UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al.*, Plaintiffs, *v.* CACI PREMIER TECHNOLOGY, INC. Defendant.	)	Case No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

In this, CACI's tenth motion to dismiss, CACI seeks to repackage virtually every unsuccessful argument it has made throughout this litigation to fit under the banner of the Court's recent decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Yet, *Jesner*'s holding is nowhere near so broad as CACI suggests and too thin a reed to support CACI's proposed radical reinterpretation of decades of Alien Tort Statute ("ATS") litigation, let alone an effectively *sub silentio* reversal of several decisions of this Court and the Fourth Circuit.

While CACI seizes on, and inflates, select passages from the plurality opinion, what the Court actually did (as well as what it did not do) demonstrates its limited effect. Even though the Court in *Jesner* (as well as the Court in *Kiobel*) granted *certiorari* to decide the question of whether all corporations were categorically exempt from liability under the ATS, the Court (including concurring Justices Alito and Gorsuch) centered its concerns on the foreign policy implications of ATS litigation generally, which the Fourth Circuit has concluded are not present in this case, and the Court chose to exempt *foreign* corporations only. Despite being squarely presented with its second opportunity to do so, the Court chose not to foreclose liability for domestic corporations, nor did it question in any way *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), or reinterpret *Kiobel v. Royal Dutch Petroleum Co*, 569 U.S. 108 (2013). And contrary to CACI's proposition, the Court in no way imported a *Bivens* "new context" or "special factors" analysis into the ATS in general, nor could it have given the fundamental differences between implied constitutional torts at issue in *Bivens* litigation and judicially recognized causes of action authorized by the ATS *and* endorsed by *Sosa*.

Thus, the choices made by *Jesner* point to this conclusion: *Sosa*-based claims against domestic corporations that sufficiently "touch and concern" the United States under *Kiobel* survive. As this Court has already held, Plaintiffs' claims for torture, war crimes and cruel

inhuman and degrading treatment satisfy the *Sosa* standard and the corporate status of CACI does not undermine the application of the ATS to these norms. As the Fourth Circuit recognized, Plaintiffs' claims are far from novel; they are as old as *Filártiga v. Peña-Irala*, which the Supreme Court has repeatedly endorsed, and otherwise sit at the heartland of the ATS jurisprudence that has developed over the past 40 years. The *Jesner* ruling does nothing to overrule this long line of authority or to foreclose Plaintiffs' claims.

It is correct that *Jesner* reemphasized *Sosa*'s requirement that the courts should exercise caution and vigilance before recognizing common law causes of action under the ATS. But there is no evidence from *Jesner* that such "judicial caution" translates into a red light that would effectively halt the ATS in its 1789 form. And critically, the purported reasons for renewed caution that CACI identifies have *already* been carefully considered and resolved by this Court and the Fourth Circuit in Plaintiffs' favor. In *Al Shimari v. CACI Premier Technology, Inc*., 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"), the Fourth Circuit concluded that adjudicating Plaintiffs' claims of conduct that is unlawful under international and domestic statutory law raises no separation-of-powers problem and are not rendered non-justiciable under the political question doctrine. Likewise, *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (2014) ("*Al Shimari III*"), specifically resolves the dominant question raised in *Jesner* by concluding that adjudication of the universally recognized norms in this case against an American entity—as opposed to a foreign one—that accordingly "touch and concern" the U.S. would not cause diplomatic strife and would advance the core purpose of the ATS and American interests in preventing and punishing torture and war crimes. CACI not only uses the cover of a Supreme Court ruling to re-litigate questions decisively resolved in this litigation, it asks the Court to

narrow the ATS even further than Justice Gorsuch would have, who would only go so far so as to exempt any *foreign* defendant from ATS litigation.

The Executive Branch and Congress have specifically condemned and called for remediation of the abuses committed at Abu Ghraib, and have court-martialed a number of CACI's co-conspirators. This is important because if the ATS stands for anything, it is that to ensure harmony in the community of nations; the United States should not provide a "safe haven" for torturers.

LEGAL BACKGROUND

A. Judicial Recognition of Claims Pursuant to the ATS

In 1980, the landmark decision in *Filártiga v. Peña-Irala* put torturers on notice that, "whenever an alleged torturer is found and served with process by an alien within our borders, [28 U.S.C.] § 1350 provides federal jurisdiction" to hear a claim against them. 630 F.2d 876, 878 (2d Cir. 1980). In so doing, the Second Circuit revived a then little-used 1789 statute and began what has been nearly four decades of consistent affirmation by federal courts that, in accord with the obligation to "observe and construe the accepted norms of international law," *id.* at 877, Congress empowered district courts to vindicate law of nations violations against non-U.S. citizens, in tort.

Filártiga found that torture "violates established norms of the international law of human rights, and hence the law of nations," through a review of the sources of international law and declared that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." *Id.* at 880, 890.[1] To

[1] The court's finding was consistent with the views of the Executive Branch, which stated that "there is little danger that judicial enforcement [of ATS claims] will impair our foreign policy efforts," despite the fact that *Filártiga* involved torture committed overseas. Brief of the

determine whether the norm at issue—torture—fell within the ambit of the law of nations and thus the ATS, the court stated, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-733 (2004), the Supreme Court endorsed both *Filártiga*'s holding and analysis. Sanctioning the line of cases since *Filártiga* that recognized certain "international norm[s] intended to protect individuals," *Sosa*, 542 U.S. at 730-31, the Court held that the ATS authorizes federal courts to use their common law powers to recognize a cause of action for a "narrow class" of international law violations that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Sosa*, 542 U.S. at 724-25, 729, 732. The Court affirmed that to fall under the jurisdiction of the ATS, the norm at issue must be "specific, universal and obligatory," and confirmed that the Second Circuit's analysis in establishing torture as an actionable norm was "consistent" with this standard. *Id.* at 732.[2]

The Court also identified several areas for "judicial caution" before recognizing claims that might implement ATS jurisdiction, including the more limited role of federal courts post-*Erie R.R. Co. v Tompkins*, 304 U.S. 64 (1938). *Sosa*, 542 U.S. at 725-26. The "general practice" of courts post-*Erie* "has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* Likewise, the Court instructed that "great caution" should

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United States as Amicus Curiae, *Filártiga*, No. 79-6090, 1980 WL 340146 at *22 (2d Cir. June 6, 1980).

