No. _____

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)

PETITION FOR A WRIT OF MANDAMUS

John F. O'Connor
Linda C. Bailey
Molly B. Fox
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com
lbailey@steptoe.com
mbfox@steptoe.com

William D. Dolan, III
LAW OFFICES OF WILLIAM D. DOLAN, III, PC
8270 Greensboro Drive, Suite 700
Tysons Corner, Virginia 22102
(703) 584-8377 – telephone
wdolan@dolanlaw.net

Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

Petitioner CACI Premier Technology, Inc. states that it is a wholly-owned subsidiary of CACI, INC. – FEDERAL, and that CACI, INC. – FEDERAL is a wholly owned subsidiary of CACI International Inc, a company that is publicly traded on the New York Stock Exchange. CACI Premier Technology, Inc. has no other parent companies and no other company owns 10% or more of CACI Premier Technology, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

Mandamus relief is appropriate when a district court's exercise of jurisdiction is "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine." *Holub Indus., Inc. v. Wyche*, 290 F.2d 852, 855-56 (4th Cir. 1961). The quintessential use of mandamus is to prevent a "judicial usurpation of power" resulting from a lower court's failure to adhere "to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967), and *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

District courts are not free to ignore binding precedent. Rather, they must follow the precedent of a higher court. This is an inflexible rule that admits of no exceptions. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). Yet the district court here has repeatedly violated that command. No more prominent example is the ruling that the United States had impliedly waived sovereign immunity with respect to allegations of *jus cogens* violations of international law, a ruling that defied hundreds of years of unbroken Supreme Court precedent. *Al Shimari* v. *CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 968 (E.D. Va. 2019). That refusal to follow binding precedent continued with the district court's recent ruling on subject matter jurisdiction.

Petitioner CACI Premier Technology, Inc. ("CACI") seeks a writ of mandamus because the district court in this action refuses to give effect to intervening binding precedents on extraterritoriality and implied causes of action that clearly and unambiguously deprive the court of subject matter jurisdiction. Through its Order and Memorandum Opinion of July 31, 2023 (Exhibits 1-2), the district court, while paying lip service to intervening decisions of the Supreme Court and this Court, has so riddled these decisions with unwarranted exceptions and distinctions as to have nullified them.

The district court's evasion of binding precedent is consistent with its acknowledgement that it has taken a "trial no matter what" approach to this case since being assigned to it, before any meaningful discovery into Plaintiffs' treatment had occurred:

> I think I told you-all when I first got this case, you know, given its tortured history, I said we're going to have lots of motions practice, but you should expect if you don't settle this case, it's going to go to trial. I mean, and that's what's going to happen. It's going to go to trial unless it settles, all right?

Ex. 3 at 52-53 (Tr. of Feb. 27, 2019)

CACI seeks a writ because it has no other adequate means of relief, and binding precedent provides a clear and indisputable right to the writ. *See United States v. Moussaoui,* 333 F.3d 509, 516-17 (4th Cir. 2003). A writ is necessary here to confine the district court to a lawful exercise of its prescribed jurisdiction.

Plaintiffs' claims in *Al Shimari* are all secondary liability claims (conspiracy, aiding and abetting) by which Plaintiffs seek to hold CACI liable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for abuses allegedly committed by U.S. soldiers at Abu Ghraib prison in Iraq. With respect to extraterritoriality, the district court chalked up Supreme Court precedents as "a perfect example of how bad facts make bad law,"[1] and has claimed that its own view of the purposes of the presumption against extraterritoriality relieve it of any obligation to "mechanically apply[]" the "focus" test established by the Supreme Court[2] for evaluating extraterritoriality challenges. Ex. 2 at 20. Indeed, the district court has disavowed any obligation to decide extraterritoriality based on the location of the conduct relevant to ATS's focus, as required by precedent. Instead, the district court decided the issue by balancing a wide array of facts of the district court's choosing "[n]otwithstanding the Supreme Court's conduct-centered approach reflected in its 'focus' analysis." Ex. 2 at 19-20. This ruling reflects deliberate disregard of precedent.

Similarly, the district court refuses to acknowledge intervening precedents dramatically scaling back federal judges' power to create implied causes of action,

---

[1] Ex. 4 at 4-5 (Tr. of Aug. 25, 2023).

[2] *See, e.g.*, *RJR Nabisco v. European Community*, 579 F.3d 325 (2016); *Doe v. Nestlé*, 141 S. Ct. 1931 (2021); *Roe v. Howard*, 917 F.3d 229, 240 (4th Cir. 2019); *United States v. Elbaz*, 52 F.4th 593, 602 (4th Cir. 2022).

which the district court did here because Congress has declined to enact any substantive ATS cause of action under which Plaintiffs could proceed.[3] As this Court has acknowledged, the standard for judge-implied causes of action is now so high as to be largely unattainable. The Supreme Court and this Court have rejected judge-created causes of action based on national security implications much more attenuated than those implicated here, and based on the existence of available remedial structures of less utility than the administrative claims procedures Plaintiffs here declined to pursue. *See, e.g.*, *Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022); *Dyer v. Smith*, 56 F.4th 271, 281 (4th Cir. 2022); *Bulger v. Hurwitz*, 62 F.4th 127, 136 (4th Cir. 2023).

