No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E
Plaintiffs-Appellees

and

TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E
Plaintiffs

v.

CACI PREMIER TECHNOLOGY, INC.
Defendant and 3rd-Party Plaintiff - Appellant,

and

TIMOTHY DUGAN, CACI INTERNATIONAL INC; L-3 SERVICES, INC.
Plaintiffs

and

UNITED STATES OF AMERICA; JOHN DOES 1-60
Third-Party Defendants.

(Caption continued on inside cover)

On Appeal From The United States District Court
For The Eastern District of Virginia, Case No. 1:08-cv-00827
The Honorable Leonie M. Brinkema, United States District Judge

PUBLIC REDACTED VERSION
REPLY BRIEF OF APPELLANT
CACI PREMIER TECHNOLOGY, INC.

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
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 Appellant CACI Premier Technology, Inc.

UNITED STATES OF AMERICA
Amicus Supporting Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' fervor to avoid the merits of CACI's appeal is palpable. Their brief does not address the merits until page 38, and their defense of the district court's rulings is cursory at best. Plaintiffs' brief barely acknowledges that on remand they abandoned any claim that CACI personnel directly mistreated them and dismissed their common-law claims, leaving only claims under the Alien Tort Statute ("ATS"), the reach of which has been significantly narrowed by recent Supreme Court precedent. While the district court denied CACI crucial discovery concerning Plaintiffs' treatment, the discovery allowed confirms U.S. military control over the military and CACI personnel who actually interrogated Plaintiffs. This, combined with developments in the law regarding ATS claims, makes clear that the district court erred in failing to dismiss this case

REPLY TO PLAINTIFFS' STATEMENT OF FACTS

A. Plaintiffs Mischaracterize Their Backgrounds and the Circumstances of Their Apprehension

Plaintiffs present a distorted narrative that they were caught up in an indiscriminate roundup and later exonerated. Even the inadequate discovery allowed refutes Plaintiffs' narrative.

Al Shimari was a 30-year member of the Ba'ath Party and an officer in the Iraqi Army (*see* Dkt. #952-3 at AS-USA-053955, 053959, 053969-70).[1] U.S. military forces captured him after finding a machine gun, ammunition, six rocket-

[1] All "Dkt." citations are to the district court docket.

propelled grenade launchers, night vision goggles, and blasting caps in a pickup truck parked at his house, and two IEDs and bags of gunpowder in the bushes outside his house (*id.* at AS-USA-053947, 053953-54). [redacted] (*id.* at AS-USA-053948-49, 053954). [redacted] (*id.* at AS-USA-053981-84, 053994-054003, 054028).

U.S. military forces found Al-Zuba'e driving a vehicle on the BOLO ("be on the lookout") list, and his name and appearance matched a person wanted for planning attacks on Coalition forces (Dkt. #952-04 at AS-USA-054130, 054136-44, 054153-55, 054159-60). [redacted] (*id.* at 054168, 054170). [redacted] (*id.* at AS-USA-054160).

[redacted] Dkt. #952-1, Ex. 7 at AS-USA-035151, 035159.

B. Plaintiffs Mischaracterize the Evidence Regarding Their Treatment and Interactions with CACI Personnel

Plaintiffs' assertion that "CACI employees repeatedly interrogated Plaintiffs" is refuted by the record. Pl. Br. 5. Plaintiffs have no knowledge of

meaningful interaction with CACI employees. CACI Br. 11-13. Without exception, intelligence interrogations by CACI employees resulted in an interrogation report entered into the U.S. military's classified database. CACI Br. 9-10. Those records show two intelligence interrogations of Plaintiffs by CACI personnel – one each of Al Shimari and Al-Zuba'e. CACI Br. 11-13. In addition, a CACI Interrogator may have questioned Al-Ejaili during the U.S. military's search for weapons after a detainee shot an MP with a smuggled pistol, but "there was nothing violating the [Interrogation Rules of Engagement] in that particular Interrogation." CACI Br. 13. That is the sum and substance of meaningful interactions between Plaintiffs and CACI employees.

Plaintiffs back into their representation that "CACI employees repeatedly interrogated Plaintiffs" by counting any time Plaintiffs allege a civilian interrogated them as an interrogation by a CACI employee. Pl. Br. 5. However, personnel at Abu Ghraib conducting interrogations in civilian clothes included [redacted], Army CID, [redacted] and other U.S. government agents. [redacted], 2690, 2696, [redacted], 2712, [redacted]-81, 3164, 3365. These interrogators, unlike the CACI employees, were not operationally controlled by the U.S. Army military intelligence ("MI") brigade and did not file post-interrogation reports in the MI brigade's database. CACI Br. 9-10. Thus, the record does not support Plaintiffs' construct that any interaction they allege with a civilian is chargeable to CACI.

