No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

and

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

v.

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

and

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

and

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

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Plaintiffs sued CACI Premier Technology, Inc. (CACI), a government contractor, under the Alien Tort Statute for injuries allegedly suffered during their detention in the Abu Ghraib prison in Iraq. CACI filed a third-party complaint against the United States, arguing the government was required to compensate it for any damages.

The district court held that the United States does not have sovereign immunity with respect to claims that the government or its agents violated jus cogens norms of international law. The court dismissed the United States on other grounds, however, and the government is no longer a party.

We file this brief as amicus curiae because CACI's appeal implicates the district court's sovereign immunity analysis. The United States has a strong interest in correcting the district court's fundamental misunderstanding of both sovereign immunity and international law. The government takes no position on the other issues raised by CACI in this appeal, including whether CACI can properly invoke so-called "derivative sovereign immunity."[1]

[1] At this Court's invitation, the United States participated as amicus curiae in an earlier appeal, No. 09-1335. The government's 2012 brief in that case provides additional background.

STATEMENT OF THE ISSUE

Whether the United States can invoke sovereign immunity as a jurisdictional defense to claims based on alleged violation of international law jus cogens norms.

STATEMENT OF THE CASE

1. Plaintiffs are Iraqi nationals who allege that they were detained by the United States military in the Abu Ghraib prison in Iraq. They seek damages for injuries they allegedly sustained as a consequence of abuse during their detention.

Plaintiffs allege that defendant CACI contracted with the United States military to provide interrogation services at the detention facility where plaintiffs were held, and that CACI was complicit in or responsible for the abuse of detainees. Plaintiffs' claims are brought under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and are based on allegations that CACI is responsible for plaintiffs' injuries, on the theory that CACI employees conspired with or aided and abetted United States military personnel. Plaintiffs did not, however, name the United States or any federal officials or employees in their complaint. See JA 185-237.

In 2018, CACI brought a third-party complaint against the United States, seeking reimbursement from the government for any damages ultimately awarded to plaintiffs. JA 1069, 1120-1133. The government moved to dismiss CACI's claims, explaining that the district court lacked subject matter jurisdiction because Congress has not waived sovereign immunity under the ATS or any other federal

statute. JA 60 (DE# 696). The United States also moved for summary judgment on the ground that CACI in 2007 settled all claims arising out of its contracts with the government. JA 89 (DE# 1129).

2. The district court rejected the government's jurisdictional objection, concluding that "the United States does not retain sovereign immunity for violations of jus cogens norms of international law." JA 2341.

The court first expressed skepticism about the roots of sovereign immunity in both English common law and early American jurisprudence, JA 2303-2314. And it compared the modern American doctrine unfavorably with the practice in other countries' legal systems. JA 2314-2319. The court cited academic commentators and the views of some judges as reflecting "academic and judicial unease with the way in which sovereign immunity had developed into a bar to recovery." JA 2317. The district court rejected the proposition that a waiver of sovereign immunity must be express, noting that "no such categorical rule exists," citing cases that permit equitable tolling of limitations periods and allow counterclaims, as well as cases concerning state sovereign immunity and foreign sovereign immunity. JA 2314-2315 n.6.

Having concluded that a waiver need not be express, the court proceeded to hold that the United States had waived immunity for claims based on alleged violations of jus cogens norms. The district court described jus cogens norms as

the category of international law rules that enjoys the highest status in international law. JA 2319-2321. The court declared that "*jus cogens* norms have developed as an expression of the international community's recognition that all states are obligated, in their capacity as states, to respect certain fundamental rights of individuals." JA 2321; see also *ibid.* (recognizing that "the exact content of the set of *jus cogens* norms is debatable," but concluding that torture is universally condemned and recognized as a violation of jus cogens). The district court assumed that jus cogens norms confer international law rights on individuals to be free from violations of those norms by states. JA 2325.

After a review of international, foreign, and American decisions addressing foreign sovereign immunity, JA 2321-2324, the district court concluded that "there is general, though not unanimous, agreement that a state may not be sued in the courts of a foreign state for conduct, including *jus cogens* violations, that occurred outside the forum state." JA 2324; but see JA 2325 (referring to "an implicit understanding that * * * [foreign sovereign immunity] may not appropriately bar relief in the courts of a state with a jurisdictional nexus to the *jus cogens* violation").