[2] The legislative history of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note, expressed strong support for the *Filártiga* decision, H.R. Rep. No. 102-367, pt. 1, at 4 (1991) (stating that the "*Filártiga* case met with general approval"), and indicated Congress' intent in passing the TVPA to "mak[e] sure the torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 102-249, at 3 (1991).

be exercised when identifying "new norms" of international law to lessen the "risks of adverse foreign policy consequences." *Id.* at 727-728.

In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Supreme Court revisited the scope and application of the ATS. The initial question upon which the Court granted *certiorari* was whether corporations could be held liable under the ATS. Following oral argument, the Court ordered briefing on a new question: whether and when courts can recognize ATS claims over extraterritorial conduct. *Id.* at 112-113.

The new question, and the decision that followed, reflected the Court's apprehension that a case such as *Kiobel* —brought by foreign plaintiffs against foreign defendants, for conduct that occurred exclusively in foreign countries, and which involved a foreign government's own action—could lead to "diplomatic strife," *id.* at 116-117, 124.[3] *Kiobel* in no way questioned *Sosa*'s holding that the ATS authorizes federal court jurisdiction over certain international law violations, and in fact affirmed "that the First Congress did not intend the provision to be 'stillborn,'" *Id.* at 115 (quoting *Sosa*, 542 U.S. at 714). It applied a general presumption against extraterritoriality but demonstrated it was not a categorical bar to ATS claims. *Id*. at 124-25 (presumption can be displaced if claims sufficiently "touch and concern" the United States)

Kiobel expressed no concern about the corporate status of defendants and implicitly approved of corporate liability in cases asserting more than the "mere corporate presence" in the United States of a foreign corporation. *Id.* at 125.

[3] The Court's analysis was animated by the principles underlying the presumption against extraterritoriality, which serves to guard against potential "unintended clashes between our laws and those of other nations which could result in international discord," and from the Judiciary "erroneously adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 115, 116 (citations omitted).

B. Judicial Recognition of Torture, War Crimes and CIDT as Cognizable Causes of Action Under ATS

The norms at issue in the case—torture, war crimes and cruel, inhuman and degrading treatment—have been widely recognized as establishing a cognizable cause of action under the ATS, including by this Court. In this Circuit, all three norms have been deemed cognizable—including against private military contracting corporations. *See, e.g., In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 574-74, 582 (E.D. Va. 2009); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 715 (D. Md. 2010), *rev'd*, 679 F.3d 201 (4th Cir. 2011); *Yousuf v. Samantar*, No. 1:04cv1360, 2012 U.S. Dist. LEXIS 122403 (E.D. Va, Aug. 28, 2012), *aff'd*, 699 F.3d 763 (4th Cir. 2012); *see also Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009), *aff'd*, 402 Fed. Appx. 834 (4th Cir. 2010). Courts around the country have come to the same conclusion—including in cases against corporations. *See, e.g.,* torture: *Sosa*, 542 U.S. at 728, 732 (quoting with approval *Filártiga*, 630 F.2d at 890); *Chavez v. Carranza*, 559 F.3d. 486, 492 (6th Cir. 2009); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Romero v. Drummond*, 552 F.3d 1303, 1315 (11th Cir. 2008): war crimes: *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 763-64 (9th Cir. 2011); *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995); *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part) (war crimes are an example of "universally condemned behavior" for which "universal jurisdiction exists to prosecute"); CIDT: *Baloco v. Drummond Co.*, 640 F.3d 1338, 1345 (11th Cir. 2011); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092-1095 (N.D. Cal. 2008).

The United States effectively agreed that a remedy for torture should exist under the ATS, including in cases against domestic corporations, when it concluded that the Federal Tort Claims Act ("FTCA") should not preempt state laws that are commensurate with torture. Br. of Amicus

Curiae United States, *Al Shimari v. CACI International, Inc.*, No. 09-1335, at 22-23, 26 (4th Cir. Jan. 14, 2012).

C. Judicial Recognition of Liability of Corporations

Each Court of Appeals that has adjudicated cases against corporations, except for the Second Circuit, has recognized that corporations are subject to liability under the ATS.[4] In each of these cases, the Courts of Appeals have determined that nothing in the text or the history of the ATS warranted establishing a bar for all claims against corporations. *See, Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017–1021 (7th Cir. 2011); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1020–1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 40–55 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *see also Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 528-31 (4th Cir 2014).

The decisions of these Courts of Appeals accord with the views of the Executive Branch across different administrations as expressed in amicus briefs in both the *Kiobel* and *Jesner* cases on the specific issue of corporate liability. Br. of Amicus Curiae United States, *Kiobel v. Royal Dutch Petroleum.* No. 10-1491 (U.S. Dec. 21, 2011) at 22 (finding that "'vigilant doorkeep[ing]'" and "exercise[ing] 'great caution'…does not justify a *categorical exclusion* of corporations from civil liability under the ATS") (emphasis added); Supplemental Br. of Amicus Curiae United States, *Jesner v. Arab Bank.* No. 16-499 (U.S. June 27, 2017) at 9 (finding that "[a] corporation can […] be a proper defendant in a civil action based on an *otherwise-valid claim* under the ATS") (emphasis added). As the Executive Branch stated in *Kiobel*, there is "no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the

[4] It was the circuit split emanating from the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010) which rendered it an outlier on the issue of corporate liability that led to the Supreme Court's grant of *certiorari* in *Jesner*.

potentially judgment-proof or unavailable individual actor, and to bar recovery against the company on whose behalf he was acting." *Kiobel* U.S. Br. 24.

D. Relevant Proceedings in this Case

1. The *Sosa* Norm

In its March 18, 2009 opinion denying in part CACI's first motion to dismiss, the district court declined to exercise jurisdiction over the Plaintiffs' ATS claims, reasoning that "tort claims against government contractor interrogators are too recent and too novel to satisfy the *Sosa* requirements for ATS jurisdiction." *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 705 (E.D. Va. 2009). On remand, following an *en banc* decision dismissing CACI's appeal for lack of jurisdiction, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014), Plaintiffs moved for reconsideration of that decision, because of "the legal consensus that has developed subsequent to the Court's 2009 ruling both in this Circuit and around the nation" which recognized that corporations are not exempt from the reach of the ATS. (Dkt. 145 at 7.) In reinstating Plaintiffs' ATS claims, the court found that they all satisfy the *Sosa* standard, and that these claims can be enforced against a U.S. corporation such as CACI. (Dkt. 159.)