Lacking evidence tying CACI personnel to the abuse they allege, Plaintiffs rely on the Taguba and Jones/Fay reports to assert that CACI personnel were part

of an overarching conspiracy to mistreat all detainees. Pl. Br. 7-9. Plaintiffs mischaracterize these reports.

Plaintiffs note that Army MPs Frederick and Graner testified that military and civilian interrogators gave MPs instructions about detainee treatment (Pl. Br. 9). Plaintiffs omit that they also testified that instructions from interrogators did not involve general detainee treatment, but were specific to a detainee assigned to that interrogator. JA.2472-73, 2700-01, 2718-19. The Taguba report implicated only one CACI employee (Steven Stefanowicz) as having given inappropriate instructions to MPs, and even that was a "suspicion." JA.1785 at ¶ 13. When deposed, MG Taguba testified that [redacted] (Dkt. #1210-1 at 91-93); [redacted] (*id.* at 50-51, 60-61); [redacted] (*id.* at 76-77); [redacted] (*id.* at 52-54, 91-93, 96).

[redacted] *Id.* at 75-76, 157-58. [redacted] *Id.* at 93-94.

The Jones/Fay report rejects Plaintiffs' narrative of an overarching "torture conspiracy," attributing most of the abuses at Abu Ghraib prison to "individual

criminal misconduct," and concludes that "[m]ost, though not all, of the violent or sexual abuses occurred separately from scheduled interrogations and did not focus on persons held for intelligence purposes." JA.1801 at ¶ 3; JA.1802 at ¶ 2. The Jones/Fay report found that forty-five military and civilian interrogation personnel engaged in some form of misconduct, only four of which were CACI employees. JA.1945-60. The misconduct alleged with respect to these four employees has no connection to Plaintiffs.

Mr. Stefanowicz, whose only connection to Plaintiffs is that he might have conducted an impromptu questioning of Al-Ejaili, is alleged to have used working dogs in interrogations without approval; pushed or kicked a detainee into his cell with his foot; failed to report a detainee's allegation of mistreatment by a linguist; directed that a detainee be shaved and dressed in women's underwear; and lied to investigators about using working dogs. JA.1959.

The allegations concerning Daniel Johnson relate to his questioning of an Iraqi police officer suspected of smuggling a pistol to a detainee. The report finds that Johnson encouraged an MP to twist the officer's handcuffs; allowed the MP to cover his nose and mouth with his hand for a few seconds; threatened to bring the MP and working dogs into the room; required the officer to squat backwards in a plastic chair; and failed to prevent him from being photographed. JA.1957.

Timothy Dugan allegedly pulled a detainee from a jeep and dragged him to an interrogation booth; consumed alcohol; and was insufficiently receptive to instruction from his Army team leader and military trainers. JA.1956. Again, the misconduct alleged regarding Johnson and Dugan is different from the abuse

alleged by Plaintiffs and Plaintiffs cannot tie Johnson or Dugan to their treatment at Abu Ghraib prison.

Finally, an unidentified CACI employee is one of seventeen persons alleged to have used an unspecified interrogation technique on an unidentified detainee that they believed in good faith had been approved by the military. There is no connection between this finding and Plaintiffs. The United States did not prosecute any CACI employees, nor did it take adverse action against CACI, which "indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." *Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009).

C. Plaintiffs' Brief Distorts the Record Regarding Operational Control of CACI Personnel

Plaintiffs' description of operational control over CACI employees is contradicted by the record. CACI Br. 8-11. Plaintiffs purport to rely on testimony from Colonel Pappas, Colonel Brady, and [redacted] for the proposition that CACI supervised the operations of its interrogators, but all three officers testified without equivocation that the U.S. military chain of command had exclusive operational control over CACI interrogators. JA.1265 (Pappas); JA.1410-11 (Brady); [redacted]

Plaintiffs quote half-sentences out of context to change these officers' testimony. In the most egregious example, [redacted]

[redacted]

ARGUMENT

A. This Court Has Appellate Jurisdiction to Review the District Court's Rulings

1. As this Court Held in *Al Shimari II*, CACI has a Right of Immediate Appeal from the District Court's Denial of Derivative Immunity

This Court has already held, sitting *en banc*, that a denial of derivative immunity to CACI is an immediately appealable order so long as the ruling is conclusive and rests on principles of law. *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205, 221-22 (4th Cir. 2012) ("*Al Shimari II*"). That ruling is the law of the case, and no intervening precedent commands a different result. CACI meets the requirements for an immediate appeal.

