Nos. 10-1891 & 10-1921

In the United States Court of Appeals for the Fourth Circuit

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, ET AL.,
APPELLEES,

v.

L-3 SERVICES, INC. & ADEL NAKHLA,
APPELLANTS.

ON REHEARING EN BANC OF AN APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NO. 08-1696)
(THE HONORABLE PETER J. MESSITTE)

SUPPLEMENTAL BRIEF OF APPELLANTS

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On January 14, 2012, at the invitation of the Court, the Department of Justice filed a brief on behalf of the United States as *amicus curiae*. Appellants file this brief to respond to the arguments made by the Government. The Government's brief addresses this Court's appellate jurisdiction and the merits of one of the four defenses asserted by defendants. While the Government asserts that the Court should not take jurisdiction and that remand is necessary even if it does, the Government's concessions in its brief establish that these assertions are incorrect.

Although the Government confirms that defendants' defenses implicate important public interests that have consistently justified collateral order jurisdiction, the Government nevertheless takes the position that the Court should not hear this appeal. Instead, the Government urges the Court to wait and see if the district court will revise its decision or perhaps certify an appeal. But that misapprehends the issue. Because the district court has clearly rejected the legal principles that would protect the substantial public interests at issue here, jurisdiction lies *now*. Absent appellate review at this stage, the Court cannot require any revision or discovery limits from the district court; discovery will go forward unfettered, which the Government admits would irreparably infringe those important interests.

On the merits of the preemption defense, the Government generally endorses the analysis of the panel majority and the D.C. Circuit, with two

modifications that it wrongly contends require remand. First, it would modify the D.C. Circuit's "integration" test, which it agrees that the D.C. Circuit correctly applied (Brief for the United States as *Amicus Curiae* ("U.S.Br.") at 16), to inquire instead into whether the alleged conduct "was undertaken within the course of the contractors' work providing the interrogation and interpretation services contracted for by the United States." (U.S.Br.20.) Even if the Court were to adopt this reformulation of the D.C. Circuit's test, however, no remand is necessary. Plaintiffs' claims plainly arose out of activities undertaken within the course of the contractors' work, as the D.C. Circuit implicitly recognized. Second, the Government urges the Court to engraft a "torture exception" onto battlefield preemption. The Court should reject this modification of the analysis, which is unmoored from law and logic and has never been adopted by any court.

The tentative conclusions the Government offers as to the appropriate disposition of these appeals are at odds with the admitted impact on military operations and lack of state interest in regulating such conduct, as well as the relevant authority. The Court should exercise jurisdiction over the appeal and order the case dismissed.

ARGUMENT

I. JURISDICTION LIES OVER ALL THE DEFENSES APPEALED

This Court has "a 'virtually unflagging obligation . . . to exercise the jurisdiction given [it].'" *Wye Oak Tech., Inc. v. Republic of Iraq*, --- F.3d ---, No. 10-1874, 2011 WL 6825271, at *4 (4th Cir. Dec. 29, 2011) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given"). The Court cannot for prudential reasons postpone or reevaluate its decision at a later date. The Court may not decline to exercise its mandatory collateral order jurisdiction in a particular case or on the basis of a case-specific, as opposed to categorical, determination. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). Notwithstanding the Government's tentative conclusion to the contrary, precedent indicates that this Court has jurisdiction over every defense on appeal.

A. The Court Has Collateral Order Jurisdiction over the Immunity Defenses

1. The Government does not dispute that the district court conclusively denied law-of-war immunity, that it is separate from the merits, that it is effectively unreviewable on appeal from final judgment, or that it implicates substantial public interests. The Government instead observes that

Dow v. Johnson, 100 U.S. 158 (1880), did not use the label "immunity." However, it is not the label used by the Court but rather the important public interests underlying *Dow* (which the Government agrees are implicated here, *see infra* Part I.B.) that render the district court's order appealable now. (Reply 4–7.) It is well established that the use of the term "jurisdiction" in the early 19th century was broad enough to encompass what we now understand as immunity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (use of lack of "jurisdiction" in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), relied upon by Justice Field in deciding *Dow*, "came to be regarded as extending virtually absolute immunity to foreign sovereigns"). And the Government simply ignores the subsequent authorities that recognize *Dow* as articulating an historic immunity. (Br.23–24 (citing *Dostal v. Haig*, 652 F.2d 173, 177 (D.C. Cir. 1981) and *Moyer v. Peabody*, 212 U.S. 78, 85–86 (1909).)

