Shimari IV*, 840 F.3d at 157. In an important vindication of the rule of law, the Court concluded that the PQD can never apply to conduct that is unlawful, even—as CACI continues to factually contend—when that conduct was at the direction of the military. *Id.* Specifically, the Court found that "[t]he commission of unlawful acts is not based on 'military expertise and judgment,' and it is not a function committed to the coordinate branches of government." *Id.* at 158. Thus, "any acts of the CACI employees that were unlawful when committed, *irrespective [of] whether they occurred under actual control of the military*, are subject to judicial review." *Id.* at 159 (emphasis added). The Court observed that "some of the alleged acts are plainly unlawful at the time they were committed," and that "[c]ounsel for CACI conceded at oral argument that at least some of the most egregious conduct alleged, including sexual assault and beatings, was clearly unlawful." *Id.* at 160.

By contrast, only for that conduct which is *not* unlawful, and thus *could* be shielded from judicial review under the PQD, a court must look to the test set forth in *Taylor v. Kellogg Brown & Root Services Inc.*, 658 F.3d 402 (4th Cir. 2011) (i.e., whether it occurred under the actual control of the military or involved sensitive military judgments) to determine if it is, in fact nonjusticiable.[3] *Id.* at 159. Applying this standard, the Court found that the District Court had erred in its analysis of both prongs of the political question inquiry for claims against military contractors set forth in *Taylor*, and that the District Court had also incorrectly held that there are no judicially manageable standards for Plaintiffs' ATS claims. *Id.* at 161. CACI's assertion that the District Court failed to follow the Fourth Circuit mandate minimizes the first of the two ways in which *Al Shimari IV* found there could be—and which the district court found there was—no PQD defense (i.e., nondiscretionary unlawful conduct) and instead continues to re-raise the

[3] CACI's newfound enthusiasm for the Fourth Circuit's (misconstrued) mandate in *Al Shimari IV* is ironic considering that it has repeatedly criticized that decision before the District Court, including in its most recent motion regarding the PQD. *See, e.g.*, CACI Ex. 9 at 14-15 & n.9 (criticizing *Al Shimari IV*'s emphasis on unlawful conduct as an expansion of *Taylor* made "[w]ithout explanation," and approvingly quoting criticism of *Al Shimari IV* from a later decision of the Court of Appeals of the District of Columbia). Even in its petition, CACI attempts to cast illegitimacy on the Court of Appeals ruling by suggesting that it was rendered by a "different panel" than in the prior appeal, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"). In fact, the panels in *Al Shimari III* and *Al Shimari IV* were the same but for one judge, and both decisions were unanimous.

alternative, and now immaterial, ground to find a valid PQD defense—i.e., the "source of any direction" by the military and any involvement of sensitive military judgments.

Specifically, when *Al Shimari IV* was decided, Plaintiffs' case included both ATS claims and common law claims. This Court noted that some of the alleged and possibly discretionary conduct may fall into a "grey area" where there is an "absence of clear norms of international law or applicable criminal law." *Id.* at 160. Conduct that falls into this grey area is "protected under the political question doctrine" to the extent that it "was committed under the actual control of the military or involved sensitive military judgments" and was not unlawful when committed. *Id.*[4]

The Court "decline[d] to render in the first instance a comprehensive determination of which acts alleged were unlawful when committed" and concluded that the District Court on remand will be required "to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review," while also observing that "some of the alleged acts plainly were unlawful at the time they were committed and will not require extensive

[4] Plaintiffs later stated that they were not pursuing any claims of misconduct that might fall into the "gray area" that would require inquiry as to whether they had been commanded by the government (Dkt. 1008 at 2), which is another reason why CACI's continued emphasis on military control is no longer material.

consideration by the district court." *Id.* The Court also observed that the District Court may at some point be required to determine whether any "grey area" conduct "was committed under the actual control of the military or involved sensitive military judgment and, thus, is protected under the political question doctrine." *Id.* Because these jurisdictional facts may be intertwined with the merits of Plaintiffs' claims, the Court reaffirmed that the intertwined facts should be resolved when the merits are addressed. *Id.* at 160-61 (quoting *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009)).