Under the collateral order doctrine, an immediate right of appeal lies from orders that "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006). "Whether to recognize an order as collateral is not 'an individualized jurisdictional inquiry,' but rather is based 'on the entire category to which a claim belongs.'" *Al Shimari II*, 679 F.3d at 219 n.11 (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009)). Consequently, the Court does not

"in each individual case engage in *ad hoc* balancing to decide issues of appealability." *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 315 (1995)).

In *Al Shimari II*, a decision rendered before any discovery had taken place in this case, this Court rejected appellate jurisdiction because the district court's derivative immunity ruling was "tentative." *Al Shimari II*, 679 F.3d at 221-22. Importantly, though, the Court expressly held that it would have appellate jurisdiction if the immunity ruling rested on undisputed material facts or presented an abstract question of law:

> More generally, ***we would have jurisdiction over an appeal like the ones attempted here "if it challenge[d] the materiality of factual issues.***"
>
> . . . .
>
> ***Hence, insofar as an interlocutory appeal of a denial of immunity requires resolution of a purely legal question*** (such as whether an alleged constitutional violation was of clearly established law), or an ostensibly fact-bound issue that may be resolved as a matter of law (such as whether facts that are undisputed or viewed in a particular light are material to the immunity calculus), ***we may consider and rule upon it.***

Id. (emphasis added) (internal citations omitted).

The district court's denial of derivative immunity is conclusive and grounded in law. The ruling occurred after CACI had taken the discovery the district court was willing to allow, and is based on the district court's legal conclusion that the United States lacked immunity for Plaintiffs' claims. JA.2345-46. Thus, the district court's derivative immunity ruling is premised on an

"abstract issue of law" for which a right of immediate appeal is available. *Al Shimari II*, 679 F.3d at 221-22.

Plaintiffs make a three-step argument against appellate jurisdiction. They contend that CACI's immunity defense is based solely on derivative *sovereign* immunity; that the United States does not have a right of immediate appeal when it is denied sovereign immunity; and that, therefore, CACI should be denied an immediate appeal. Each step of Plaintiffs' argument is flawed. Moreover, Plaintiffs' argument would mean that CACI is never permitted a pretrial appeal of a denial of immunity, effectively nullifying its right not to stand trial.

Plaintiffs premise that CACI's entitlement of immunity is based solely on derivative *sovereign* immunity is wrong. CACI asserted an entitlement to derivative immunity under the principles applied in *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1447-48 (4th Cir. 1996), which provides immunity to contractors performing delegated governmental functions for which the United States would be immune from suit. *Id.*; *see* CACI Br. 25; Dkt. #1153 at 5. Such a denial of derivative immunity to a government contractor is immediately appealable. *Mangold*, 77 F.3d at 1446.

Moreover, while a few courts, but not all, have distinguished between federal sovereign immunity and state/foreign sovereign immunity for purposes of immediate appealability,[2] this Court has drawn no such distinction. Rather, this

[2] *Compare Pullman Constructions Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (United States lacks a right of immediate appeal from denial of sovereign immunity) *with In re World Trade Ctr. Disaster Site Litig.*, 521 (Continued …)

Court has repeatedly reinforced the general proposition that "[o]rders denying sovereign immunity are immediately appealable collateral orders." *Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994); *Rux v. Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006) (same); *see also Yousuf v. Samantar*, 699 F.3d 763, 768 n.1 (4th Cir. 2012) ("A pretrial order denying sovereign immunity is immediately appealable under the collateral-order exception to the final judgment rule."); *S.C. Wildlife Fed. v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008) ("Denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable under the collateral order doctrine."); *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 447 (4th Cir. 2006).

Moreover, as the Second Circuit observed in *In re World Trade Center*, Supreme Court precedent repeatedly has characterized the United States' sovereign immunity as entailing a right not to be sued, which brings with it a right to immediately appeal a denial of immunity. 521 F.3d at 191 (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and *Minnesota v. United States*, 305 U.S. 382, 387 (1939)). Thus, the threshold premise of Plaintiffs' jurisdictional argument – that the United States' sovereign immunity is not an immunity from suit – is not the law.