The district court's Order is not the first time in this case the district court has disregarded precedent. The district court denied CACI derivative sovereign immunity by deciding that the district court, and not Congress, should decide whether the United States' sovereign immunity should extend to allegations of *jus cogens* violations of international law, notwithstanding Supreme Court precedent holding that the scope of sovereign immunity is for Congress to decide and waivers "will not be implied." *Lane v. Pena*, 518 U.S. 1897, 192 (1996). *That decision*

[3] The only substantive cause of action created by Congress under the ATS is the Torture Victims Protection Act, 28 U.S.C. § 1350 note. *See Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1403 (2018) (plurality opinion). That Act is not applicable to this case.

remains the only decision in the history of the Republic to find an implied waiver of sovereign immunity. In the last appeal in this case, Judge Quattlebaum observed that the unavailability of collateral order review had taken the Court "down a dangerous road," one with "potentially quite significant" implications. *Al Shimari v. CACI Premier Tech., Inc.*, 775 F. App'x 758, 760-61 (4th Cir. 2019) ("*Al Shimari V*") (Quattlebaum, J., concurring in judgment).

Absent this Court's intervention, the trial of this matter will have to navigate a minefield created by the United States' three successful invocations of the state secrets doctrine to withhold evidence regarding Plaintiffs' treatment in detention and the identities of interrogation personnel with whom they interacted. For its part, CACI will be forced to defend itself against the most incendiary accusations imaginable with both hands tied behind its back, and Plaintiffs will attempt to prosecute a case that – in the unlikely event they are successful – could never survive appeal. The trial of this action would be farcical, with the jury having to make credibility determinations when virtually every witness with knowledge of Plaintiff's treatment testifies pseudonymously through deposition read-ins or otherwise, and with CACI denied the identities of the CACI employees who interacted with Plaintiffs and are the supposed source of CACI's liability. None of these consequences are justified or acceptable when the law unequivocally precludes jurisdiction over this matter.

II. RELIEF SOUGHT

CACI seeks a writ of mandamus directing the district court to dismiss this case for lack of subject matter jurisdiction.

III. ISSUES PRESENTED

1. Whether the district court has failed to adhere to a lawful exercise of its prescribed jurisdiction by continuing to apply the multi-factor extraterritoriality approach used in *Al Shimari III* rather than the mechanical "focus" test mandated by the Supreme Court and this Court.

2. Whether the district court has failed to adhere to a lawful exercise of its prescribed jurisdiction not giving effect to intervening precedents that do not permit judge-implied causes of action in a case such as the present case.

IV. BACKGROUND

A. Relevant Proceedings Through *Al Shimari III*

Plaintiffs allege that they were subjected to torture, war crimes, and cruel, inhuman, and degrading treatment ("CIDT") by U.S. soldiers at Abu Ghraib prison in Iraq. They assert secondary liability claims (conspiracy, aiding and abetting) under the ATS[4] against CACI, which provided a handful of civilian contractor interrogators to augment the military intelligence operation at Abu Ghraib prison. Plaintiffs originally asserted primary liability claims against CACI, but they were

[4] Plaintiffs asserted common-law claims but have since abandoned them.

dismissed in 2018 based on Plaintiffs' concession that CACI personnel "never laid a hand on them."[5]

In 2013, the district court (Hon. Gerald Bruce Lee) dismissed Plaintiffs' ATS claims as impermissibly extraterritorial pursuant to *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Dkt. #460.[6] This Court reversed. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"). While the Supreme Court had applied the "focus" test to extraterritoriality challenges involving other statutes,[7] *Al Shimari III* crafted a different test for ATS. 758 F.3d at 527. Noting that *Kiobel* "broadly stated that 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory," this Court held that "courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.*

Accordingly, the Court found Plaintiffs' claims, which at the time included primary liability claims of torture, war crimes, and CIDT, were sufficiently domestic based on all of the facts relevant to Plaintiffs' claims, without regard to ATS's focus. The facts on which this Court relied included (1) that CACI and its

[5] Ex. 5 at 15 (Tr. of Sept. 22, 2017) ("We are not contending that the CACI interrogators laid a hand on the plaintiffs.").

[6] "Dkt." cites are to the docket in *Al Shimari*, No. 1:08-cv-827 (E.D. Va.).

[7] *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) ("*Aramco*") (Title VII); *Morrison v. Nat'l Austrl. Bank Ltd.*, 561 U.S. 247, 266-67 (2010) (Securities Exchange Act).

employees were U.S. citizens and the employees had U.S.-issued security clearances, (2) that CACI's provision of interrogators arose out of a U.S. government contract, and (3) the Court's sense that the TVPA and Anti-Torture Act, though not applicable, reflected Congress's intent to provide a forum for aliens to sue U.S. citizens for acts of torture. *Id.* at 530-31.

The Court also noted *Kiobel*'s absence of guidance for lower courts and the likelihood of further development of the test for extraterritoriality under ATS:

> Although the "touch and concern" language in *Kiobel* may be explained in greater detail in future Supreme Court decisions, we conclude that this language provides current guidance to federal courts when ATS claims involve substantial ties to United States territory. We have such a case before us now, and we cannot decline to consider the Supreme Court's guidance simply because it does not state a precise formula for our analysis.

Al Shimari III, 758 F.3d at 529.

Al Shimari III also directed the district court to address justiciability on remand. The Court explained that the case should be dismissed on political question grounds if CACI's interrogators were operating under the direct or plenary control of the U.S. military and "national defense interests were closely intertwined with military decisions governing the contractor's conduct." *Id.* at 533.