It was in this limited context, one that may have involved examining the degree of actual military control for "grey area" conduct, that the Court stated that the District Court would need "to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Id.* at 160; *see* Petition at 1, 2, 3, 7. The question of direction by military has no relevance for the nondiscretionary unlawful conduct the District Court identified. Put another way, even if the Court were to grant mandamus and ask the District Court to examine this second, alternative "grey area" inquiry regarding PQD, it would have no effect, since the District Court has already found, pursuant to *Al Shimari IV*, clearly unlawful conduct that independently precludes a PQD defense.

II. The District Court Satisfied the Fourth Circuit's Mandate

On remand, the District Court did just what the Fourth Circuit instructed: "determine which of the alleged acts, or constellations of alleged acts, violated settled international law or criminal law governing CACI's conduct and, therefore, are subject to judicial review." And the District Court did so by examining the evidence regarding the specific conduct to which the Plaintiffs were subject, namely, the Plaintiffs' own testimony regarding their treatment.

Immediately after *Al Shimari IV* was issued, Judge Lee recused himself *sua sponte* and the case was reassigned to Judge Brinkema. The District Court determined that to comply with this Court's mandate, it needed to resolve the PQD jurisdictional issue first, (Dkt. 653 at 7),[5] and it ordered that the depositions of the as yet un-deposed Plaintiffs be taken via video link in preparation for deciding the PQD issue, (Dkt. 571). Plaintiffs Mr. Al-Zuba'e and Mr. Al Shimari traveled to Beirut where video depositions were conducted in February 2017; Plaintiff Mr. Al-Ejaili had already been deposed in 2013. Plaintiffs also voluntarily dismissed their common law claims in January 2017, leaving only the ATS claims. *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 686 (E.D. Va. 2018).

In order to fulfill the Fourth Circuit's mandate and determine whether the treatment to which the Plaintiffs were subjected was unlawful, the District Court

[5] Citations to the docket are to the docket of the District Court, No. 1:08-0827-LMB-JFA.

ordered briefing by the parties first regarding the appropriate legal framework that would apply to Plaintiffs' ATS claims, and then regarding the substantive content of the rules governing treatment of detainees. *Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 596 (E.D. Va. 2017). The District Court ordered this briefing on the ATS and then issued an opinion specifically to address the "threshold issue" of "whether the Court had subject matter jurisdiction and, per the Fourth Circuit's opinion in *Al Shimari IV*, to resolve that question it would need to determine whether the alleged CACI conduct was unlawful when committed." *Id.* at 598. The District Court's ATS opinion "sets forth the legal standard under which this litigation will proceed." *Id.*

After a thorough review of the law, including a detailed discussion of this Court's opinion in *Al Shimari IV*, *id.* at 597, the District Court concluded that torture, CIDT, and war crimes all constituted violations of the law of nations and were actionable pursuant to the ATS, and as such represented international norms that were specific, universal, and obligatory. *Id.* at 599-606; *see also Al Shimari*, 324 F. Supp. 3d at 686 ("The Court held that torture, CIDT, and war crimes all constitute violations of the law of nations and that claims of torture, CIDT, and war crimes are actionable against private parties under the ATS.").

Following additional discovery in the form of Plaintiff depositions (which supplemented the extensive discovery already taken in this case before discovery

closed in 2013 and in a prior litigation against CACI that has been applied to this case), and after the District Court had set forth the applicable standard for showing ATS violations, the District Court instructed CACI to file a motion raising any Rule 12 arguments it intended to make, including its PQD defense. (Dkt. 616, 620.) CACI moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) on a variety of grounds, including lack of jurisdiction and failure to state a claim. (Dkt. 626, 627.) CACI argued—among other things—that the abuses suffered by Plaintiffs were insufficiently serious to be actionable as claims for torture, CIDT, or war crimes pursuant to the ATS. (Dkt. 627 at 12-25.) On September 22, 2017, the Court announced it was denying CACI's motion to dismiss from the bench. (Dkt. 648.)