More recently, this Court confirmed that conclusion, finding ample support in domestic statutory and case law that Plaintiffs' claims satisfy the *Sosa* norm. *Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595 (E.D. Va. 2017). In so doing, the Court rejected CACI's argument that the TVPA and the Anti-Torture Statute provide exclusive remedies for acts of torture. This Court found that "whether these statutes create a cause of action is beside the point because courts have recognized that torture is a common law cause of action under the ATS." *Id.*

at 600.[5] This Court proceeded to affirm that Plaintiffs sufficiently stated a claim for torture, war crimes and CIDT under the ATS. *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-827, 2018 U.S. Dist. LEXIS 28267, at *44-53 (E.D. Va. Feb. 21, 2018).

2. Presumption Against Extraterritoriality and Absence of International Discord

Following the Court's decision in *Kiobel*, CACI again moved to dismiss based on the preemption against extraterritoriality. After this Court granted CACI's motion, the Fourth Circuit vacated the decision and rejected CACI's categorical reading of *Kiobel* to bar all claims relating to torts occurring abroad. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"). The Fourth Circuit found that Plaintiffs' claims—against a U.S. corporation under contract with the U.S. government and alleging a conspiracy with U.S. personnel—"touch and concern" the United States with "sufficient force," so as to displace the presumption. *Id.* at 530-31.

Critically, the Fourth Circuit concluded that this is not the kind of case that would risk "international discord" because the substantive norm of torture is universally recognized and because there is no risk of haling foreign nationals into U.S. courts, "given that defendants are United States citizens." *Id.* at 530. It also expressly concluded that litigation will not require "unwarranted judicial interference in the conduct of foreign policy," because "the political branches have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals." *Id*. (internal citations omitted).

[5] The court quoted Judge Posner's analysis with approval: "because the ATS makes violations of the law of nations actionable in U.S. courts 'the fact that Congress may not have enacted legislation implementing a particular treaty or convention ... does not make a principle of customary international law evidenced by the treaty or convention unenforceable in U.S. courts." 263 F. Supp. 3d at 600 (quoting *Flomo*, 643 F.3d at 1022).

Indeed, the court found that providing "aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad" accorded with the intent expressed by Congress through the enactment of the TVPA and 18 U.S.C. § 2340A. *Id.* at 531.

3. Political Question Doctrine and Separation of Powers

The Fourth Circuit also reversed the district court's subsequent dismissal under the political question doctrine. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"), *vacating* 119 F. Supp. 3d 434 (E.D. Va. 2015). The Fourth Circuit held that the political question doctrine does not apply because "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity," *Al Shimari IV,* 840 F.3d at 157; that "the commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function committed to a coordinate branch of government," *id.* at 158; that "courts are competent to engage in the traditional juridical exercise of determining whether particular conduct complied with applicable law," be it a statue or treaty. *Id.* at 158, 159 (citing *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012). It further found that judicially manageable standards exist that would not implicate the authority of coordinate branches because "the terms 'torture' and 'war crimes' are defined at length in the United States Code and in international agreements to which the United States has obligated itself." *Id.* at 161 (citing 18 U.S.C. §§ 2340-2340A (implementing U.S. obligations at a signatory to the Convention Against Torture) and 18 U.S.C. § 2441 (implementing U.S. obligations under the Geneva Conventions)).

E. *Jesner v. Arab Bank*

In *Jesner*, the Court granted *certiorari* on this question: "whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability." Petition for Writ of Certiorari, *Jesner v. Arab Bank, PLC,* , No. 16-499, 2016 WL 6069100, at * i (U.S. Oct. 5, 2016); 137 S. Ct. 1432 (2017) (granting cert petition). This same question had been granted in *Kiobel*, but

deferred after the Court ordered re-argument to address the separate question of the extraterritorial application of the ATS. *Kiobel*, 569 U.S. at 114. The Petitioners and Respondent in *Jesner* briefed this question on these—categorical—terms.[6]

Yet, the Court chose not to answer this question, and instead, revealing its steady concern about foreign policy implications surfaced in *Sosa* and reiterated in *Kiobel*, pivoted to a narrower and focused one: "whether common-law liability under the ATS extends to a *foreign* corporate defendant." *Jesner*, 138 S. Ct. at 1398 (emphasis added). In addressing this question, *Jesner* re-affirmed the vitality of *Sosa*, *see id.* at 1399, noting that courts evaluating whether to recognize a common-law cause of action under the ATS should ask first, whether the alleged violation is of "a norm that is specific, universal and obligatory," (the *Sosa* norm) and second, whether courts should exercise "judicial discretion" in authorizing a claim, considering the important role of the coordinate branches "in managing foreign affairs." *Id.* at 1399 (quoting *Sosa*, 542 U.S. at 732, 727); *see also id*. at 1409 (Alito, J., concurring) (identifying *Sosa*'s "two-step process"). The *Jesner* plurality referred to this second step as "judicial caution" or "vigilant doorkeeping." *Id.* at 1390.

Under the first step of *Sosa*, the *Jesner* plurality considered the question arguably left open in footnote 20 of *Sosa*—whether the *Sosa* norm can extend to corporations, and noted the competing views on that question. *Id*. at 1400-02. The plurality ultimately chose not to resolve that broader question, opting instead to focus on whether *Sosa*'s second step cautions against

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[6] *Compare* Brief of Petitioners, *Jesner v. Arab Bank, PLC*, No. 16-499, 2017 U.S. S. Ct. Briefs LEXIS 2177, at 35, 48-49 (U.S. June 20, 2017) (arguing that "corporate liability flows from the text, history and purpose of the ATS," and "*Sosa v. Alvarez-Machain*, does not preclude corporate liability") *with* Brief of Respondent, 2017 U.S. S. Ct. Briefs LEXIS 2980, at *35 (arguing "The Law of Nations Imposes No Specific, Universal and Obligatory Duty on Corporations, Either Generally or in this Context").

recognizing ATS liability against foreign corporations. The majority in *Jesner* determined that caution should be exercised when considering claims against foreign corporations for two reasons.

First, the Court observed that, as a general matter, Congress is better suited institutionally to develop causes of action that generate new forms of "substantive legal liability." *Id.* at 1402-03 (relying on *Sosa* to affirm that "courts must exercise 'great caution' before recognizing new forms of liability"); *see also id*. at 1410 (Alito, J., concurring) (emphasizing that courts fashioning common law should "effectuate congressional policy") (citations and quotations omitted).