B. Proceedings Since *Al Shimari III*

On remand, the district court dismissed on political question grounds. Dkt. #547. This Court vacated the district court's judgment, holding that Judge Lee erred by not considering whether "conduct by CACI employees . . . was unlawful when committed," and by focusing on formal control rather than "actual control." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 151 (4th Cir. 2016) ("*Al Shimari IV*").

Judge Lee recused himself (Dkt. #562), and the case was reassigned to the Honorable Leonie M. Brinkema. More than a year later, the district court allowed CACI to begin seeking discovery from the United States regarding Plaintiffs' treatment. Dkt. #687. The United States asserted the state secrets privilege twice to withhold the identities of interrogators and translators interacting with Plaintiffs, assigning pseudonyms to all participants in Plaintiffs' interrogations. Ex. 6 at 4-6. The district court upheld the United States' state secrets assertion. Dkt. #791, 850, 886, 921.[8]

[8] The district court also upheld the state secrets privilege for "the tailored interrogation plan actually used for a lengthy interrogation of Al Shimari," a plan that "provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation," and reports "summariz[ing] the results of interrogations [that] were completed close in time to their conclusion" for Al Shimari and Al-Zuba'e. Dkt. #1044-1, Ex. 24 at 18-20.

As a result, CACI has been denied discovery of the identities of the interrogation personnel who participated in interrogations of Plaintiffs, including the identities of CACI personnel participating in interrogations of Plaintiffs. Thus, CACI has to defend against *respondeat superior* liability for the alleged actions of former CACI employees whose identities are being withheld from CACI. Between June 2018 and February 2019, CACI took pseudonymous telephonic depositions of eleven of the fourteen participants in intelligence interrogations of Plaintiffs, every participant the United States could locate. This included pseudonymous depositions of two CACI interrogators, each of whom had participated in one interrogation of a Plaintiff.

CACI filed dispositive motions in early 2019. CACI's extraterritoriality argument invoked the "focus" test mandated in *RJR Nabisco*, a case decided two years after *Al Shimari III*. In *RJR Nabisco*, the Supreme Court confirmed that the "focus" test applied to ATS, and explained why *Kiobel* did not identify ATS's focus: "Because all the relevant conduct regarding those violations took place outside the United States, we did not need to determine, as we did in *Morrison*, the statute's 'focus.'" *RJR Nabisco*, 579 U.S. at 337 (citations and quotations omitted).

The district court acknowledged that *RJR Nabisco* created a "possibly new standard," but stated that it was "not reversing the Fourth Circuit." Ex. 3 at 5 (Tr.

of Feb. 27, 2019). CACI brought to the district court's attention this Court's decision from two days earlier in *Roe v. Howard*, 917 F.3d 229, 240 (4th Cir. 2019), in which this Court declined to affirm the district court's application of *Al Shimari III* and instead applied the "focus" test required by *RJR Nabisco*. Nevertheless, the district court denied CACI's extraterritoriality challenge by invoking law of the case and reciting domestic facts relied on by this Court in *Al Shimari III*, all of which were mundane actions of a domestic corporation. Ex. 3 at 5-6. The district court rejected other bases CACI asserted for dismissal, including derivative sovereign immunity. In denying CACI's motions, the district court admitted having determined from the time the case transferred from Judge Lee, and before meaningful discovery had occurred into Plaintiffs' treatment, that this case would proceed to a trial if CACI did not settle. *Id.* at 52-53.

CACI appealed the district court's denial of derivative sovereign immunity and asked this Court to exercise pendent appellate jurisdiction over the district court's extraterritoriality ruling. At oral argument, Judge Floyd commented on the district court's invocation of the law of the case regarding extraterritoriality:

> Somewhere in the record, Judge Brinkema said that it's – used the phrase "law of the case." Does – does she understand that *RJR Nabisco* controls?"

Ex. 7 at 12 (Floyd, J.). Ultimately, this Court dismissed the appeal for lack of appellate jurisdiction. *Al Shimari V*, 775 F. App'x at 759. CACI sought *certiorari*

regarding this Court's appellate jurisdiction ruling, which the Supreme Court denied. *CACI Premier Technology, Inc. v. Al Shimari*, 141 S. Ct. 2850 (2021) (Mem.).

Eleven days before the Supreme Court denied CACI's *certiorari* petition, the Supreme Court decided *Nestlé*, which reaffirmed that the "focus" test applied to ATS. *Nestlé*, 141 S. Ct. at 1936-37. CACI renewed its extraterritoriality motion, arguing that *Nestlé* rendered indefensible the district court's reliance on law of the case to continue applying the *Al Shimari III* test for extraterritoriality. Dkt. #1332.

CACI later filed a supplemental memorandum advising the district court of *United States v. Elbaz*, 52 F.4th 593 (4th Cir. 2022). *Elbaz* reaffirmed the mandatory nature of the "focus" test and held that the focus of a secondary liability claim (conspiracy in *Elbaz*) was the primary actionable violation. *Id.* at 604. Because the primary violations of ATS alleged by Plaintiffs – torture, war crimes, CIDT – all occurred in Iraq, CACI argued that *Elbaz* compelled dismissal of Plaintiffs' claims.

While CACI's extraterritoriality motion remained pending, the Supreme Court decided *Egbert v. Boule*, 142 S. Ct. 1793 (2022). In *Egbert*, which is a *Bivens* case, the Court explained that courts are "long past 'the heady days in which [federal courts] assumed common-law powers to create causes of action.'"