Despite including an extensive quote from that oral argument, CACI fails to cite or acknowledge the District Court's subsequent written opinion explaining her oral decision.[6] That is because the District Court's 2018 opinion rejecting CACI's PQD motion both shows that the District Court complied with the Fourth Circuit's

[6] The exchange between the District Court and CACI's attorney that is cited by CACI throughout its petition is irrelevant in light of the District Court's full written opinion, and rests on the false assertion by CACI that "[t]here's basically been no development at this point" of CACI's involvement in the abuse at Abu Ghraib. (CACI Ex. 2, Tr. at 9:17-20.) As Plaintiffs' counsel clarified later in the hearing, there had been extensive discovery taken at that point both in this case and in a prior litigation involving CACI's actions at Abu Ghraib that had been deemed produced in this litigation. *Id.*, Tr. at 14:8-16:16.

mandate and explains why CACI's renewed attempt to invoke the PQD failed pursuant to law of the case.

The opinion issued by the District Court followed extensive discovery in this action and was based on the evidentiary record before the District Court, which included 1) the Plaintiffs' testimony regarding their abuse, 2) the Plaintiffs' expert medical reports corroborating physical and mental injury and expert reports regarding torture, 3) depositions taken in this case from military police guards at Abu Ghraib, and 4) Plaintiffs sworn interrogatory responses. *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 677-82 & n. 15 (E.D. Va. 2018). The District Court made clear that she relied on the *facts* of the case, including the Plaintiffs' depositions, and not just the allegations in the Third Amended Complaint in deciding that she had subject matter jurisdiction over this case.[7] *Id.* at 677 n. 13.

As stated by the District Court, the PQD jurisdictional and merits arguments have merged in this case: since Plaintiffs' ATS claims are based on violations of

[7] Even with regard to the Third Amended Complaint, the District Court noted that the allegations "that CACI interrogators entered into conspiracies with military personnel to abuse plaintiffs and that CACI interrogators aided and abetted the abuse of plaintiffs" in the Third Amended Complaint were "supported by substantial evidence, including depositions taken of military personnel before the TAC was filed, and the jurisdictional evidence developed since the filing of the TAC has aligned with these allegations." *Id.* at 688 n.22. Such evidentiary support in the Complaint was possible because, contrary to CACI's characterization of the 2018 PQD decision as "pre-discovery," discovery in the case had already concluded on April 26, 2013, after substantial discovery had occurred with respect to third-parties, including the United States. *See, e.g., id.* (citing depositions of military personnel); *see also* Dkt. 568 at 11-12.

international law that are "specific, universal, and obligatory" regarding torture, CIDT, and war crimes, if Plaintiffs have valid claims pursuant to the ATS, then—pursuant to the Court's holding in *Al Shimari IV*—CACI's conduct was unlawful and the PQD does not apply. *Id.* at 688. The District Court concluded that "plaintiffs' allegations—*and the evidence they have produced in support of those allegations*—describe sufficiently serious misconduct to constitute torture, CIDT, and war crimes, all of which violated settled international law at the time—and still do. Accordingly, plaintiffs have appropriately stated a claim under the ATS and the political question doctrine is inapplicable." *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 693 (E.D. Va. 2018) (emphasis added).

The District Court's 2018 PQD opinion, which was "evidence-based" and not "pre-discovery," therefore fulfilled the *Al Shimari IV* mandate by both determining "which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review" and did so by examining "the evidence regarding the specific conduct to which the plaintiffs were subjected." *Al Shimari IV*, 840 F.3d at 160.

III. The District Court Properly Rejected CACI's Repetitive Efforts to Dismiss the Case

Following its loss on this motion to dismiss, and almost ten years into the litigation, CACI impleaded the United States. (Dkt. 665.) CACI has since

brought four additional (and unsuccessful) dispositive motions: a challenge to ATS jurisdiction based on *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (*See* Dkt. 859 (opinion denying motion)); a motion to dismiss based on the United States' invocation of the state secrets privilege (Dkt. 1040); summary judgment based on numerous issues, including the factual support for Plaintiffs' ATS conspiracy and aiding and abetting claims (Dkt. 1033); and its most recent challenge to subject matter jurisdiction that is the purported basis for this petition (Dkt. 1057).