Second, the Court concluded that it would be "inappropriate" for the Court to do so because of the distinct foreign policy implications arising from permitting individuals to "sue foreign corporations in federal courts in the United States." *Id*. at 1406. Because the ATS is designed to promote "harmony in international relations," *id*., and "avoid[] diplomatic strife," *id*. at 1410 (Alito, J., concurring), the Court identified numerous reasons why ATS claims against foreign corporations would "create unique problems" and defeat that purpose. *Id*. at 1407. Specifically, the litigation created "significant diplomatic tensions" with the government of Jordan, which considered the suit a "grave affront" to its sovereignty, and that the U.S. government regularly relies upon defendant Arab Bank for counterterrorism partnerships. *Id.* at 1406-7 (citations and quotations omitted). Noting that foreign sovereigns have objected to ATS suits against their own corporations, the Court concluded that, "these are the very foreign-relations tensions the First Congress sought to avoid." *Id.* at 1407; *see also id.* 1410-11 (Alito, J., concurring) (identifying foreign government objections to suits in U.S. courts). The Court also cautioned that authorizing ATS suits against foreign corporations might encourage foreign

nations to "hale our [corporations] into their courts for alleged violations of the law of nations." *Id*. at 1405 (citations omitted).

Accordingly, the Court limited its decision to foreclosing suits against foreign corporations only. *Id*. at 1407. Even Justice Alito, who has expressed broader skepticism of ATS litigation, *see id.* at 1409 (questioning whether *Sosa* was "correctly decided") would have gone no farther than excluding foreign corporations from ATS liability. *See id*. at 1409 ("this Court should not create causes of action under the ATS against foreign corporate defendants."); *id*. at 1410 (same). And Justice Gorsuch, who would have gone further, would have foreclosed liability against all foreign defendants—but, taking into account the existing Supreme Court precedent as set forth in *Sosa* and *Kiobel*, left intact *Sosa* claims against all U.S. defendants that "touch and concern" the United States under *Kiobel*. 138 S. Ct. at 1419 (arguing ATS liability should not extend "to punish *foreign* parties for conduct that could not be attributed to the United States" and thereby risk reprisal against the U.S.) (Gorsuch, J., concurring) (emphasis in original).

ARGUMENT

A. *Jesner*'s Holding is Limited to the Distinct Cautions Pertaining to ATS Claims Against Foreign Corporations

Jesner's holding is narrow and precise: "foreign corporations may not be defendants in suits brought under the ATS." 138 S. Ct. at 1407. *Jesner*'s reasoning is tethered to that narrow holding: the judiciary should generally defer to Congress before imposing substantive norms and domestic-law liabilities on foreign corporate forms because suits because of the risk of creating diplomatic strife. *Id*. at 1406-07. *Jesner* held that, given the risk of diplomatic strife attendant to suits against foreign corporations, that class of defendant is exempt from ATS liability. *See* 138 S. Ct. at 1406 (plurality opinion); *see also* 138 S. Ct. at 1410 (Alito, J., concurring) (excluding foreign corporations); 138 S. Ct. at 1419 (Gorsuch, J., concurring) (urging no ATS liability for

any foreign entity). But asked to reach a broader holding precluding *all* corporate liability, the Court, for the second time in six years, declined to do so. *Cf.* 138 S. Ct. at 1437 (Sotomayer, J., dissenting) ("Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose.").

Despite stray language that, taken out of context, could be read to portend what CACI claims is a broader rollback of the ATS, the decision did not engraft a *Bivens* framework into ATS jurisprudence, nor did the Court overrule *Sosa* or question *Kiobel*. As such, *Jesner* leaves in place *Sosa*-authorized claims that "touch and concern" the United States brought against domestic corporations such as CACI. *See* Dkt. 679, Dkt. 159.

1. *Jesner* Does Not Displace ATS Claims Against Domestic Corporations for *Sosa*-Based Claims

While *Jesner* held that foreign corporations cannot be sued in U.S. courts for law-of nations violations, there are two critical things the Court did *not* do. First, despite certifying for review the question whether corporations are categorically exempt from ATS liability (for the second time) and despite Respondent's urging, the Court elected not to so hold. *Jesner*, 138 S. Ct. at 1407 (plurality opinion); *id*. at 1409 (Alito, J., concurring). Second, the Court did not overrule *Sosa* or reinterpret *Kiobel*—indeed, the plurality and Justice Alito endorsed *Sosa* and applied its second step in exercising judicial caution to not extend ATS claims to foreign corporations, while Justice Gorsuch would have gone one step further to exclude all foreign entities. While *Jesner* counseled "vigilant doorkeeping," in recognition of ATS claims, it did not instruct courts to close the door altogether to the ATS nor, given its endorsement of *Sosa*, did it choose to freeze the ATS in its 1789 form. *Id.* at 1398.

This means at least eight justices in *Jesner* voted to leave in place ATS liability for *Sosa*-based claims against domestic corporate defendants, at least where the "relevant conduct" satisfies *Kiobel*'s presumption-against-extraterritoriality test. *Id.* at 1395. This Court and the Fourth Circuit have already held that: (i) Plaintiffs' claims for torture, war crimes and cruel, inhuman and degrading treatment satisfy *Sosa*, Dkt. 679 at 47, (ii) that domestic corporations are subject to the ATS, Dkt 159, and (iii) that the claims satisfy *Kiobel*'s presumption against extraterritoriality, *Al Shimari III*. Thus, *Jesner* presents no jurisdictional bar to Plaintiffs' claims, which remain at the core of the ATS. As with its characterization of the Court's holding in *Kiobel*, CACI reads too much into *Jesner* and, as with *Kiobel*, the Court left ample room for core ATS claims such as those brought by Plaintiffs.

2. *Jesner* Does Not Incorporate the *Bivens* Analysis Into the ATS

CACI reads *Jesner* to have effectively engrafted a *Bivens* framework, including that doctrine's "new context" and "special factors" analyses, directly into the ATS. (Dkt. 812 at 3, 13-15 (suggesting existence of remedies from statutory schemes narrower than remedies available here forecloses ATS relief).) While some of the principles involving implied causes of action have come to animate both areas of law, there is no evidence in *Jesner* that the Supreme Court believes that the *Bivens* and the ATS frameworks are coterminous. To begin, none of the opinions in *Jesner* ever use the term "special factors" or "new context" —the touchstones in *Bivens* jurisprudence, *see Ziglar v. Abassi*, 137 S. Ct. 1843 (2017) —and the plurality only passingly mentions *Bivens* in characterizing the nature of the claims that were at issue in *Correction Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001). *See Jesner*, 138 S. Ct. at 1403.