The Government also asserts that there are "difficult questions" concerning whether *Dow* extends to the domestic courts of the occupying force and whether it protects contractors working with the military. (U.S.Br.9, 11.) But to establish jurisdiction, defendants need only show that they have a "substantial claim" to immunity. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 & n. 6 (11th Cir. 2007). The Government does not suggest that these questions have been definitively settled against defendants,

and it ignores the authorities cited by defendants that suggest or hold that these questions should be answered in defendants' favor. (Br.23–27; Reply 17–18.) Given the importance of the question whether those working alongside the military in detaining and interrogating the occupied are subject to civil suit by them, the existence of such "serious and unsettled" questions by definition establishes collateral order jurisdiction based upon a "substantial claim" to immunity. *McMahon*, 502 F.3d at 1339 n.6 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982), *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949), and *Van Cauwenberghe*, 486 U.S. at 524).

Notably, the Government does not argue that the questions it raises *should* be decided against defendants; instead, the Government states only that it is not "prepared at this point" to take a position on law-of-war immunity. (U.S.Br.11.) Yet the Government concedes that "*Dow* and the policies it reflects may well inform the ultimate disposition of these claims"—a concession that amply confirms the existence of a "substantial claim" to immunity. (U.S.Br.11.) Even the panel dissent did not dispute that defendants' assertions of immunity under *Dow* could provide jurisdiction. *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 214 (4th Cir. 2011) (King, J., dissenting), *vacated and reh'g en banc granted* (Nov. 8, 2011).

2. The Government cannot dispute collateral order jurisdiction over derivative immunity in the face of this Court's decision in *Mangold v. Ana-*

lytic Services, Inc., 77 F.3d 1442 (4th Cir. 1996). It does not address *Mangold* and instead incorrectly asserts that the district court's derivative immunity ruling was inconclusive because the district court wanted to review the contract. (U.S.Br.12.) Defendants explained the error of this argument, which flies in the face of this Circuit's precedent, in their briefs, but the Government fails to address defendants' analysis. (Br.21–22; Reply 13–14.)

B. The Court Has Collateral Order Jurisdiction over the Battlefield Preemption Defense

The Government agrees with defendants that if the district court proceeds to final judgment with unfettered discovery, substantial public interests protected by the battlefield preemption defense will be irreparably infringed. (U.S.Br.3–4.) This justifies collateral order jurisdiction over the district court's denial of the defense. *Will v. Hallock*, 546 U.S. 345, 353 (2006). The Government also confirms that battlefield preemption implicates "significant federal interests," including "ensuring that state-law tort litigation does not lead to second-guessing military judgments" (U.S.Br.2), avoiding the adverse effect of "discovery and other pretrial proceedings on military discipline and readiness" (U.S.Br.5), and "protecting the primacy of existing tools for the government to regulate the conduct of contractors working on behalf of the United States" (U.S.Br.2). The Government further acknowledges that unlimited discovery before final judgment threatens to destroy these "vital interests" (U.S.Br.26) by adversely affecting "military

readiness" and "distract[ing] military and civilian personnel from their critical duties to safeguard national security" (U.S.Br.5).

In addition to the burden and distraction of litigating claims by enemy aliens, military decisionmakers would be chilled from utilizing contractors if doing so would import tort law to the battlefield. The interests in avoiding interference with government operations and preserving the initiative of those carrying out its functions cause other immunities to satisfy *Cohen*; if anything, they are heightened in the battlefield context. (Reply 6–7.) This militates in favor of providing collateral order review of immunity defenses asserted by private parties working alongside government employees who are entitled to immediate appeal of the denial of immunity. *Cf.* Brief for the U.S. as Amicus Curiae at 15, *Filarsky v. Delia*, No. 10-1018 (U.S. Nov. 21, 2011) ("Affording immunity in those circumstances . . . directly promotes the same policy considerations that animate the doctrine's application to public officials").

The Government, however, inexplicably takes the position that, notwithstanding the potential infringement of these "significant federal interests," which cannot be remedied if review is deferred, collateral order jurisdiction does not exist. (U.S.2.) Seemingly working backward from the proposition that case-management techniques *may* be sufficient to protect these vital interests (U.S.Br.26: "if experience demonstrates otherwise, the

United States will reconsider its position"), the Government asserts that the interests at issue may be adequately protected if the district court "promptly reevaluate[s] the preemption defense" (U.S.Br.2), conducting discovery "limited to the federal preemption defense" (U.S.Br.26) under "careful limitation and close supervision" (U.S.Br.4). This is not how collateral order jurisdiction is evaluated because it depends upon prevailing before the district court.