Just as CACI ignores the District Court's evidence-based 2018 PQD opinion in this petition, it ignored the opinion in its renewed PQD briefing before the District Court. Inexplicably for a motion on PQD, CACI cited the 2018 PQD decision exactly once in its opening brief, and even then only for fact that Plaintiffs' direct liability claims against CACI were dismissed. *See* CACI Ex. 9 at ii, 16.[8] As with this petition, CACI's opening brief contained no discussion of the District Court's reasoning or factual support and instead presented a one-sided factual recitation of the pseudonymous testimony from interrogators that they did not conduct or know about any abuses at Abu Ghraib, in order to argue that

[8] CACI was forced to acknowledge the 2018 PQD decision in its reply brief, yet still only dealt with it in a conclusory manner and mischaracterized the decision as not being "fact-based." (Dkt. 1119 at 12-13.)

Plaintiffs lacked proof of their conspiracy and aiding and abetting claims. (CACI Ex. 9 at 16-20.)[9]

In light of the District Court's 2018 decision that the PQD does not require dismissal as long as Plaintiffs state valid claims for violations of international law pursuant to the ATS, the crucial decision at the February 27, 2019 hearing was on CACI's summary judgment motion, which, among other things, challenged the factual sufficiency of Plaintiffs ATS claims based on theories of conspiracy and aiding and abetting liability. CACI made similar arguments in its summary judgment motions regarding the sufficiency of Plaintiffs' evidence against CACI as it did in the renewed PQD motion. *Compare* CACI Ex. 9 at 16-20, *with* Dkt. 1034 at 14-15, 19-21 (CACI's brief in support of its recent summary judgment motion).

At oral argument, the District Court denied CACI's motion for summary judgment as to three of the plaintiffs and found that sufficient evidence existed regarding their ATS conspiracy and aiding and abetting claims to go to trial:

> As for the other three ... plaintiffs, they've made allegations of conduct that does qualify in my view to keep them in this case. We have the testimony of Sgt. Frederick, who clearly talks about CACI

[9] CACI also repeated, again without reference to the District Court's 2018 PQD decision, its typical arguments regarding control and whether the case involves sensitive military judgments. (CACI Ex. 9 at 20-26.) While Plaintiffs continue to dispute these points, they are now irrelevant to this case since the District Court has decided twice, on the evidence, that CACI's conduct was unlawful and therefore ineligible for PQD protection regardless of control or military judgment.

> employee Stefanowicz. He claims that that employee told him, Frederick, to treat certain detainees, quote, like "S"; that another CACI employee, Johnson, asked him to show where there were pressure points on people and then instructed him to hit a detainee on pressure points if he didn't answer questions.
>
> You've also got Cpl. Graner, who testified about [CACI employee] Big Steve -- again, that's Stefanowicz -- forcing a detainee to stand on a box, and there's a photo of Johnson with a detainee in one of those problematic [stress] positions.
>
> You've got the testimony of CACI former employee Nelson, who expressed serious concerns about Dugan and Johnson. You've got evidence in this case that Mr. Porvaznik, who was the person, the CACI lead person on board for several months during this critical time period, not bringing any of these concerns to the attention of anybody at CACI or, or following up on problems with the military.
>
> You've got CACI Interrogator A admitting that he had seen naked detainees. It's unclear in my view whether it's two or three, but more than one naked detainee.
>
> You've got evidence in the record that CACI promoted Stefanowicz, that they fought the firing of Johnson, that they made no effort to contact Nelson.
>
> I mean, there's enough evidence in my view to show -- to let this case go forward. In other words, there are material issues of fact that are in dispute, and given the broad concepts of both conspiracy liability and aiding and abetting liability, there's enough to go forward.

(CACI Ex. 11, Tr. 15:20-17:1.)

It was following this decision that the District Court stated that oral argument on CACI's PQD motion was unnecessary because "we've already addressed that. That's law of the case." *Id.* at 52:17-22.

Following the hearing, the District Court issued its order denying CACI's subject matter jurisdiction motion for the reasons stated in open court. (CACI Ex. 1.) The Court also dismissed Plaintiff Rashid.[10] *Id.*

[10] Contrary to CACI's intimation that the District Court is unfairly predisposed against CACI, the Court stated:

> Now, the really interesting motion is the motion for summary judgment, and here I want to hear, Mr. LoBue, from you. I have a real concern that most of Mr. Rashid's allegations cannot go forward in this case, because as I understand, the uncontested facts were that CACI did not -- no CACI personnel arrived at Abu Ghraib before September 28 of 2003. I think that's actually a stipulation.
>
> And the Interrogation No. 1, which is the one that I've seen the deposition, that's the one where all of these -- incredibly troubling conduct occurred: the shooting of Mr. Rashid in the leg, being hung from a ceiling fan to be interrogated. All of that occurs in Interrogation No. 1, which occurs according to the interrogation report which is in this record on September 28.
>
> That's before CACI's people are on site, and the interrogators involved in that interrogation were military people. That's also uncontestable, I think, in this record. Moreover, some of the allegations that Rashid said about the sexual misconduct and a particular female who was tormenting him he describes as occurring before the first interrogation, which again is before CACI is on the scene.
>
> So I don't know how any of those allegations from Mr. Rashid can stay in this case. **I think there it would be poisonous and unfairly prejudicial to CACI to have any reference be made to gunshots or being hung from a chandelier** -- or a ceiling fan. The only things that -- the only allegations, I believe, that are still in this case that would have occurred after the first interrogation and after CACI is now on board would be Rashid's claim that he was part of a naked pyramid, that he was hidden from a human rights delegation visit, and

The very next day, CACI filed another dispositive motion in which it seeks dismissal based on its purported derivative sovereign immunity, another issue it has previously (and unsuccessfully) raised in this litigation.[11] (Dkt. 1149.)

ARGUMENT

The single issue presented by CACI in its petition is "whether the district court failed to comply with this Court's instructions when it refused to consider CACI's post-discovery political question challenge."[12] (Petition at 4.) Because the

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> that there may have been some continuing tormenting by this female soldier about putting plastic ties over parts of his body, etc.
>
> But the plaintiff needs to address that because I think the Rashid case is extremely weak and possibly shouldn't be in this case at all, all right?

(CACI Ex. 11, Tr. at 7:11-8:9.)

[11] CACI's claim that it filed this petition "reluctantly" rings hollow. (Petition at 1-2.) CACI has never in the course of this long litigation shown reluctance towards motion or appellate practice.

[12] CACI's repeated references to its latest challenge to the court's jurisdiction under the ATS are therefore irrelevant to this petition, including its disingenuous statement that a panel of this Court recently "declined to affirm the district court's reliance on *Al Shimari III* and applied the framework required by *RJR Nabisco* to affirm on alternative grounds." Petition at 16. The Court in *Roe v. Howard* "declined to affirm the district court's reliance on *Al Shimari III*" only in the sense that it resolved the case on alternative grounds for claims under the Trafficking Victim Protection Act. Indeed, the Court explicitly stated that it was not addressing whether the "focus" test of *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2101 (2016), had any impact on *Al Shimari III*, and recognized that the "touch and concern" test in *Kiobel v. Royal Dutch Petroleum Co.*, 596 U.S. 108 (2013), and thus this Court's decision in *Al Shimari III* is good law. As the Court

District Court did consider, and properly rejected, CACI's purported "post-discovery" PQD motion, CACI's petition should be denied.

I. Standard of Review

A writ of mandamus is a "drastic remedy that should be used only in extraordinary circumstances." *In re Crawford*, 724 F. App'x 213, 214 (4th Cir. 2018). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *United States v. Moussaoui*, 333 F.3d 509, 516 (4th Cir. 2003) (*quoting Will v. United States*, 389 U.S. 90, 95 (1967)). A party seeking the writ must show, among other things, "a clear and indisputable right" to the relief sought and that there are "no other adequate means to attain the relief" sought. *See Moussaoui*, 333 F.3d at 517; *In re Braxton*, 258 F.3d 250, 261 (4th Cir. 2001).

A writ will not issue when an order may be reviewed on appeal from a final judgment. *See In re Braxton*, 258 F.3d at 261 (collecting cases). The Court of Appeals "must be reluctant indeed to permit" a petitioner "to accomplish by mandamus" what the law "so clearly prohibits by way of interlocutory appeal not

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stated, "*RJR Nabisco* **did not overturn *Kiobel*** and — in step two — retains a similar emphasis on the relevant claim's connection to U.S. territory." *Roe*, No. 17-2338, 2019 WL 903983, at *7, n. 6 (emphasis added). *See also Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016) (expressly affirming *Al Shimari III*'s "touch and concern" analysis and stressing the strength of Plaintiffs' U.S.-based "relevant conduct"). Nor is the state secrets doctrine relevant to this petition, despite CACI's frequent complaints in the petition regarding its unsuccessful state secrets motions.