Egbert, 142 S. Ct. at 1802 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001)). CACI moved to dismiss, arguing that *Egbert* set a standard for implying causes of action that Plaintiffs could not meet. Dkt. #1367. While that motion was pending, CACI advised the district court of this Court's decisions in *Dyer*, 56 F.4th at 281, and *Bulger*, 62 F.4th at 136, in which this Court acknowledged the extraordinarily high bar for judge-implied causes of action. Dkt. #1386.

C. The District Court's Decision on CACI's Motions to Dismiss

After holding CACI's motion to dismiss on extraterritoriality for two years, and its motion to dismiss regarding judge-made causes of action for one year, the district court denied both motions on July 31, 2023. Ex. 1. In the accompanying Memorandum Opinion, the district court acknowledged that recent Supreme Court decisions such as *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 143 S. Ct. 2522, 2532-33 (2023), held that under the "focus" test, the only fact that matters is the place where the conduct relevant to the statute's focus occurred. Ex. 2 at 19-20. Nevertheless, the district court relied on a *dissenting* opinion from a Fifth Circuit case decided in 2017 (before *Nestlé* and before *Abitron*) for the proposition that it should consider non-conduct factors such as the defendants' citizenship, the existence of a U.S. government contract, and the district court's own conception of "the domestic and foreign interests of the United States" in deciding whether

Plaintiffs' claims were sufficiently domestic, "[n]otwithstanding the Supreme Court's conduct-centered approach reflected in its 'focus' analysis." Ex. 2 at 19-20 (citing *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 209-11 (5th Cir. 2017) (Graves, J., dissenting)).

Indeed, the district court openly stated its view that its own conception of ATS's purpose and the United States' interests justified an approach to extraterritoriality that does not involve "'mechanically applying' the presumption against extraterritoriality":

> Moreover, "mechanically applying" the presumption against extraterritoriality "to bar these ATS claims would not advance the purposes of the presumption," because a basic premise of the presumption is avoiding "'international discord' resulting from 'unintended clashes between our laws and those of other nations,'" which is not present here.

Ex. 2 at 20.

Having concluded that it did not need to mechanically apply the "focus" test, the district court conducted the same multi-factor balancing of *all facts relevant to ATS claims* that this Court adopted in *Al Shimari III*:

> In sum, even after *Nestlé*, "CACI's status as a United States corporation," the "United States citizenship of CACI's employees," "facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States" by the United States government, *Al Shimari III*, 758 F.3d at 530-31, as well as Iraq's status as territory under United States control,

> all show that plaintiffs' claims involve a domestic application of the ATS.

Ex. 2 at 20.

With respect to CACI's motion regarding implied causes of action, the district court relied on its conclusion in 2018 that "'it is law of the case[] that adjudication of plaintiffs' claims does not impermissibly infringe on the political branches' and that allowing plaintiffs' claims to proceed is consistent with the purpose of the ATS." Ex. 2 at 36. The Court's law of the case determination relied on precedent from 2018 and earlier, Ex. 2 at 34-35, decisions that did not reflect recent precedents curtailing federal courts' power to imply causes of action.

On August 9, 2023, the day the district court approved a public version of its July 31 decision, CACI moved for certification under 28 U.S.C. § 1292(b). Dkt. #1398. The district court denied CACI's § 1292(b) motion on August 25, 2023. The district court called CACI's motion "an interesting one," but stated its view that in dismissing CACI's last appeal for lack of jurisdiction, "[t]he Fourth Circuit I think has sent a pretty clear signal that it does not want to entertain interlocutory appeals." Ex. 4 at 3-4 (Tr. of Aug. 25, 2023). With respect to extraterritoriality, the district court characterized "some of the early" Supreme Court extraterritoriality decisions as "a perfect example of how bad facts make bad law." *Id.* at 4.

V. REASONS WHY THE WRIT SHOULD ISSUE

A. Applicable Standard

Courts provide relief through a writ of mandamus when the petitioner "has shown a 'clear and indisputable right' to the requested relief," the petitioner has "no other adequate means to obtain the relief [it] desires, and "the court deems the writ 'appropriate under the circumstances.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 796 (4th Cir. 2018) (alteration in original) (quoting *Cheney*, 542 U.S. at 380-81).

"The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which the writ is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (second alteration in original) (quoting *Roche*, 319 U.S. at 26). Courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" and have issued the writ in the face of a judicial "usurpation of power" or a "clear abuse of discretion." *Id.* (quoting *Will*, 389 U.S. at 95).[9]

[9] Because ATS is a "strictly jurisdictional" statute that creates no substantive causes of action, *Kiobel*, 569 U.S. at 116 (2013), "[w]hether the ATS bars claims related to extraterritorial conduct presents an issue of subject matter jurisdiction." *Warfaa v. Ali*, 811 F.3d 653, 658 (4th Cir. 2016) (citation omitted). Whether the district court has the power to create the ATS causes of action Plaintiffs seek also goes directly to whether ATS presents a jurisdictional basis for Plaintiffs' claims.