The Government's approach would protect the relevant interests only when a district court recognizes preemption early in the litigation after, if necessary, limited discovery on that defense alone. Here, if there is no jurisdiction, the case will be returned to the district court to proceed in accord with its decision that there is no battlefield preemption doctrine and that discovery should go forward unfettered. (J.A.924–28.) Having rejected wholesale the D.C. Circuit's analysis of the same claims, there is no reason to believe that the district court will reevaluate without direction from this Court. Absent appellate review, discovery, and potentially trial, will proceed without the protections that the government urges "must" be in place (U.S.Br.2) to prevent irreparable intrusion into substantial public interests.[1] At any rate,

[1] The Government implies that should the district court not revise its opinion and refuse to certify the issue under 28 U.S.C. § 1292(b), then mandamus review would be appropriate. (U.S.Br.6.) If true, that proposition means that the Court could treat this appeal as a petition for mandamus. *See*

because this case rests upon an alleged conspiracy with military personnel, the discovery limits that the Government imagines might be sufficient to protect the interests of the federal government are incompatible with the litigation of these claims. *See* Br.43-55 (citing *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411–12 (4th Cir. 2011)).

Finally, the Government acknowledges that battlefield preemption is not "typical" preemption, which generally is only a defense to liability. As a distinct category, battlefield preemption implicates different federal interests than other forms of preemption, and those interests are uniquely threatened by discovery and trial. Thus, battlefield preemption must be recognized in the early stages of litigation to be given effect. (U.S.Br.5; *see* Br.39–40.) This is the *sine qua non* of a category suitable for collateral order review. The Government cites cases from other circuits in arguing that collateral order review is not appropriate for battlefield preemption, but defendants have distinguished those cases (Br.42–43), and the Government does not attempt to address those distinctions.

C. The Court Has Pendent Jurisdiction over the Battlefield Preemption Defense

The Government does not dispute that if the Court has collateral order jurisdiction over either of the immunity defenses, then it also has pendent ju-

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Mangold, 77 F.3d at 1453 (Phillips, J., specially concurring and delivering the opinion of the court on the issue of subject matter jurisdiction).

risdiction over the battlefield preemption defense. Indeed, the Government's representations regarding battlefield preemption encourage the exercise of pendent jurisdiction: the federal interests at stake are substantial and important, proceedings before final judgment could greatly impair them, and the defense should be given effect as early as possible in the litigation.

D. The Court Has Jurisdiction over the Political Question Defense

This Court and others have repeatedly concluded that when one issue gives the Court interlocutory jurisdiction over an appeal, the Court also has jurisdiction to resolve justiciability issues like the political question defense, even if those issues would not independently be appealable. (Br.51–52; Reply 16–17.) The government's exclusive reliance on *Rux v. Sudan*, 461 F.3d 461 (4th Cir. 2006), to argue to the contrary is misplaced, as defendants have previously explained. (Br.52 n. 8). *Rux* concerned statutory standing, which, unlike the political question doctrine, "has nothing to do with" the Court's subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998); *see Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007). In any event, the Government does not dispute that the Court has pendent jurisdiction over political question if it has collateral order jurisdiction over any of the other defenses.

II. PLAINTIFFS' CLAIMS ARE PREEMPTED AND BARRED

The Government rejects the district court's analysis of preemption and endorses the rationale of the panel decision and D.C. Circuit in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011). *Compare* U.S.Br.14–16, *with* J.A.874–77. It proposes that this Court adopt the defense articulated in *Saleh* but reformulate the test to apply to a broader range of activity and add a "torture exception." The reformulated test, which would have mandated the same result in *Saleh*, is easily satisfied here based upon the pleadings; no remand is necessary. The Court should reject the unsupported and illogical torture exception that the Government proposes for the first time here.