Moreover, the *Bivens* framework could *not* be incorporated into the ATS because of fundamental differences in the nature of the claims. *Bivens* claims involve causes of action implied directly from the Constitution, absent any congressional authorization; it is that absence

of *any* congressional authorization to the judiciary to impose monetary damages on individual federal government employees that has brought heightened skepticism to *Bivens*. *See Ziglar*, 137 S. Ct. at 1848. In contrast, the ATS is a statute by which Congress has affirmatively conferred onto federal courts the power to "recognize private causes of action" involving a limited class of serious violations of the law of nations. *Sosa*, 542 U.S. at 724; *see also* 28 U.S.C. § 1350 ("the district courts shall have original jurisdiction of any civil action by an alien *for a tort only* […]") (emphasis added). And that recognition is consistent with federal courts historic competence to adjudicate claims involving international law. *See The Paquete Habana*, 175 U.S 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"). Moreover, to read a broad special-factors type reasoning into the ATS would implausibly render *Jesner* deeply inconsistent with *Sosa* because *Bivens*-specific "special factors" will frequently militate against even those claims that easily satisfy *Sosa* and *Kiobel*.

Indeed, Congress has viewed nearly forty years of judicial recognition of federal common law claims under the ATS with apparent approbation. It even chose to enact the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350, note, to supplement the ATS by providing human rights protections to U.S. citizens that the courts had been enforcing under the ATS—but that otherwise was not available given the ATS restriction of common law remedies to "aliens." *See* S. Rep. No. 102-249, at 5 (1991) (explaining the TVPA is designed to "enhance the remedy already available under" the ATS by "extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad"); *see* H.R. Rep. No. 102-367, pt. 1, at 3 (1991) ("Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and

specific remedy, not limited to aliens, for torture and extrajudicial killing"); *Sosa*, 542 U.S. at 731 (characterizing TVPA as "supplementing," not replacing, "the judicial determination" in *Filártiga*). Thus, it would actually violate separation of powers for a court to engraft judge-made law regarding implied constitutional torts onto a congressionally enacted statute; courts are not free to ignore or dispose of grants of jurisdiction. *See id.* at 725 (nothing "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute").

Given *Jesner*'s holding and its refusal to displace the ATS domain carefully outlined in *Sosa* and *Kiobel*, the *most* that can be said about *Jesner*'s applicability in future cases is that it limits ATS claims to certain classes of defendants. Following *Jesner*, the ATS landscape now appears to be as follows: (i) under *Sosa*, courts must ensure that a claim raises a norm that is sufficiently "specific, universal and obligatory"; (ii) under *Kiobel*, a court must ask if the "relevant conduct" underlying a claim sufficiently "touch[es] and concern[s] the United States so as to overcome the presumption against extraterritoriality; and (iii) under *Jesner*, courts cannot extend their jurisdiction over a *Sosa*-based claim that overcomes *Kiobel*'s presumption-against-extraterritoriality against foreign corporate defendants, and should keep at the forefront the foreign policy implications of recognizing such claims.

Because this Court and the Fourth Circuit have already held that Plaintiffs allege *Sosa*-based norms for conduct identified as unlawful by the political branches, Dkt. 679 at 47, that the relevant conduct satisfies *Kiobel*'s presumption against extraterritoriality, *Al Shimari III*, 758 F.3d at 529-30, and that domestic corporations are appropriate defendants, Dkt. 159, *Jesner* is no bar to relief in this case.

B. Plaintiffs' Claims Are at the Core of the ATS

Plaintiffs' claims remain at the heartland of ATS jurisprudence and nothing in *Jesner* undermines that status. In *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), the Second Circuit revived the long-dormant ATS and found that it authorized recognition of causes of action for torture because that violation is akin to the class of offenses understood to be prohibited by the law of nations in 1789: "For purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind." In *Sosa*, the Supreme endorsed *Filártiga*'s recognition of torture as a cognizable ATS norm. 542 U.S. at 732. Indeed, even the *Jesner* plurality endorsed that conclusion: "International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators 'enem[ies] of all mankind.' *Sosa*, 542 U.S. at 732." *Jesner*, 138 S. Ct. at 1401-02. *See also Kiobel*, 569 U.S. at 127-28 (Breyer, J., concurring). Many cases, including in this Circuit, since have endorsed torture as a *Sosa*-based norm, *see infra* at pp. 6-7, and have recognized war crimes and CIDT as cognizable. *See id*; *see also Al Shimari IV*, 840 F.3d at 161 (plaintiffs allege "familiar torts based on long-standing common law principles.").[7]

[7] Thus, even *if* this Court were to accept CACI's suggestion to import a *Bivens*-type "special factors" analysis into the ATS context, that analysis would counsel against disrupting settled ATS law. In *Ziglar v. Abassi*, the Supreme Court concluded that claims questioning the discretionary policy-making judgments of highest-level government officials in the exigent post 9/11 context for constitutional claims not previously recognized by the Court, raised "special factors" precluding the recognition of a *Bivens* remedy against the Attorney General, FBI Director and INS Director. 137 S. Ct. at 1860. Still, it did not disrupt the core of *Bivens* claims. Justice Kennedy emphasized that the ruling in *Ziglar* "is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. Instead, "[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1856-57. The same must be true here.

In addition, this Court and all but one of the Courts of Appeal considering the question have held that corporations are subject to ATS liability. *See* Dkt. 159; *see infra* at pp. 7-8. Had the Supreme Court wished to question that line of cases, let alone overrule it, it would have been overt in undertaking such a radical re-writing of ATS jurisprudence.

Nevertheless, CACI raises again here, an argument raised and rejected repeatedly in this litigation: that these claims are novel because they "aris[e] on the battlefield" and involve the "conduct of war." (Dkt. 812 at 4-5.) This is incorrect as a matter of fact and law. As a matter of fact, the conduct here did not occur on any battlefield nor did it involve any discretionary, split-second decision-making during active conflict. The conduct occurred in a prison location outside the zone of combat against civilian detainees; and, inside that prison facility it occurred pursuant to a deliberative conspiracy between CACI personnel and low-level MPs, to abuse detainees primarily outside of formal interrogations. *See Al Shimari IV*, 840 F.3d at 152 ("[M]ost of these acts of abuse occurred during the nighttime shift at the prison ... [and] were possible because of a 'command vacuum' at Abu Ghraib, caused by the failure of military leaders to exercise effective oversight over CACI interrogators and military police.").