While mandamus relief is not appropriate every time a district court errs in exercising jurisdiction, the writ ordinarily will issue when the district court's exercise of jurisdiction is "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine." *Holub*, 290 F.2d at 855-56 (holding that mandamus relief was justified because it was "clear beyond doubt that the court has no jurisdiction"); *see also Abelesz v. OTP Bank*, 692 F.3d 638, 653 (7th Cir. 2012) (issuing writ of mandamus to direct dismissal of suit because the plaintiffs "simply do not come close " to meeting requirements for establishing jurisdiction); *In re United States*, 463 F.3d 1328, 1337-38 (Fed. Cir. 2006) (issuing writ of mandamus because "the Court of Federal Claims clearly erred by not dismissing this case" for lack of subject matter jurisdiction); *In re Impact Absorbent Techs., Inc.*, No. 96-3496, 1996 WL 765327, at *3 (6th Cir. Dec. 18, 1996) (applying *Holub* standard and issuing writ because district court clearly lacked jurisdiction); *Bell v. Sellevoid*, 713 F.2d 1396, 1403 (8th Cir. 1983) (issuing writ of prohibition because plaintiff's claim was "so clearly outside the jurisdiction of the federal courts they [petitioners] should not be compelled to go through a federal trial"); *BancOhio Corp. v. Fox*, 516 F.2d 29, 33 (6th Cir. 1975) (issuing writ because "[t]he jurisdictional question in the present case, however, can in no way be characterized as difficult").

The subject matter jurisdiction issues raised by CACI are not close questions under current precedent. Whether influenced by a prejudgment that this case will go to trial if not settled,[10] a perceived dictate from this Court not to allow interlocutory appellate review,[11] or an abiding view that recent Supreme Court precedents represent "bad law,"[12] or resulting from a simple misreading of binding precedent, the district court's rulings on extraterritoriality and implied causes of action evince a "failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine." *Holub*, 290 F.2d at 855-56. Thus, the district court's refusal to give effect to clearly-applicable, binding precedent fits comfortably within the class of erroneous exercises of jurisdiction for which a writ of mandamus is appropriate.

B. The District Court's Extraterritoriality Decision Is Plainly Erroneous in Light of Current Binding Precedent

In *Al Shimari III*, this Court acknowledged that *Kiobel* did not "state a precise formula for our analysis" and that the proper test for extraterritoriality under ATS "may be explained in greater detail in future Supreme Court decisions." 758 F.3d at 529. The Supreme Court has now provided that guidance.

---

[10] Ex. 3 at 52-53 (Tr. of Feb. 27, 2019).

[11] Ex. 8 at 15 (Tr. of June 15, 2018); Ex. 4 at 3-4 (Tr. of Aug. 25, 2023).

[12] Ex. 4 at 4 (Tr. of Aug. 25, 2023).

In *RJR Nabisco*, the Court observed that the extraterritoriality test for ATS claims is the same "focus" test applicable to every other statute. 579 U.S. at 337. The Court emphasized in *RJR Nabisco* that the *only* conduct that matters for extraterritoriality purposes is the conduct relevant to the statute's focus, "regardless of any other conduct that occurred in U.S. territory." *Id.* In *Nestlé*, the Supreme Court reaffirmed that the "focus" test applies to ATS and that general corporate activity such as decisionmaking is irrelevant to an extraterritoriality analysis. 141 S. Ct. at 1937.

In *Abitron*, the Supreme Court emphasized the mechanical nature of the "focus" test. For statutes with no extraterritorial application, courts "must identif[y] the statute's 'focus' *and* as[k] whether the *conduct relevant to that focus* occurred in United States territory." *Abitron*, 143 S. Ct. at 2528 (alterations in original) (internal quotations and citations omitted). As the Court explained:

> Step two is designed to apply the presumption against extraterritoriality to claims that involve both domestic and foreign activity, separating the activity that matters from the activity that does not. After all, we have long recognized that the presumption would be meaningless if any domestic conduct could defeat it. Thus, [i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad. And if the relevant conduct occurred in another country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory.

Id. at 2529 (internal quotations and citations omitted). *Abitron* also emphasized that the relevant inquiry is not the place of the statute's *focus*, but the place of the *conduct* relevant to the statute's focus. *Id.* at 2532-33.

This Court has acknowledged that the "focus" test is the mandatory test for extraterritoriality. In *Roe*, which involved the Trafficking Victims Protection Act, the Court declined to affirm the district court's reliance on the *Al Shimari III* test for extraterritoriality and affirmed on the alternative ground that the "focus" test supported entry of judgment. *Roe*, 917 F.3d at 240; *see also Elbaz* (holding that courts "must" apply the "focus" test when assessing extraterritoriality challenges).

The district court's Memorandum Opinion, however, resists and ultimately evades the Supreme Court's extraterritoriality precedents. *RJR Nabisco*, *Nestlé*, and *Abitron* mandate a mechanical test for extraterritoriality, one that identifies a statute's focus, determines the conduct relevant to the focus, and "separate[es] the activity that matters from the activity that does not" to determine extraterritoriality. *See Abitron*, 143 S. Ct. at 2529.

The district court, however, has granted itself leeway to use its own views of "the domestic and foreign interests of the United States" to decide extraterritoriality through a balancing of all facts relating to Plaintiffs' claims, "[n]otwithstanding the Supreme Court's conduct-centered approach reflected in its 'focus' analysis." Ex. 2 at 19-20. The district court concluded that its own views

of the purpose of the presumption against extraterritorially give it the prerogative to avoid "'mechanically applying' the presumption against extraterritoriality." *Id.* at 20.

The Supreme Court has adopted a mandatory, mechanical test for extraterritoriality that, by design, promotes predictability of results and is not dependent on the variability of individual judges' value judgments. It is not within the district court's powers to decide against mechanically applying the "focus" test formulated by the Supreme Court in favor of a fluid approach more to its liking. The district court may view the Supreme Court's recent extraterritoriality precedents as "bad law" based on "bad facts,"[13] but they are law nonetheless, and district courts must follow them. As Judge Floyd succinctly observed in the last appeal in this case, "*RJR Nabisco* controls." Ex. 7 at 12.