A. The Government's Reformulation of *Saleh* Does Not Change the Rationale or Require a Remand

Consistent with its previous statements (Br.47–49), the Government agrees with defendants that the "uniquely federal interests" underlying the combatant activities exception generally preempt state-law tort suits against "civilian contractors assisting the military in detaining and interrogating enemy aliens in a U.S. military prison in Iraq during wartime." (U.S.Br.13.) Those federal interests "clearly outweigh whatever interests the States might have" in regulating contractors through tort claims brought by enemy aliens. (U.S.Br.14–15; Br.44–46.) The Government's reformulation comprises two steps: (1) would the claims be barred by the combatant activities ex-

ception if brought against the United States (U.S.Br.18–19); and (2) was the alleged conduct within the outer perimeter of the contractual relationship between the contractor and the military (U.S.Br.19–21). The claims in *Saleh* and those asserted here easily meet this test because they arise out of the detention and interrogation of plaintiffs while they were in U.S. military custody.

1. "[T]he first step of the preemption analysis is readily satisfied." (U.S.Br.24.) The Government confirms that the "detention and interrogation of enemy aliens captured in and around a battlefield or war zone plainly arise out of the military's combatant activities." (U.S.Br.24.) The Government clarifies that application of the combatant activities exception "does not turn on whether a challenged act is itself a 'combatant activity,' or whether the alleged tortfeasor is himself engaging in a 'combatant activity.'" (U.S.Br.17.) Instead the challenged act need only "arise out of" combatant activities. (U.S.Br.17.) The Government's conclusion, however, is the same as that of the panel and the D.C. Circuit: the challenged acts here fall within the scope of the combatant activities exception. (U.S.Br.24.)

2. In the second step of its analysis, the Government analogizes to the familiar scope-of-employment test to ask whether the challenged conduct "was undertaken within the course of the contractors' work providing for the interrogation and interpretation services contracted for by the United

States." (U.S.Br.20.) Under the Government's reformulation (and consistent with the holding of the *Saleh* court but contrary to the district court's analysis, *see* J.A.37–49), allegations that the challenged conduct violated the terms of the contract, exceeded contractual duties, violated approved interrogation techniques or other military directives, or was otherwise unlawful does not preclude a finding that such conduct was undertaken within the course of the contractors' work. (U.S.Br.20, 25–26.)

Contrary to the Government's suggestion, remand is not necessary to conclude that this test is satisfied by the allegations here. Plaintiffs allege that the U.S. military contracted with L-3 for the provision of civilian translators and interrogators to support military detention and interrogation, including at Abu Ghraib prison. (J.A.22, 65.) The challenged conduct arose exclusively during plaintiffs' detention and interrogation in prisons controlled by the U.S. military, where defendants were employed and performing services pursuant to their contracts. (J.A.23–61.) To the extent that plaintiffs identify alleged perpetrators, they do so by reference to categories of contractual duties, i.e., unnamed "translators" and "interrogators." Moreover, the conspiracy that plaintiffs allege is between prison guards, interrogators, and linguists; occurs within the military detention facilities; and concerns the detention and interrogation of prisoners, which clearly falls within the scope of work alleged in the complaint. *See* J.A.22 (contract required L-3 "to pro-

vide translators" and "services, including translations and interrogation services" to the U.S. military). The allegations of torture and war crimes do not take the claims out of the course of the contractor's work. *See Ali v. Rumsfeld*, 649 F.3d 762, 774–75 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 528 n.1 (D.C. Cir. 2009) (per curiam); *Harbury v. Hayden*, 522 F.3d 413, 421–22 (D.C. Cir. 2008).

Lawsuits against interrogators and translators implicate the unique federal interests that create battlefield preemption, whether those interrogators and translators are military officials or contractors working alongside them. *See* U.S.Br.19 (describing purpose of the second step). This case is predicated upon an alleged conspiracy with military personnel with whom the contractors worked in the military detention facilities. Thus, the actions of military personnel and the nature of the military's supervision, interrogation, and detention are placed directly in issue here. There is no plausible reading of the complaint where that would not be the case (especially given the extensive public record). *See, e.g.*, J.A.185–200 (explaining that military retained command over interrogation and detention at Abu Ghraib). In short, the "military nature" of the challenged conduct pervades this tort action. *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 267 (4th Cir. 2011). If this Court adopts *Saleh*, with or without the Government's reformulation of

the battlefield preemption test, then as a matter of law, these claims must be dismissed.

At any rate, as the Government has previously acknowledged, the scope-of-work inquiry is irrelevant to the liability of L-3, which cannot be held vicariously liable for the acts of its employees that are of a personal or private nature. *See* Brief for U.S. as Amicus Curiae at 17, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011).