Indeed, as the Fourth Circuit has emphasized, beatings of detainees of the kind at issue here does not constitute a battlefield activity—they constitute a crime. *See United States v. Passaro*, 577 F.3d 207, 218 (4th Cir 2009) ("No true 'battlefield interrogation' took place here: rather, Passaro administered a beating in a detention cell. Nor was this brutal assault 'conducted by the CIA'—rather, Passaro was a civilian contractor with instructions to interrogate, not to beat."). CACI also does not distinguish between lawful interrogations—on or off a battlefield—and torture.

And, as a matter of law, this *could not* be considered a permissible battlefield activity. Binding international humanitarian law draws an intentionally bright line between conduct on an active battlefield and duties related to detention and interrogation, necessarily outside of the battlefield. The Geneva Conventions require that war-time prisons be established outside of combat, outside the battlefield. *See* Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 Art 83 ("[t]he Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war") and Arts. 84-88; Third Geneva Convention relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 23. Moreover, Common Article 3 of the Geneva Conventions, imposes a strict legal duty to protect persons who are *hors de combat* or in the custody of the detaining power and correspondingly prohibits the infliction of cruel and inhuman treatment on individuals in detention. Geneva Convention, Common Article 3. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631, 642 (2006) (recognizing Common Article 3 duty of care applies to detainees in any armed conflict). *See also* 18 U.S.C. §§ 2340-2340B (prohibiting "inflict[ion] of severe physical or mental pain or suffering"), War Crimes Act, 18 U.S.C. § 2441 (prohibiting torture, and cruel and degrading treatment and grave breaches of the Geneva Conventions).[8]

To be clear, CACI's claim does not emanate from *Jesner*; it reflects a position it has taken *throughout* this litigation and accords with the position taken by Judge Neimeyer in his *dissent* from the 12 vote en banc majority in *Al Shimari II*—which only garnered three votes. *Compare Al Shimari II*, 679 F.3d 205, 268 (Niemeyer, J., dissenting) (courts should not impose

[8] *See also* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1091, 118 Stat. 2067, 2068 (2004) (the McCain Amendment): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location shall be subject to cruel, inhuman, or degrading treatment or punishment.

"tort duties onto an active war zone") *with* Dkt. 812 at 5 (context of war cannot "be regulated or second-guessed through tort litigation"). This is decidedly not the law in this Circuit. *See, e.g.*, *Al Shimari v. CACI Premier Technology, Inc.*, 679 F.3d 516 (4th Cir. 2014) (en banc); *Al Shimari III*, 758 F.3d at 532-33, 536 (rejecting CACI's assertion that wartime context of the case required categorical dismissal of claims pursuant to the political question doctrine); *Al Shimari IV*, 840 F.3d at 154, 159 (unlawful conduct, even if authorized by military authorities is justiciable by the courts); *id*. at 162 (Floyd, J., concurring) ("it is beyond the power of even the President to declare such conduct unlawful"). Likewise, the Supreme Court has also consistently rejected the notion that claims arising in contexts contiguous to battlefields—even against U.S. officials, including the President and Defense Secretary—are immune to judicial review. *See Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (rejecting sufficiency of military administrative hearings and ordering "meaningful" judicial review of detention decisions in Guantanamo); *Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 535-36 (2004) (emphasizing distinction between questioning "core strategic matters of warmaking," and questions involving "individual liberties," for which the Constitution "most assuredly envisions a role for all three branches").

C. Separation of Powers Concerns Cannot Displace Plaintiffs' ATS Claims

Plaintiffs' claims satisfy the demand for "judicial caution" when applying the ATS, as these core ATS claims do not produce "significant foreign policy implications." *Jesner*, 138 S. Ct. at 1403-04. Plaintiffs' long-recognized claims of torture, CIDT and war crimes do not interfere with Congress' role so as to require eliminating those claims from the ATS canon; and indeed, comport with the political branches' intention that this conduct be prohibited, punished and redressed. As Justice Alito explained, when fashioning causes of action as a matter of federal common law, the judiciary's "function is to effectuate congressional policy." *Id*. at 1410

(internal citations and quotations omitted); *see also id*. (stressing necessity of "[f]idelity to congressional policy.").

Congress' endorsement of the policy to condemn the *jus cogens* norms against torture, CIDT and war crimes is clear, as this Court and the Fourth Circuit have found. The Geneva Conventions—which the United States along with nearly every other nation have ratified—mandate that all detainees are protected from universally condemned torture and other war crimes regardless of their status—*i.e.*, civilian or combatant. *See, e.g.*, Third Geneva Convention; Fourth Geneva Convention, arts. 3, 5; Geneva Conventions, Common Article 3. They obviously operate in a wartime or occupation context. *See Hamdan*, 548 U.S. at 630-32. The 1984 U.N. Convention Against Torture and Cruel, Inhuman and Degrading Treatment ("CAT") imposes an absolute, non-derogable prohibition on torture and CIDT by state parties. Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027. The United States signed the treaty in 1984,[9]

[9] *See* Letter of Transmittal from President Ronald Reagan to the Senate (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today."), *available at*, http://www.presidency.ucsb.edu/ws/?pid=35858; *see also* H.R. Rep. 102-367(I) (1991) at 2-3 ("The universal consensus condemning [official torture] has assumed the status of customary international law.").

In reporting to the various bodies of the United Nations charged with overseeing States parties' compliance with their treaty obligations, the United States has consistently cited the ATS as one mechanism by which it upholds its obligations to punish these acts and provide a remedy for these offenses. *See, e.g.*, U.S. Dep't of State, United States Report to the Committee Against Torture, ¶¶51, 61-63, 277-280 (reporting on "measures giving effect to its undertakings under [CAT]", cites ATS cases for torture that occurred in territory of foreign sovereigns), U.N. Doc.CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf. *See also* U.N. Human Rights Committee, 4th periodic report of the United States, ¶ 185, U.N. Doc. CCPR/C/USA/4 (May 22, 2012), *available at*, http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/USA/4.

and the federal anti-torture statute, enacted in 1994, represents congressional implementation of CAT, mandating the same prohibitions and definitions. 18 U.S.C. § 2340. *See United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) (finding that 18 U.S.C. § 2340 "tracks the provisions of the CAT in all material respects"). The Torture Victim Protection Act, enacted in 1992, expands the ATS to ensure its protections against torture are also applicable to U.S. citizens. 28 U.S.C. § 1350 note § 2(a), 106 Stat. 73 (1992).