certified under" 28 U.S.C. section 1292(b). *In re Catawba Indian Tribe*, 973 F.2d 1133, 1137 (4th Cir. 1992); *see also In re Braxton*, 258 F.3d at 261. "It is well established that mandamus may not be used as a substitute for appeal." *In re Crawford*, 724 F. App'x at 214. Nor is a party's claim that the district court has not complied with a mandate of this Court sufficient for a grant of mandamus. *See, e.g.*, *In re Depineres*, 131 F. App'x 401, 402 (4th Cir. 2005) (denying mandamus petition when the writ was requested by the petitioner "to determine whether the district court is complying with this court's mandate" and concluding that the "relief sought by [petitioner] is not available by way of mandamus"); *In re Vincent*, No. 88-1731, 1988 U.S. App. LEXIS 21250, at *1 (4th Cir. Oct. 20, 1988) (denying petition for mandamus "in which he claims that the district court has not complied with this Court's mandate" because the petitioner "will be able to raise any questions about the propriety of the district court's actions in his pending appeal").

II. The District Court Faithfully Complied with the Fourth Circuit's Mandate

CACI has no "clear and indisputable right to relief" in this petition. CACI's whole petition rests on the false premise that the District Court did not comply with the mandate from *Al Shimari IV*. As detailed above, the District Court's 2018 PQD decision fully satisfied the mandate of *Al Shimari IV*, and CACI's renewed motion was properly denied because the record before the District Court, which

also involved CACI's summary judgment motion on the factual sufficiency of Plaintiffs claims, contained sufficient evidence to bring Plaintiffs' ATS claims to trial.

Central to CACI's petition is its notion that "the district court's requirement that political question be briefed and considered only before allowing discovery from the eyewitnesses to Plaintiffs' interrogations made compliance with this Court's remand instructions impossible." Petition at 17. CACI's position appears to be that the Plaintiffs were not "eyewitnesses" to their own interrogations and abuse, and that their testimony somehow does not constitute evidence. This is absurd. As recounted at length in the District Court's 2018 PQD decision, the Plaintiffs provided detailed testimony regarding the abuses they suffered at Abu Ghraib, most of which occurred outside of any formal interrogation sessions. 324 F. Supp. 3d at 677-87. The District Court relied on this evidence, along with other record evidence such as Plaintiffs' expert reports, in concluding that the PQD did not apply and the District Court had subject matter jurisdiction over the case.[13] *Id.* at 677-87 n.13, 689-693 ("[P]laintiffs' allegations—and the evidence they have produced in support of those allegations—describe sufficiently serious misconduct to constitute torture, CIDT, and war crimes, all of which violated settled international law at the time—and still do. Accordingly, plaintiffs have

[13] CACI chose not to depose Plaintiffs' experts or to question their opinions regarding the acts of torture and resulting serious injuries that Plaintiffs sustained.

appropriately stated a claim under the ATS and the political question doctrine is inapplicable."). As much as CACI tries to ignore this decision, it cannot escape it—the District Court's 2018 PQD decision analyzed whether Plaintiffs had alleged unlawful conduct and was also the evidence-based opinion that CACI claims is required. Moreover, because Plaintiffs stated that they were not challenging any "grey area" conduct where, in accordance with this Court's *Al Shimari IV* decision, command and control by the military might be relevant, there was no need for the District Court to make findings on that subject to resolve the PQD defense.

CACI also ignores that its summary judgment motion, which had an extensive evidentiary record accompanying it, was decided on the same day as its renewed PQD motion, with the District Court holding that three of the four Plaintiffs had shown evidence that raised material issues of fact regarding their ATS claims. CACI asserts the general rule that jurisdiction must be established before proceeding on the merits, but as this Court made clear in *Al Shimari IV*, when the jurisdictional facts are intertwined with the merits, then they should be resolved with the intertwined merits issues. 840 F.3d at160-61. And as the District Court explained in its 2018 PQD opinion, since Plaintiffs' ATS claims allege violations of international law, the analysis of whether the ATS claims are sufficient merges with the PQD analysis of whether CACI engaged in unlawful conduct "such that if plaintiffs' claims are cognizable under the ATS, they

necessarily state a violation of settled international law and the political question doctrine is inapplicable." 324 F. Supp. 3d at 688. As the District Court properly stated, CACI's renewed PQD motion was foreclosed by its 2018 PQD decision. Since the disputes of material fact regarding the merits of their ATS claims are intertwined with the disputed PQD facts, and as the District Court has denied CACI's summary judgment motion on the merits of the ATS claims (except for Mr. Rashid), these disputes of fact must now be resolved at trial by a jury.