Finally, even if the United States lacked a right to appeal immediately a denial of sovereign immunity, it does not follow that the same rule would apply to

---

F.3d 169, 191 (2d Cir. 2008) (rejecting *Pullman* as inconsistent with Supreme Court precedent casting sovereign immunity as a right to be free from suit).

derivative immunity. As Plaintiffs acknowledge, the few courts holding that the United States lacks a right of immediate appeal have done so on the basis that the United States created the federal courts, "is no stranger to litigation in its own courts," and thus does not need the protections attendant to a right of immediate appeal. Pl. Br. 28 (quoting *Pullman*, 23 F.3d at 1168). The federal courts are not CACI's "own courts" in the way they are for the United States, so the rationale used by the few courts denying the United States a right of immediate appeal does not apply.

2. Because CACI's Appeal Is Proper, This Court Has a Duty to Satisfy Itself That This Court and the District Court Have Subject Matter Jurisdiction

Plaintiffs' brief calls it a "made-up jurisdictional theory" that this Court always has a duty to satisfy itself that this Court and the district court have subject matter jurisdiction. Pl. Br. 34. Plaintiffs' theory, notably unaccompanied by citation to authority, is that this Court need only dither with the niceties of subject matter jurisdiction for appeals after a *final judgment*, and that in other appeals the Court has a freewheeling power to exercise whatever jurisdiction it wants. Pl. Br. 35.

But "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004).

Moreover, Plaintiffs' argument cannot be squared with *Kiobel v. Dutch Petroleum Co.*, 569 U.S. 108, 114 (2013), which reached the Supreme Court on *interlocutory appeal*. *Id.* After granting review, the Supreme Court followed its own admonition about satisfying itself that subject matter jurisdiction existed and directed the parties to file supplemental briefs addressing extraterritoriality. *Id.*

The need to evaluate subject matter jurisdiction is particularly acute given the district court's derivative immunity ruling. The district court ruled that the United States would lack immunity for Plaintiffs' claims but did not address the other requirements for derivative immunity. JA.2345-46. If this Court concludes that the district court erred – as CACI believes it should – the Court would have to decide whether to address the other requirements for derivative immunity or to remand them for consideration in the first instance by the district court. It would make little sense to remand an issue for consideration where this Court has not satisfied itself that the district court even has jurisdiction to act.

3. This Court Has Pendent Jurisdiction to Review the District Court's Preemption Ruling

Plaintiffs' brief suggests that the only common issue running between immunity and preemption in this case is that they involve "warfighting." Pl. Br. 33. This is not correct. Derivative immunity requires consideration of whether the United States would have sovereign immunity for Plaintiffs' claims and whether CACI's actions were authorized by the United States. CACI Br. 25-28. Preemption requires consideration of whether the United States would have sovereign immunity for Plaintiffs' claims and whether CACI's employees were

"integrated into combatant activities over which the military retains command authority." CACI Br. 53 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). This overlap is not "abstract," as Plaintiffs suggest; the overlap is nearly complete.

B. CACI Is Entitled to Derivative Immunity

1. CACI's Assertion of a Third-Party Claim Against the United States Does Not Preclude It from Challenging the District Court's Denial of Derivative Immunity

Consistent with their strategy of avoiding the merits, Plaintiffs argue that by filing third-party claims against the United States, CACI waived or is estopped from asserting derivative immunity. Pl. Br. 35-38. Plaintiffs did not make this argument in the district court in opposing CACI's immunity motion (Dkt. #1172), and cannot raise it now.[3] Even if Plaintiffs had argued waiver and estoppel below, their arguments misconstrue the contingent nature of third-party claims.

"A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty *who is or may be liable to it* for all or part of the claim against it. Fed. R. Civ. P. 14(a) (emphasis added). A third-party claim is contingent because it applies only if the third-party plaintiff's defenses against the

[3] "[I]f a party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court." *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) (alteration in original); *United States v. Benton*, 523 F.3d 424, 428 (4th Cir. 2008) ("Failure to raise an argument before the district court typically results in the waiver of that argument on appeal.").

plaintiff have failed. *Id.* Accordingly, third-party complaints commonly make allegations that are inconsistent with those asserted in defending against the plaintiff's claims. As one commentator observed:

> However, the third-party defendant may not object to alternative pleading by the third-party plaintiff even if there is an inconsistency between the claims pleaded by that party against the original plaintiff and the claims against the third-party defendant; Rule 8[(d)] expressly permits this type of pleading.