Congressional enactment of the War Crimes Act, 18 U.S.C. § 2441, similarly reflects the firm congressional policy against torture and CIDT in the context of war, and effectively implements the Geneva Conventions by providing that a war crime includes any "grave breach" of the Geneva Conventions (*i.e.*, Fourth Geneva Convention, Art. 147, prohibiting torture, inhuman treatment and willfully causing great suffering or serious injury to body or health) and violations of Common Article 3 to the Geneva Conventions, which include torture and CIDT. *Id.* at § 2441(c)(1). *See In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d at 582 (finding that in "ratifying the Geneva Conventions, Congress has adopted a precise, universally accepted definition of war crimes [and] through enactment of a separate federal statute, Congress has incorporated this precise definition into the federal criminal law. 18 U.S.C. § 2441."). More specifically, as the Fourth Circuit underscored, *Congress itself* expressly concluded that the conduct at issue in this case was unambiguously unlawful, in violation of "policies, orders, and laws of the United States and the United States military." *See Al Shimari III*, 758 F.3d at 521 (quoting H.R. Res. 627, 108th Cong. (2004)).

This is why the Fourth Circuit concluded that adjudicating Plaintiffs' claims would not present a political question: *i.e.* "to the extent the challenged conduct violated settled

international law or the criminal law to which the CACI employees were subject at the time the conduct occurred." *Al Shimari IV*, 840 F.3d at 159.

CACI's reading of these statutory norms has the principle exactly backwards. Contrary to CACI's view, the existence of these strong congressional norms demonstrates the *legitimacy* in our system of separation of powers of recognizing parallel federal common law causes of action; the overlap between the ATS cause of action and the congressional policy is substantial. That the congressional enactments do not map 1:1 to the ATS cause of action in all respects is immaterial in the ATS context and explainable, particularly given the pre-existence of the ATS and burgeoning ATS litigation at the time of the enactment of these various statutes. This is not, as CACI necessarily assumes, a *Bivens* claim, where courts may look to a congressional scheme and refuse to create a cause of action for constitutional tort where that statute evidences an intention to limit an individual's scope of relief. *Cf. Bush v. Lucas*, 462 U.S. 367, 374 (1983) (because claims arise out of an employment relationship governed by comprehensive procedural and substantive provisions giving meaningful remedies, it would be inappropriate for this Court to create a new damages remedy under *Bivens*); *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983) (Congress' creation of an elaborate statutory scheme regulating "special patterns that define military life" precludes tort remedy). Indeed, as described above, Congress wholeheartedly endorsed ATS liability—at least for core ATS claims such as Plaintiffs'—during the process of passing the TVPA. *See infra* at pp 16-17; *see also* H. R. Rep. No. 102-367, pt. 1, at 3 (1991) (noting the TVPA "establish[es] an unambiguous and modern basis for a cause of action has been successfully maintained under an existing law," the ATS).[10]

[10] Retreading an old argument, one rejected by this Court, CACI incorrectly asserts that Congress has "*affirmatively prohibited* claims such as those present here." (Dkt. 812 at 15

D. Foreign Policy Considerations Support, Rather Than Displace Plaintiffs' ATS Claims

The predominant concern of the *Jesner* Court (as well as the *Kiobel* Court) is the potentially negative foreign policy implications arising out of judicial recognition of ATS claims. As CACI correctly points out, the Court articulated the objective of the ATS as: "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (citing *Sosa*, 542 U.S. at 715-19); Dkt. 812 at 9.

CACI takes this this elementary principle and implausibly translates it into a particularized, self-serving rule: "Congress enacted ATS to provide a federal forum for international law violation [sic] that 'if not adequately redressed could rise to an issue of war'." (Dkt. 812 at 18 (quoting *Sosa*, 542 U.S. at 715).) From this false premise, CACI baldly concludes that: "claims cannot be maintained under the ATS that regulate U.S. military

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(citing Federal Tort Claims Act; emphasis in original).) The Federal Tort Claims Act permits suits against the United States for certain acts of employees for certain state law torts, while preserving certain exemptions from suit, including for claims "arising out of the combatant activities of the military or naval forces." 28 U.S.C. § 2680(j). But Congress in no way contemplated that the FTCA's provisions—or exemptions from state law torts—included private contractors. In fact, Congress expressly *excluded* contractors from its terms. *Id.* § 2671 ("the term 'Federal agency' ... *does not include any contractor* with the United States.") (emphasis added). To the extent that the FTCA has been read to limit liability of private contractors in certain circumstances that Plaintiffs have contended are not present here, that limitation only operates to preempt *state law torts* from the federal policy implicitly embodied in the FTCA. *See Metzgar v. KBR*, 744 F.3d 326, 348-49 (4th Cir. 2014). The ATS is a federal *statute* and it is hornbook law that preemption operates only so that federal laws displace state laws. *See also* Dkt. 679 at 47 (rejecting CACI's similar ATS preemption argument). Finally, it is far from "self-evident" that Congress did not intend to allow "international regulation of CACI's conduct under the guise of the ATS"—this bald statement does not follow from CACI's characterization of the FTCA, and is wrong on its own terms.

operations once hostilities have already commenced." (Dkt. 812 at 18 (ATS principles "have no application whatsoever once the United States is already at war").)

Quite simply, this claim makes no sense. First, CACI's premise confuses a consideration with a constraint. *Sosa*'s reference to historical instances in which failure to provide a remedy "could rise to an issue of war," 542 U.S. at 715 (citing 4 William Blackstone Commentaries 68 and Vattel, Emer de, *The law of nations or, principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*, 463-64), is only one *example* of the broader ATS principle of avoiding international discord; it is not a legal threshold. And, as *Kiobel* recently reaffirmed the ATS is not "stillborn" in its 1789 form. *Kiobel*, 136 S. Ct. at 115 (quoting *Sosa*, 542 U.S. at 714).

CACI's subsequent conclusion—that the ATS can provide no relief because Plaintiffs' claims arose after a war already started—is confused. Even during war, domestic law (*e.g.*, War Crimes Act) and international Conventions governing conduct of war (*e.g.*, CAT, Geneva Conventions) and the corresponding obligation to the international community are not suspended; indeed, international humanitarian law—designed to apply *in the context of armed conflict* and thus known colloquially as "the laws of war" —compel obedience to the prohibitions on torture and CIDT. *See* 18 U.S.C. § 2441 (violations of Common Article 3 are grave breach of Geneva Conventions constitutes a war crime). It is for this reason that war crimes have been found to be among the paradigmatic ATS claims. *See supra* II (B).