The district court then concluded that "the federal government [does not retain] sovereign immunity that protects it from being sued in an American court for alleged *jus cogens* violations committed by Americans." JA 2325. The court

reasoned that the law of the United States at the time of the Founding incorporated international law, and that as international law has evolved to recognize jus cogens norms, American law has evolved as well to include "a federal common law right derived from international law that entitles individuals not to be the victims of *jus cogens* violations." JA 2327. The district court also concluded that the United States had implicitly waived its sovereign immunity in a variety of ways. The court held that "by joining the community of nations and accepting the law of nations, the federal government has impliedly waived any right to claim sovereign immunity with respect to *jus cogens* violations when sued for such violations in an American court." JA 2327. The district court further held that the government waived sovereign immunity by ratifying the Convention Against Torture. JA 2328-2332; see also JA 2335 ("by participating in the Nuremberg trials and the parallel development of peremptory norms of international law and by continuing to recognize the existence of such peremptory norms, the United States has waived its sovereign immunity for any claims arising from the violations of such norms"); *ibid.* (the United States has consented to suit for violations of jus cogens norms "by holding itself out as a member of the international community because the respect and enforcement of *jus cogens* norms are fundamental to the existence of a functioning community of nations").

Although the court denied the government's motion to dismiss, it granted the motion for summary judgment, holding that "the unambiguous wording of the settlement agreement * * * bars CACI's claims against the United States." JA 2351. For that reason, the district court rejected on the merits CACI's third-party claims against the United States. The government is thus no longer a party to the litigation.

The issue of sovereign immunity remains in the case, however, because CACI urged that it was entitled to assert "derivative" sovereign immunity, and moved to dismiss on this ground. The district court denied the motion. The court noted its holding that the United States lacked sovereign immunity and explained that derivative sovereign immunity is unavailable to protect a contractor from liability where the government is not itself immune. JA 2345. The district court also observed that, even if the United States were entitled to sovereign immunity, "it is not at all clear that CACI would be extended the same immunity" because plaintiffs allege that CACI exceeded the terms of its contract with the United States. JA 2346. But the court ultimately did not reach that question.

SUMMARY OF ARGUMENT

The district court fundamentally misunderstood principles of sovereign immunity and international law in holding that the United States is not protected by sovereign immunity from claims in federal court alleging violations of

international law jus cogens norms. That conclusion cannot be squared with the many decisions of the Supreme Court and this Circuit, which establish that a waiver of sovereign immunity must be explicit and unambiguous.

The court similarly erred in its assumption that a norm of international law, by itself, operates to create judicial remedies and override domestic legal principles in the law of the United States. Neither membership in the community of nations nor ratification of the Convention Against Torture creates rights that can be asserted against the government in federal courts.

ARGUMENT

THE DISTRICT COURT MISAPPLIED PRINCIPLES OF SOVEREIGN IMMUNITY AND MISUNDERSTOOD THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW.

A. Congress Has Not Enacted A Waiver of Sovereign Immunity For Claims Based On Alleged Violations Of International Law.

1. Only Congress can waive the federal government's sovereign immunity and it must do so expressly. See, *e.g.*, *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) ("a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text") (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see also *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). "Absent a waiver, sovereign immunity shields the

Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), quoted in *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). This Court likewise has repeatedly held that sovereign immunity bars suit against the United States unless Congress has enacted a clear and unambiguous waiver in the text of a federal statute. See, *e.g.*, *Robinson* v. U.S. *Dep't of Educ.*, 917 F.3d 799, 802 (2019) ("Sovereign immunity, in short, can only be waived by statutory text that is unambiguous and unequivocal.").

The fundamental principle that the "United States, as sovereign, is immune from suit save as it consents to be sued," *Mitchell*, 445 U.S. at 538, is not a recent innovation. The Supreme Court nearly two hundred years ago described the principle that the United States may not be sued without its consent as "universally received opinion." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821). And Alexander Hamilton wrote as much in 1788: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81 (Alexander Hamilton).