6 Wright & Miller, *Federal Practice & Procedure* § 1455 (3d ed. 2004); *see also Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1148-49 (9th Cir. 2007).

The premise of CACI's third-party complaint is that the United States is liable to CACI *if CACI is liable to Plaintiffs, which would mean that CACI had been found not entitled to derivative immunity*. CACI was at all times very clear that it was making a classic alternative claim. *See* JA.1209, 1214. This district court fully understood CACI PT's position, noting at oral argument that the gravamen of CACI's argument is that "if the Court does find that the government is immune, that they should have the benefit of the same immunity." Dkt. #752 at 12.

Indeed, the United States' sovereign immunity motion was still pending when CACI filed its derivative immunity challenge, and CACI again was crystal clear in arguing that both the United States and CACI have immunity for Plaintiffs' claims. CACI's derivative immunity challenge included over four pages of argument under the heading "The United States would be immune from suit if Plaintiffs had asserted their claims against the United States." Dkt. #1153 at 6-10.

The idea that CACI somehow hoodwinked the district judge as to its position on sovereign immunity is entirely without merit.

2. The District Court Erred in Denying Derivative Immunity to CACI

a. The United States Would Be Immune from Plaintiffs' Claims

Unsurprisingly, Plaintiffs barely defend the district court's ruling that the United States lacked immunity for Plaintiffs' claims. For eleven years, Plaintiffs have litigated claims that soldiers abused them, but never asserted a claim against the United States or any soldier. In opposing CACI's derivative immunity motion, Plaintiffs never contested sovereign immunity, arguing only that CACI was not entitled to derivative immunity. Dkt. #1172 at 10. Plaintiffs' actions speak louder than their words, supporting the inference that Plaintiffs believed the United States enjoyed sovereign immunity.

CACI's brief and the United States' *amicus* brief explain why allegations of *jus cogens* violations do not vitiate sovereign immunity. CACI Br. 19-24; U.S. Br. 7-14. Absent express statutory waiver, the United States has been immune from lawsuits of any kind since its founding. *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (2019). The ATS does not waive sovereign immunity. *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). None of the statutes containing express immunity waivers apply. U.S. Br. 10. In short, the United States' entitlement to immunity from Plaintiffs' claims is incontrovertible.

Plaintiffs urge that the district court appropriately found a waiver of sovereign immunity under the federal common law. Pl. Br. 42-45. The fatal problem with that endorsement of the district court's *sui generis* approach is that innumerable decisions hold that "a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *FAA v. Cooper*, 566 U.S. 284, 290 (2012) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Moreover, Congress has specifically foreclosed waiver for tort claims "arising in a foreign country" or "arising out of the combatant activities" during time of war. 28 U.S.C. § 2680(k), (j). The district court's common law analysis cannot overcome the clear and unequivocal statutory retention of sovereign immunity.

b. CACI Meets the Other Requirements for Derivative Immunity

Plaintiffs assert that immunity is unavailable because CACI was not performing a government function. Pl. Br. 38. Plaintiffs did not make this argument below (Dkt. #1172), and therefore cannot make it now. *See* note 3. In any event, Plaintiffs' argument is no better than frivolous. The record is unequivocal that CACI and military interrogators operated as an integrated team under plenary military control. CACI Br. 8-11. Congress regards interrogation of detainees as such an inherently governmental function that it now prohibits contract interrogators. *See* National Defense Authorization Act for FY2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2452.

Plaintiffs further argue that whether CACI complied with federal law and the government's instructions is intertwined with the merits and therefore must be

resolved at trial. Pl. Br. 39-41. Plaintiffs' argument fails because they have no evidence whatsoever in the over 4,500 pages of record that CACI engaged in any unlawful conduct or failed to follow government instructions with respect to them. CACI Br. 11-14. If Plaintiffs wanted to assert that CACI lacked immunity because its employees engaged in unauthorized conduct with respect to them, it was incumbent that they present specific record evidence to support their contention. They have no such evidence. Accordingly, CACI is entitled to derivative sovereign immunity. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014) ("*Burn Pit*"); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018).

C. Plaintiffs' Failure to Present Evidence of Domestic Conduct Comprising Violations of International Norms Requires Dismissal

RJR Nabisco, Inc. v. European Community requires application of the "focus" test to determine whether Plaintiffs' claims involve an impermissible extraterritorial application of ATS. 136 S. Ct. 2090, 2101 (2016). Under the focus test, a court examines only the conduct that the ATS seeks to regulate. If there is insufficient domestic conduct comprising the alleged violation of universally accepted and specific international norms, there is no jurisdiction. CACI Br. 32-35. CACI argued that, in the record here, there is no evidence of domestic conduct involving these Plaintiffs that violated international norms. *Plaintiffs' brief does not dispute this dispositive point; nor does their brief contend that they can satisfy the focus test.* That is fatal to jurisdiction.