Critically, the Fourth Circuit has already resolved this issue in Plaintiffs' favor. In *Al Shimari III*, the Fourth Circuit rejected the same class of arguments CACI raises here. The Court explained that this is not the kind of case that would risk "international discord" because the substantive norm of torture is universally recognized, and because there is no risk of strife with a

foreign nation where the plaintiffs voluntarily avail themselves of U.S. courts and the "defendants are U.S. citizens." 758 F.3d at 529-30. In addition, the court expressly concluded that litigation will not require "unwarranted judicial interference in the conduct of foreign policy," because "the political branches have already indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals." *Id.* at 530 (quoting *Kiobel* 133 S. Ct. at 1664).[11]

Similarly, in *Al Shimari IV*, the Fourth Circuit concluded that Plaintiffs claims can be adjudicated without questioning "sensitive military judgments" because the military has no discretion to authorize unlawful conduct: "the commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function committed to a coordinate branch of government." 840 F.3d at 158-59. Plaintiffs' claims fall squarely within the jurisdiction of U.S. courts because, evaluating the legality of CACI's conduct as against a "statute or treaty is what

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[11] *Al Shimari III* also undermines CACI's heavy reliance on *Ziglar*, 137 S. Ct. at 1861. CACI incorrectly reads into *Ziglar* a principle that claims arising in a "national-security context" are "dispositive." (Dkt. 812 at 17.) *First*, *Ziglar* actually says the opposite: it warned against the invocation of "national-security concerns" as a "talisman used to ward off inconvenient claims," 137 S. Ct. at 1862. The Court did not overrule *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (denying Attorney General absolute immunity from damages claims arising in a national security context). *Second*, *Ziglar* was primarily concerned with judicial second-guessing of a discretionary *policy* undertaken by senior-level government officials. *See Ziglar*, 137 S. Ct. at 1860 (claims challenge "a high-level executive policy created in the wake of a major terrorist attack on terrorist soil."); *id.* ("these claims would call into question the formulation and implementation of a general policy"). In holding Plaintiffs' claims can proceed, *Al Shimari IV* is consistent with this principle: it distinguishes discretionary, lawful policy decisions—which in certain circumstances may not be amenable to judicial review—and challenges to clearly unlawful actions, which are regularly easily amenable to judicial review. *Al Shimari IV*, 840 F.3d at 159. While ignoring the force of *Al Shimari IV*, CACI continues (Dkt. 812 at 17) its habit of pressing the conclusion in *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991), that "tactics employed on the battlefield are clearly not subject to judicial review," even though Plaintiffs' claims do not question battlefield tactics and despite *Tiffany* conclusion that claims in a wartime context would be justiciable if "the government violated any federal laws contained either in statutes or in formal published regulations." *Id.* at 280.

courts do," *id.* at 159 (citing *Zivotofsky*, 132 S. Ct. at 1427), and such claims are "justiciable to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred," *id.*

There are ample additional reasons why adjudicating Plaintiffs claims would not invite international discord. First, unlike in *Jesner* and other cases against foreign corporations that could upset foreign sovereigns, 138 S. Ct. at 1407, there has been and would be no reason for the Iraqi government to object to Iraqi nationals accessing justice in U.S. courts against a U.S. defendant; on the contrary, providing redress to Iraqi victims in U.S. courts serves to ameliorate diplomatic friction caused by torture at Abu Ghraib. The U.S. government, which is now conditionally a party in this case, has *never* indicated any foreign policy concerns regarding this case; indeed, in proceedings in the Fourth Circuit, the United States government *endorsed* judicial review of Plaintiffs' state law claims sounding in torture given the "strong federal interest" in remediating violations of the federal torture statute. Br. of United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc*., No. 09-1335 at 22 (4th Cir. Jan. 14, 2012). In addition, former President Bush affirmed that the abuses at issue in this case violated U.S. law and policy and our international obligations and called for "justice to be served."[12] The then Secretary of Defense likewise condemned the abuse of detainees, testifying that such brutality was "inconsistent with the values of our nation," and calling for accountability for victims.[13]

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

[13] Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004, *Review of Department of Defense Detention and Interrogation Operations, Hearings Before Senate Committee on Armed Services,* 108th Cong., 2nd Sess.(2004), *available at,* https://www.gpo.gov/fdsys/pkg/CHRG-108shrg96600/html/CHRG-108shrg96600.htm.

Third, the United States government had no hesitation in court-martialing and imprisoning a number of the CACI co-conspirators, including key witnesses such as Ivan Frederick and Charles Graner, which in part reflects the United States' understanding that punishing unlawful conduct in the course of a war advances—rather than impedes—the harmony between the United States and the international community. There can be no meaningful distinction from a foreign relations perspective between punishing U.S. soldiers criminally and punishing a U.S. corporation civilly in U.S. courts for the same conduct. It would be perverse to imagine a gap in responsibility between soldiers and civilian contractors—who made millions of dollars from services to the U.S. government in Iraq.

Finally, adjudicating Plaintiffs claims advances harmony in the international community because there is a "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring); *Al Shimari III*, 758 F.3d at 530 (same); see *also*; S. Rep. No. 102-249, at 3 (1991) (Congressional intent in passing the TVPA was to "mak[e] sure the torturers and death squads will no longer have a safe haven in the United States."); *Sosa*, 542 U.S. at 732 (quoting *Filártiga*, 630 F.2d at 890).

* * *

Jesner does not provide cover to re-litigate the same issues CACI has repeatedly raised, and lost, throughout this litigation. This case was not like *Kiobel* and is not like *Jesner*. All of the political branches—Congress, the former President and Defense Secretary, as well as the Department of Justice—far from counseling judicial caution, have recognized the harm Abu Ghraib has done to the United States on the international stage and have, in one way or another, endorsed remediation to its victims. Unlike many cases involving foreign corporations, these

four Iraqi torture victims have no other place to go to pursue justice. There could be no friction with any foreign government for holding a U.S. entity liable for committing clear international law violations (that are commensurate with domestic statutory violations) in a court in which CACI is domiciled. Hearing Plaintiffs' well-established claims raising the most egregious international law violations in this court will promote international harmony, not degrade it; the role of the federal courts will be ennobled, not diminished.

CONCLUSION

For the foregoing reasons, CACI's Motion to Dismiss for lack of subject matter jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, I electronically filed Plaintiffs' Opposition to Defendant CACI Premier Technology, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction through the CM/ECF system, which sends notification to counsel for Defendants and the United States Government.

/s/ John Kenneth Zwerling
John Kenneth Zwerling (VA Bar #08201)