And the "focus" test, when faithfully applied, plainly renders Plaintiffs' claims extraterritorial. All of Plaintiffs' claims are secondary liability claims. The object of a secondary liability claim is the primary unlawful conduct itself, so extraterritoriality for a secondary liability claim is determined by where the primary violation occurred. *Elbaz*, 52 F.4th at 604. In this case, the alleged primary violations are abuses Plaintiffs allegedly suffered at the hands of U.S. soldiers in Iraq.

[13] Ex. 4 at 4-5 (Tr. of Aug. 25, 2023).

The Court's analysis in *Elbaz* applies with full force to the ATS. The ATS provides jurisdiction "over a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The only *actus reus* referenced in the statute is the commission of a tort in violation of the law of nations. The torts at issue in this case are torture, war crimes, CIDT. Conspiracy and aiding abetting are not themselves torts, but are bases for holding defendants "secondarily liable for the wrongful acts of others." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 484 (2023); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (aiding and abetting liability establishes circumstances under which a defendant may be held liable under international law for aiding and abetting *the violation of that law by another*" (emphasis added)).[14]

In *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), this Court made the common-sense observation that the object of secondary liability under ATS is the primary conduct in violation of international law, holding that aiding and abetting liability requires proof of practical assistance *with the purpose of assisting* in the international law violation. *Id.* at 398.[15] Consistent with *Elbaz*, the United States'

---

[14] This Court adopted *Presbyterian Church* as the law of this Circuit on aiding and abetting. *Aziz*, 658 F.3d at 398.

[15] That ATS is a jurisdictional statute only does not change the "focus" analysis. As explained in *Morrison* with respect to implied causes of action under the Exchange Act of 1934, the "focus" test looks to the conduct prohibited by the statute even if the statute itself does not create a private damages action. *Morrison*,

position in *Nestlé* was that secondary liability claims under ATS are extraterritorial if the underlying torts themselves occur overseas,[16] though the Supreme Court did not need to decide this issue to reject the plaintiffs' claims.[17]

These precedents establish beyond doubt that claims seeking to impose secondary liability on U.S. citizens for international law violations allegedly occurring in Iraq do not qualify as a domestic application of ATS. *See Adhikari*, 845 F.3d at 193-94 (rejecting ATS claims involving alleged primary violations of international law occurring in Iraq as impermissibly extraterritorial). The district

---

561 U.S. at 261 n.5. The conduct prohibited under ATS is the commission of a tort in violation of the law of nations. 28 U.S.C. § 1350.

[16] Brief of the United States as *Amicus Curiae* at 28, *Nestle USA, Inc. v. Doe*, No. 19-416 (U.S. Sept. 2020) ("To the extent a cause of action for aiding and-abetting is cognizable under the ATS at all, its 'focus' is the underlying principal conduct."), *available at* 2020 WL 5498509.

[17] Moreover, even if, contrary to *Elbaz*, the relevant conduct for extraterritoriality could be viewed as the allegedly conspiratorial or aiding-and-abetting conduct, the district court's ruling would still be plainly erroneous. The gravamen of Plaintiffs' theory of liability is that CACI interrogators in Iraq instructed soldiers to "rough up" detainees. The domestic conduct identified by the district court, much of which is inconsistent with the actual record, is neither conspiratorial nor aiding and abetting. Mem. Op. at 25-31. With one exception, the domestic conduct identified by the district court is general corporate activity that is not actionable under ATS. *See Nestlé*, 141 S. Ct. at 1937. The district court also references a CACI employee in Virginia receiving an email from a former employee making vague references to misconduct by soldiers in Iraq, with the district court placing weight on the CACI employee's failure to report the email to Army officials. Mem. Op. at 27-28. Left unsaid by the district court is that the email states that the Army was already investigating the undescribed misconduct (*see* Ex. 9), and that, in any event, the failure to report wrongful conduct does not qualify as aiding and abetting. *Twitter*, 143 S. Ct. at 488-89.

court's evasion of the Supreme Court's "focus" test is thus plainly erroneous, justifying mandamus relief to stop this judicial usurpation of power. *Holub*, 290 F.2d at 855.

C. The Court's Conclusion That It Could Imply the Causes of Action Plaintiffs Assert Is Plainly Incorrect

The district court's assessment of its power to imply causes of action fares no better. Recent Supreme Court precedent demonstrates just how disfavored judge-made causes of action have become:

> At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a range of policy considerations . . . at least as broad as the range . . . a legislature would consider. . . . Unsurprisingly, Congress is far more competent than the Judiciary to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain.

Egbert v. Boule, 142 S. Ct. at 1802-03. This Court recently quoted with approval Justice Gorsuch's observation in *Egbert* that the Court's separation-of-powers test "left 'a door ajar and [held] out the possibility that someone someday might walk through it even as it devises a rule that ensures no one . . . ever will." *Dyer*, 56 F.4th at 277 (alterations in original) (quoting *Egbert*, 142 S. Ct. at 1793 (Gorsuch, J., concurring)). Even more recently, this Court observed in *Bulger* that the judiciary's authority to create any causes of action "is, at best, uncertain." 62 F.4th at 136 (quoting *Egbert*, 142 S. Ct. at 1802-03).

In the face of these precedents, the district court offered two reasons why it could continue to imply damages remedies in this case: (1) the "law of the case" doctrine excused it from evaluating the propriety of judge-implied causes of action in light of recent precedents; and (2) recent decisions in *Bivens* cases have no bearing on judges' powers to create new ATS claims. Both premises are transparently incorrect.