Plaintiffs contend that the "touch and concern" standard of *Al Shimari III* remains the law. Pl. Br. 46. But *RJR Nabisco* holds that the focus test adopted in *Morrison v. Nat'l Austrl. Bank, Ltd.*, 561 U.S. 247, 264 (2010), applies to claims under ATS. *RJR Nabisco*, 136 S. Ct. at 2101. Plaintiffs' argument also is contradicted by *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), which applied the focus test for determining extraterritorial jurisdiction. And it is doomed by *Roe v. Howard*, 917 F.3d 229, 240 (4th Cir. 2019), where this Court cited *RJR Nabisco*'s focus test, and not *Al Shimari III*, as the controlling standard for ATS jurisdiction. *Roe*'s embrace of *RJR Nabisco* was preceded by other appellate decisions holding that the focus test, and not the touch and concern test, governs. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1125 (9th Cir. 2018) ("*Doe II*"); *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 194 (5th Cir. 2017).

Plaintiffs respond to this torrent by claiming that *Roe* held that *RJR Nabisco* did not reverse *Kiobel* and retained an emphasis on the relevant claim's connections to U.S. territory. Pl. Br. 47. This argument overreaches. What Plaintiffs present as a holding is *dicta* in footnote 6. That footnote expressly states that the Court was not resolving the effect of *RJR Nabisco* on *Kiobel*. Moreover, *RJR Nabisco* held that *Morrison* and *Kiobel* require the same standard for extraterritorial jurisdiction – the focus test. The Court cannot reasonably regard the *dicta* of footnote 6 as holding that *Al Shimari III*'s touch and concern test, with claims as the touchstone, remains valid.

Plaintiffs next suggest that *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), renders CACI's analysis "impossible," arguing that *Jesner* "expressly

affirmed *Kiobel*'s touch and concern test." Pl. Br. 46. This is demonstrably wrong. *Jesner* neither endorsed nor applied any touch and concern test. And in adopting a *per se* rule that liability under ATS does not extend to foreign corporations, *Jesner* is the antithesis of a touch and concern approach. Accordingly, *RJR Nabisco,* not *Al Shimari III*, controls and must be followed as intervening precedent.

Plaintiffs characterize as unproven CACI's contention that the focus of the ATS is torts committed in violation of universally-accepted and specific international norms. Pl. Br. 47. Tellingly, Plaintiffs offer no alternative "focus" of ATS. Nor do they address the multiple appellate court decisions finding the focus of the ATS to be exactly what CACI has argued. The Supreme Court has made clear that the focus of a statute is the object of its solicitude, which includes the conduct it seeks to regulate and the parties it seeks to protect. *WesternGeco*, 138 S. Ct. at 2137. In analyzing the focus of a statute, the Supreme Court has repeatedly looked to the text of that statute. CACI Br. 34.

The text of the statute is straightforward: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Given this text, the focus of the ATS is a model of clarity – a tort committed in violation of the law of nations or a treaty of the United States. The only relevant conduct for ATS jurisdiction is the conduct comprising the alleged international law violations. There is no dispute, on this record, that all conduct regarding the Plaintiffs and the alleged violations of international law – conspiracy and aiding and abetting –

occurred, if at all, in Iraq. The wholesale absence of domestic conduct leaves the Court without jurisdiction.

D. Plaintiffs' Claims Present Nonjusticiable Political Questions

In *Al Shimari IV*, this Court directed the district court to evaluate justiciability by examining the "evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place," *Al Shimari IV*, 840 F.3d at 160. This district court failed to do that. It denied CACI essential discovery (CACI Br. 6-7) and then refused to consider a fact-based political question challenge after CACI completed the limited discovery permitted. Plaintiffs argue that this Court's remand instructions required a fact-based political question analysis only for the "*alternative* theory" of discretionary acts in a legal "grey area" (Pl. Br. 52), but that is not what this Court commanded. *Al Shimari IV*, 840 F.3d at 159-61. The language of the quote itself references ***evidence*** and ***specific conduct*** to which Plaintiffs ***were*** subjected. *Id.* This language demands a factual examination.