The additional evidence gathered by CACI in discovery after the 2018 PQD decision at most raised questions of fact regarding Plaintiffs' ATS claims that must now be resolved at trial. CACI has no "clear and indisputable right to relief" to order the District Court to conduct a third, frivolous review of the PQD issues in this case.

CACI's efforts to paint the District Court as biased against its PQD motion is also unavailing. The District Court's statement about expecting the case to go to trial should be understood in the context of this litigation and the February hearing, at which the court had before it CACI's summary judgment motion: that is, the Court observed (not knowing yet another motion would follow the day later) that after denying summary judgment, the typically inevitable next step in litigation—but for settlement—is a trial. Yet, CACI seems to suggest that the announcement regarding the expected prospect of a trial is somehow coercive. A court's

comments based on the record evidence that are directly pertinent to resolving a motion made by the defendant cannot be viewed as evidence of bias or otherwise improper.

CACI claims that the District Court has treated its recent motions as a "mere speed bump on the road to trial," yet each example it gives of this supposed treatment involves an issue that had been previously litigated and decided against CACI. (Petition at 24-25.) CACI has been arguing PQD since its first motion to dismiss in 2008, *Al Shimari II*, 679 F.3d at 209, and, as discussed above, its most recent motion was correctly denied. The issue of ATS extraterritoriality had also already been decided by this Court in *Al Shimari III* and so, as correctly stated by the District Court, is also law of the case. CACI's final example, preemption, has also been raised multiple times before. In fact, the issue was previously disposed of by the District Court in the same 2018 ruling that decided the PQD issue, and, just as with the PQD ruling, CACI chooses in this petition to ignore the prior decision while criticizing the District Court for summarily denying its most recent effort to relitigate the issue. *See Al Shimari*, 324 F. Supp. 3d at 698 (rejecting preemption of the ATS, a federal statute, and distinguishing the D.C. Circuit's decision in *Saleh v. Titan Corp.*, 580 F.3d 1, 16-17 (2009), as focusing on the

conflict between state tort law and federal policy).[14] CACI should not expect lengthy opinions when it is relitigating issues that were previously decided in this case.

Finally, any implication that the District Court is not giving CACI's many motions adequate consideration is belied by the fact that the District Court *granted* CACI's summary judgment motion with respect to Mr. Rashid and dismissed his case. (CACI Ex. 1.)

III. CACI's Mere Disagreement with the District Court Can Be Resolved on Appeal

CACI's unhappiness at having one of its many recent motions denied does not represent "exceptional circumstances amounting to a judicial usurpation of power [that] will justify the invocation of this extraordinary remedy." *Moussaoui*, 333 F.3d at 516. Every litigant whose position is rejected can voice similar disappointment; these are the usual type of disagreements with a ruling that can and should be addressed on appeal. *See In re Crawford*, 724 F. App'x at 214 ("It is well established that mandamus may not be used as a substitute for appeal."). CACI provides no explanation for why its objections to the District Court's PQD decision cannot be addressed on appeal in the normal course following trial. As

[14] CACI states that this Court adopted *Saleh*'s preemption test in *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014). But *Burn Pit*'s preemption analysis involved state law claims, and so is irrelevant to CACI's claim that one federal statute (the ATS) is "preempted" by others. In any event, CACI has not sought a writ of mandamus on this issue.

this Court noted in this case back in 2012, a PQD decision does not warrant an interlocutory appeal. *Al Shimari II*, 679 F.3d at 215. As CACI has an adequate remedy in a post-trial appeal, its petition for mandamus should be denied.

CONCLUSION

For the reasons stated above, CACI's petition for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because the brief (as indicated by word processing program, Microsoft Word) contains 6,635 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

March 14, 2019

/s/ Robert P. Lobue
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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I electronically filed the above document through this Court's CM/ECF system, which will automatically serve the following counsel of record.

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