The law of the case doctrine does not shield prior court orders from reexamination when "controlling authority has since made a contrary decision of law applicable to the issue." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). A district court's discretion to invoke law of the case is particularly limited "in the context of motions to reconsider issues going to the court's Article III subject matter jurisdiction." *Id.* Thus, the law of the case doctrine provides no license for district courts to evade binding intervening precedent.

Moreover, in identifying the law of the case, the district court relied on this Court's prior extraterritoriality and political question decisions as supposedly rejecting separation-of-powers challenges to Plaintiffs' claims. Ex. 2 at 34. But extraterritoriality is a question of statutory construction, and has nothing to do with separation of powers. *United States v. Skinner*, 70 F.4th 219, 224 (4th Cir. 2023). Moreover, the political question inquiry addressed by this Court concerned a

narrow question of fact – whether CACI personnel in Iraq were under the "direct control" of the U.S. military. *Al Shimari III*, 758 F.3d at 535. This inquiry had nothing to do with the completely distinct set of separation-of-powers concerns that underlie judicial creation of private rights of action, specifically the proper allocation of lawmaking power and judicial competence to make policy decisions typically associated with enacting legislation. *Egbert*, 142 S. Ct. at 1802-03.

The district court's attempt to distinguish recent precedents as "*Bivens* only" also cannot withstand scrutiny. As CACI explained to the district court, the separation-of-powers test for recognizing *Bivens* actions and for recognizing ATS actions is exactly the same. *Ziglar* (a *Bivens* case) and *Jesner* (an ATS case) are illustrative:

***Ziglar v. Abbasi*, 137 S. Ct. 1858 (2017)**	***Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018)**
"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . . courts must refrain from creating the remedy in order to respect the role of Congress . . . ."	"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." (omission in original) (quoting *Ziglar*, 137 S. Ct. at 1858)

And the Supreme Court has not just used the same *words* to describe the required separation-of-powers test; it has repeatedly treated *Bivens* and ATS decisions interchangeably in applying that test. In *Jesner*, an ATS case, the Court relied on three *Bivens* cases in observing that judge-created causes of action are

disfavored because "the Legislature is in the better position to consider if the public interest would be better served by imposing a new substantive legal liability."[18] In *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), a *Bivens* case, the Court quoted and relied on *Jesner* for the propositions that (1) caution is required before implying damages actions "[i]n both statutory and constitutional cases," and (2) "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 742, 744, 747.

One year later, the plurality opinion in *Nestlé*, an ATS case, cited *Hernandez* for the proposition that "our precedents since *Sosa* have clarified that courts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress." *Nestlé*, 141 S. Ct. at 1937 (citing *Hernandez*, 140 S. Ct. at 735). And *Egbert*, a *Bivens* case, completed the circle, with the Court's majority opinion quoting the *Nestlé* plurality in holding that "'even a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (quoting *Nestle*, 141 S. Ct. at 1937). Thus, Supreme Court precedent over five cases running from *Ziglar* to *Egbert* makes clear that there is a single separation-of-powers test applicable to *Bivens* and ATS claims, and the Court has used both types of claims to develop and refine that

[18] *Jesner*, 138 S. Ct. at 1402 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), and *Ziglar*, 137 S. Ct. at 1857).

test. Indeed, in *Dyer*, this Court quoted *Nestlé* (an ATS case) for the proposition that "'even a single sound reason to defer to Congress' will be enough to require the court refrain from creating a *Bivens* remedy." *Dyer*, 56 F.4th at 281 (quoting *Nestlé*, 141 S. Ct. at 1937 (plurality opinion)).

When current precedent is given effect, Plaintiffs' proposed implied causes of action do not pass muster. In *Egbert*, the Supreme Court concluded that a claim that a border patrol agent roughed up an American smuggling suspect, in the United States, had enough of a national security context to require courts to refrain from implying a damages remedy. 142 S. Ct. at 1804-05. In *Dyer*, this Court held that the impact of allowing photography of a TSA pat-down was sufficiently connected to national security and foreign affairs to preclude a judge-made cause of action. 56 F.4th at 280. The foreign affairs and national security nexus is much closer here, where Plaintiffs were captured and detained by the U.S. military and held at a war-zone interrogation facility in Iraq, and where Plaintiffs seek to hold CACI liable for abuses allegedly committed against them by U.S. soldiers.

In *Egbert*, *Dyer*, and *Bulger*, the Supreme Court or this Court held that the mere existence of an alternative remedial structure, even if ineffective or unavailable to the plaintiff before it, categorically precludes a judge-created cause of action. *Egbert*, 142 S. Ct. at 1806-07 (grievance procedure of uncertain utility); *Dyer*, 56 F.4th at 280 (remedial claim process that did not apply to the plaintiff);

Bulger, 62 F.4th at 140-41 (process for challenging prison transfer that decedent did not have time to use). Here, an administrative claim process was available for bona fide claims of detainee abuse, *Saleh v. Titan*, 580 F.3d 1, 2 (D.C. Cir. 2009), but Plaintiffs elected not to utilize it. Under *Egbert*, *Dyer*, and *Bulger*, that is fatal to Plaintiffs' ATS claims.