B. There Is No Torture Exception to Battlefield Preemption

Notwithstanding its embrace of battlefield preemption, the Government argues that, in this situation only (U.S.Br.23 & n.8), if the state law claims are based on allegations that the contractor committed torture, as defined in 18 U.S.C. § 2340, battlefield preemption should not apply and the case should proceed through discovery and possibly trial. (U.S.Br.22.) This position, giving enemy aliens (U.S.Br.13, 15, 23–24) the power to unleash trial and discovery on the U.S. military's detention and interrogation operations on the battlefield, is illogical and without a shred of support.

The Court should not create such an exception unmoored from law and logic. Critically, the Government is unable to identify any expression of congressional intent in support of allowing torture-based tort claims. In fact, to the extent that Congress has spoken on that issue, it has consistently ex-

pressed precisely the opposite intent, as has the Executive except for this particular filing.

The criminal statute the Government relies on, 18 U.S.C. § 2340 ("Anti-Torture Statute), was enacted to fulfill U.S. obligations under the Convention Against Torture. *See* Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques* 8 (C.R.S. Jan. 25, 2008) ("*CAT Overview*"). It contains no private right of action. Its civil counterpart is the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, in which Congress created a federal civil cause of action for torture, also to fulfill CAT obligations. *CAT Overview* 12–13. The Government has taken the position that CAT is inapplicable to detainee operations in Afghanistan, Iraq, and Guantanamo. *See id* at 18; Reply 9.

Congress clearly did not intend the civil cause of action it created pursuant to CAT to extend to these circumstances because it applies only to conduct under the color of *foreign* law. *See* 28 U.S.C. § 1350 note; *cf.* Statement by President George Bush upon Signing H.R. 2092, 1992 U.S.C.C.A.N. 91, 92 (Mar. 12, 1992) ("I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad"); Br.47. By definition, this civil cause of action does not apply to claims brought against contractors acting in support of the U.S. military's combatant operations.

Nor does the federal interest underlying the Anti-Torture Statute—the punishment of torture through *federal criminal* prosecution—evince any congressional interest in allowing civil tort claims. As the Supreme Court recently explained, criminal prosecution cannot be equated to allowance of a civil tort claim. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (creation of a civil claim "raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion"). As the Government acknowledges, "even where torture is alleged, the federal interests in avoiding judicial second-guessing of sensitive military judgments and intrusive discovery are still weighty, and the state interests in providing a tort-law remedy against civilian contractors for enemy aliens in U.S. military prison during wartime remain limited." (U.S.Br.21.)

The Government's torture exception would open a door long ago closed by the Supreme Court's observation in *Dow*: "[n]or can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." 100 U.S. at 165.

Finally, it is nonsensical to argue, as the Government does, that federal law does not preempt state tort law here (but will in future cases, *see*

U.S.Br.23 n.8) because at the time of the events at Abu Ghraib the federal government lacked the "enhanced tools" it now has to hold contractors accountable (U.S.Br.23). The Anti-Torture Statute was enacted in 1994 and has been in force throughout the intervening period—it was available to prosecute substantiated claims of abuse at Abu Ghraib. Similarly, other criminal and contractual remedies that the Government cites were in force at the time of the alleged events, as was the system of compensation through the Foreign Claims Act. (U.S.Br.22.) The fact that no contractors were prosecuted for torture cannot be attributed to a gap in criminal or administrative jurisdiction. This Court has made clear that there is criminal jurisdiction over the misdeeds of individual contractors even when they do not rise to the level of torture. *See United States v. Passaro*, 577 F.3d 207, 214–15 (4th Cir. 2009); J.A.199. The Government's attempt to exclude its own employees from this one-time-only torture exception without identifying any principled basis for distinguishing contractors working alongside soldiers further demonstrates that this argument is unavailing. (U.S.Br.23 n.8.)

CONCLUSION

The district court's order denying defendants' motions to dismiss should be reversed.

Respectfully submitted,

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January 20, 2012

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

I, Ari S. Zymelman, hereby certify that:

1. I am an attorney representing Appellant L-3 Services, Inc.

2. This brief is in proportionally spaced 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 Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 3,995 words.

/s/ Ari S. Zymelman
ARI S. ZYMELMAN

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, I caused a true copy of the foregoing Supplemental Brief for Appellants to be filed through the Court's electronic case filing system, which will send notice of such filing to all registered CM/ECF users.

/s/ Ari S. Zymelman
ARI S. ZYMELMAN

JANUARY 20, 2012