Alternatively, Plaintiffs argue that the district court actually conducted the required factual analysis, a conclusory statement unadorned by citation to the record. Pl. Br. 52. But the district court's ruling on CACI's Rule 12(b)(1) motion focused on Plaintiffs' allegations and left open whether jurisdiction would exist once the factual record developed. JA.1054-57 (district court describing analysis at that stage of the political question doctrine as "premature" and admitting, "I haven't finished the job for the Fourth Circuit, have I?"). After discovery, the

district court denied CACI's justiciability challenge on "law of the case" grounds based on its earlier, admittedly incomplete analysis. JA.2275-76.

While Plaintiffs tout this Court's holding in *Al Shimari IV* that claims involving unlawful conduct do not implicate nonjusticiable political questions, *Plaintiffs cannot cite to any record evidence of unlawful conduct directed at them by CACI employees*. Unable to rely on the record, Plaintiffs offer CACI's concession that Plaintiffs' ***allegations*** involved unlawful conduct. Pl. Br. 52. True, but irrelevant. Allegations are insufficient to fend off a factual challenge to subject matter jurisdiction and cannot create a disputed issue that requires resolution concurrently with the merits. *Al Shimari IV*, 840 F.3d at 160-61 (citing *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009)); *see also* Pl. Br. 53.

Plaintiffs next raise a strawman argument that CACI interrogators need not have physically harmed Plaintiffs for liability to attach. Pl. Br. 53. There is zero evidence in the record CACI interrogators harmed Plaintiffs directly or indirectly, or conspired with anyone who did. CACI Br. 40-41. Thus, Plaintiffs' claims fall entirely within the political question doctrine as Plaintiffs likewise offer no evidence contradicting the military's actual control over CACI personnel or the sensitive military judgments inherent in interrogation operations at Abu Ghraib. Pl. Br. 52-53.

Finally, Plaintiffs assert the government's invocation of state secrets privilege in a manner that cripples CACI's ability to defend itself either does not harm CACI or harms Plaintiffs more. CACI does not doubt the sincerity of Secretary Mattis's privilege invocation, but the prejudice to CACI's defense is

clear. Plaintiffs totally ignore this Court's decision in *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007), deeming dismissal based on the state secrets privilege necessary if "the defendants could not properly defend themselves without using privileged evidence." CACI cannot defend itself adequately while being denied access to documentation showing the interrogation techniques approved by the U.S. military for Plaintiffs' interrogations and contemporaneous reports of the approaches used, as well as the identities of the CACI and military personnel participating in Plaintiffs' interrogations.

Plaintiffs' claim that the state secrets assertion prejudices them as much as CACI is inconsistent with what they argued below. When their goal was to limit CACI's ability to discover facts regarding Plaintiffs and their treatment, Plaintiffs repeatedly asserted that they did not need the information over which the government has invoked privilege. *See* Dkt. #912 at 2-3 ("The identities of linguists and analysts with whom Plaintiffs had direct contact therefore is not "essential" or "critical" . . . to Plaintiffs' affirmative proof."); Dkt. #987 at 6 (contending that unredacted interrogation plans and reports are "not necessary to resolve this case").

E. The Vigilant Doorkeeping Required by *Jesner* Preclude Application of ATS to Plaintiffs' Claims

The analytical framework mandated by *Jesner*, 138 S. Ct. at 1386, precludes judicial recognition of private rights of action under ATS that arise out of military operations in war. CACI Br. 44-48. Instead of engaging with the *Jesner*

framework, Plaintiffs cite to pre-*Jesner* decisions in an attempt to ignore this significant development in the law regarding ATS.

Plaintiffs argue that *Jesner*'s reasoning is "tethered" to its "narrow holding" and that this case is distinguishable because "the substantive norm against torture is universally recognized." Pl. Br. 49-50. But *Jesner* is one of a series of Supreme Court cases admonishing lower courts to be parsimonious in allowing ATS cases proceed and to defer to Congress in most instances. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004); *Kiobel*, 569 U.S. at 116. CACI acknowledges that torture is a recognized violation of international norms, and is not arguing that such claims are never actionable under ATS. Rather, CACI's argument is that separation-of-powers and foreign-relations concerns bar ATS claims *arising out of U.S. military operations in a war*. Indeed, *Jesner* makes clear that separation-of-powers and foreign-relations concerns are independent reasons for dismissal even when the proposed tort is actionable under ATS. 138 S. Ct. at 1394 (assuming that material support of terrorism is actionable but dismissing anyway).