While this Court has rightly wondered whether a judge-created cause of action is *ever* permissible under current Supreme Court precedent, *Dyer*, 56 F.4th at 277, this is not a case at the margins. It falls squarely within the zone of claims involving national security interests (certainly more so than *Egbert* and *Dyer*), and involves a request for judge-made causes of action where an alternative remedial structure has been eschewed by Plaintiffs. This is not the extraordinary case where the judiciary is better equipped than Congress to decide whether to authorize and define a private right of action.

D. CACI Lacks an Adequate Means to Obtain the Requested Relief Other than a Writ of Mandamus

The district court's Order denying CACI's motions to dismiss is not a final judgment from which an appeal of right exists, nor is it an appealable collateral order. While this Court has held that a petitioner need not make a futile motion for § 1292(b) certification before seeking mandamus relief, *In re Fluor Intercontinental*, 803 F. App'x 697, 700 (4th Cir. 2020), CACI went through that

process and the district court summarily denied CACI's motion for § 1292(b) certification. Ex. 4.

As set forth in Section V.A, *supra*, the availability of an appeal after final judgment is not an adequate means for relief when the district court's exercise of jurisdiction is "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine." *Holub*, 290 F.2d at 855-56. CACI meets this standard. With respect to extraterritoriality, Judge Floyd expressed surprise three years ago that the district court was still using law of the case as a justification for applying *Al Shimari III* instead of the "focus" test required by *RJR Nabisco*. Ex. 7 at 12. The district court's approach has gotten no better with age. In the three years since Judge Floyd's observation, the Supreme Court has decided *Nestlé* and *Abitron*, and this Court has noted the mandatory nature of the "focus" test in *Elbaz*. The district court's conclusion that it has the power to avoid a "mechanical" application of the mechanical "focus" test is either a willful defiance of higher judicial authority or a clear failure to understand what is required by binding precedent. Either possibility supports mandamus relief.

But there are reasons other than the clear absence of jurisdiction that make waiting for a postjudgment appeal inadequate in this case. Any trial of this action necessarily will require factual development regarding Plaintiffs' treatment while

in U.S. custody. The United States has asserted the state secrets privilege to withhold from discovery the identities of interrogators participating in the few interrogations of Plaintiffs, as well as detailed interrogation plans and reports from Plaintiffs' interrogations. But there will be live witnesses who have personal knowledge of facts that the United States has deemed a state secret. When these witnesses testify, the questions and answers will be walking a tightrope on the edges of classified state secrets.

The trial of this action also will put into the public eye military and CACI personnel who served honorably and have not been implicated in any mistreatment of detainees.[19] While innocent of any wrongdoing, their names will be disclosed at trial and available to persons who might desire to do harm to those associated with U.S. military operations in Iraq generally or at Abu Ghraib prison specifically. *Cf. In re Roman Catholic Diocese of Albany, N.Y.*, 745 F.3d 30, 36 (2d Cir. 2014) (postjudgment appeal of personal jurisdiction ruling was not an adequate means of relief where ongoing litigation "implicates significant confidentiality interests"). These harms cannot be remedied by allowing CACI a postjudgment appeal if it were to lose at trial.

[19] The identities of persons serving at Abu Ghraib prison are not a state secret. Evidence connecting military or civilian interrogation personnel to a particular detainee, however, has been declared a state secret by the United States and the district court.

E. Issuance of the Writ Is Appropriate Under the Circumstances

CACI meets the requirements for mandamus relief. The district court has rejected the notion that it must hew to the "Supreme Court's conduct-centered approach reflected in its 'focus' analysis." Ex. 2 at 19-20. While the "focus" test is mandatory, the district court has exempted itself from "'mechanically applying' the presumption against extraterritoriality" based on its own view that the Supreme Court's "focus" test does not "advance the purposes of the presumption." Ex. 2 at 20. With respect to implied causes of action, the district court's premise that *Bivens* cases are inapposite to the ATS context does not withstand even cursory review of recent precedents.

While mandamus is a drastic remedy, its quintessential use is to correct judicial overreach such as is occurring in this case. Moreover, the two substantive issues addressed in this petition, extraterritoriality and implied causes of action, involve questions of law that can be decided promptly on the existing record. Therefore, deciding CACI's petition on the merits is a good use of scarce appellate-court resources.

VI. CONCLUSION

For all of these reasons, the Court should issue a writ of mandamus directing the district court to dismiss this case.

Respectfully submitted,

/s/ John F. O'Connor

John F. O'Connor
Linda C. Bailey
Molly Bruder Fox
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
joconnor@steptoe.com
lbailey@steptoe.com
mbfox@steptoe.com

William D. Dolan, III
LAW OFFICES OF WILLIAM D. DOLAN, III, PC
8270 Greensboro Drive, Suite 700
Tysons Corner, Virginia 22102
(703) 584-8377 – telephone
wdolan@dolanlaw.net

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rule of Appellate Procedure 21(d), this petition contains 7,797 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 21(d) and 32(c)(2), which make the typeface requirements of Federal Rule of Appellate Procedure 32(a) applicable to petitions for extraordinary writs, because this petition has been prepared in a proportionately-spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

September 7, 2023

/s/ John F. O'Connor
John F. O'Connor

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 7th day of September, 2023, in the manner indicated below, on the following:

The Honorable Leonie M. Brinkema (by hand delivery)
United States District Judge
United States District Court
for the Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314

Cary Citronberg, Esq. (by email and U.S. Mail)
Zwerling/Citronberg, PLLC
114 North Alfred Street
Alexandria, VA 22314
cary@zwerling.com

/s/ John F. O'Connor
John F. O'Connor