Plaintiffs argue that the Torture Victims Protection Act ("TVPA") helps their position. Pl. Br. 50-51. Plaintiffs have the argument backwards. As *Jesner* makes clear, the lesson drawn from Congress's enactment of the TVPA is not that Congress supports private rights of action for alleged torture, but that Congress legislated in this area and elected not to create a private right of action for Plaintiffs' claims. *Jesner*, 138 S. Ct. at 1398, 1404; *see also* CACI Br. 46-47.

Plaintiffs quote a prior decision of this Court out of context to argue that the existence of ongoing hostilities does not prevent judicial relief. Pl. Br. 51 (quoting

Al Shimari IV regarding the political question doctrine). The issue is not whether some redress should be available for international law violations in a war, but whether judge-made private rights of action should supplement all of the existing and available means of redress for such violations. *Jesner* dictates that federal courts reject claims brought under ATS that implicate serious separation-of-powers concerns, concluding that it is for Congress, and not the courts, to create a private right of action.

F. Plaintiffs' Claims Are Preempted

The district court denied preemption at the motion to dismiss stage, concluding that the FTCA preempted only state-law claims. It denied preemption on summary judgment without explanation. Relying on *Saleh,* CACI explained that the FTCA can preempt an *international* law claim brought pursuant to ATS. CACI Br. 48-53. In response, Plaintiffs merely parrot the district court's myopic view that federal law cannot preempt a claim brought under ATS. Pl. Br. 54-55.

That approach ignores that causes of action brought under ATS are judge-made based on international norms. *Sosa*, 542 U.S. at 713. While Plaintiffs acknowledge that "federal statutory law can displace federal common law," they nevertheless argue that "[t]he FTCA was enacted to waive federal sovereign immunity for claims sounding in state tort law." Pl. Br. 55. Not surprisingly, they cite no support for that restrictive construction of the FTCA. There is, however, sound support for the proposition that the FTCA can preempt international law claims. As the Supreme Court recognized in *Sosa,* "[t]he application of foreign

substantive law [was] what Congress intended to avoid by the foreign country exception" to the FTCA. *Sosa*, 542 U.S. at 707. That applies with equal force to the combatant activities exception, particularly given that combatant activities generally arise outside the United States.

Plaintiffs next downplay *Saleh*, arguing that this Court disagreed with *Saleh*'s view of the "federal interest underlying the FTCA" in *Burn Pit*, 744 F.3d at 351. Pl. Br. 56. That is correct, but irrelevant. In *Burn Pit*, this Court found *Saleh's* view of the federal interest to be "too broad because it does not limit the interest of "eliminat[ing] . . . tort from the battlefield to actors under military control." *Id.* With that this Court then proceeded to "adopt the *Saleh* test" for preemption, recognizing that federal interests preclude allowing tort claims against a contractor when its employees are integrated into the military chain of command. *Burn Pit*, 744 F.3d at 351. CACI has demonstrated the unqualified integration and plenary control by the military over the interrogation activities of CACI personnel.

Plaintiffs argue that whether CACI could meet the *Saleh/Burn Pit* test for preemption "is a contested issue," and then point the Court back to their Statement of Facts. Pl. Br. 56. That is not an allowable response. Plaintiffs must demonstrate that there are specific and material facts in dispute which create a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A failure, as here, to identify specific facts requires entry of summary judgment. *See United States ex rel. Oberg v. Penn. Higher Ed. Assistance Agency*, 804 F.3d 646, 669 n.17 (4th Cir. 2015). Regardless, Section C of CACI's Reply to Plaintiffs' Statement of Facts lays bare Plaintiffs' mischaracterization of the record

regarding integration of CACI personnel into the military chain of command. The actual evidentiary record, which is what matters, does not give rise to a triable issue.

CONCLUSION

The Court should remand this case with instructions to dismiss the Third Amended Complaint.

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
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, VA 22102
(703) 584-8377
wdolan@dolanlaw.net

Counsel for Appellant CACI Premier Technology, Inc.

May 24, 2019

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

I, John F. O'Connor, hereby certify that:

1. I am an attorney representing Appellant CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the cover page, table of contents, table of authorities, certificates of compliance and service, and signature block) contains 6,497 words.

/s/ John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2019, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of the foregoing to be served by electronic mail and first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

Baher Azmy
Katherine Gallagher
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
bazmy@ccrjustice.org
kgallagher@ccrjustice.org

Attorneys for Appellees

/s/ John F. O'Connor