2. Congress has not enacted a statute that waives sovereign immunity for claims based on alleged violations of international law. Plaintiffs' only remaining claims are brought under the ATS, but this Court has expressly recognized that the ATS itself does not waive federal sovereign immunity. *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("the Alien Tort Statute * * * has

not been held to imply any waiver of sovereign immunity"). "Thus, any party asserting jurisdiction under the Alien Tort Statute must establish, independent of that statute, that the United States has consented to suit." *Ibid.* Every other circuit that has addressed the issue has likewise recognized that the United States retains its sovereign immunity from suit under the ATS. See *Tobar* v. *United States*, 639 F.3d 1191, 1196 (9th Cir. 2011) (quoting and following *Goldstar*); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity."). The district court's holding that sovereign immunity does not apply to claims under the ATS is squarely foreclosed by this Court's holding in *Goldstar*, which the district court omitted to discuss or even mention.

It would have been surprising if Congress had silently waived the sovereign immunity of the United States for claims under the ATS, but in any event Congress expressly barred tort claims "arising in a foreign country" in the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2680(k); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004) (rejecting headquarters theory as limitation on foreign-country exception). The FTCA also bars claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Thus, the statute that waives sovereign immunity for tort claims expressly excludes claims of the type asserted here. Understandably,

therefore, plaintiffs did not assert claims against the United States here under the ATS or the FTCA. And no other statute would apply. The Administrative Procedure Act, for example, does not waive immunity for damages actions, see 5 U.S.C. § 702 (referring to an "action * * * seeking relief other than money damages"); the Tucker Act does not waive immunity for claims sounding in tort, see 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); and the military's administrative claims statutes, the Military Claims Act and the Foreign Claims Act, do not include any waiver of sovereign immunity, see *Tobar*, 639 F.3d at 1196 (Military Claims Act); *Saltany* v. *Reagan*, 702 F. Supp. 319, 321 (D.D.C. 1988), *aff'd* 886 F.2d 438, 441 (D.C. Cir. 1989) (per curiam) (Foreign Claims Act).[2]

3. Although the Supreme Court has made clear that "the United States cannot be sued at all without the consent of Congress," *Block* v. *North Dakota ex rel. Board of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983), and that "waivers of sovereign immunity may not be implied." *Lane*, 518 U.S. at 190, the district court concluded that "no such categorical rule exists." JA 2314 n.6.

[2] The Foreign Claims Act creates an administrative regime that makes monetary compensation available to individual detainees, including those detained at Abu Ghraib, who were subjected to abuse and mistreatment, whether the abuse was committed by a civilian contractor employee or U.S. personnel. See 10 U.S.C. § 2734; see also *Saleh* v. *Titan Corp.*, 580 F.3d 1, 2-3 (D.C. Cir. 2009) (noting that Abu Ghraib detainee received compensation under the Foreign Claims Act). Plaintiffs here have not filed claims under that provision.

Disregarding controlling precedent, the district court cited inapposite cases, none of which implicitly overruled the dozens of cases establishing that waivers of sovereign immunity must be explicit. The court noted, for example, that the Supreme Court held in *United States* v. *Wong*, 135 S. Ct. 1625 (2015), that the limitations period of the FTCA is subject to equitable tolling. But *Wong* did not purport to broaden the scope of the FTCA's waiver beyond that established by statute. The question before the Court was whether, as an interpretive matter, Congress had made the statutory deadline of the FTCA jurisdictional or whether it might be subject to tolling. *Id.* at 1630-1631; see also *id.* at 1638-1639 (analyzing terms of statutory waiver). *United States* v. *Beggerly*, 524 U.S. 38 (1998), was a suit under the Quiet Title Act, a statute that includes a waiver of sovereign immunity. And the Court held there only that a judgment obtained by the United States as plaintiff could be reconsidered in a proper case where there was a grave miscarriage of justice. See *id.* at 47-49.[3] The Court in *OPM* v. *Richmond*, 496 U.S. 414 (1990), did not reach the question whether sovereign immunity barred a claim based on collateral estoppel because the Constitution's Appropriations Clause precluded the relief sought. *Id.* at 423-424. Moreover, the Court there

[3] Similarly, the Supreme Court's discussion of when certain counterclaims may be offset against a judgment obtained by the United States addressed only those counterclaims authorized by statute. *United States* v. *Eckford*, 73 U.S. (6 Wall.) 484, 489-491 (1868).

signaled that it is inappropriate to find a waiver of sovereign immunity for tortious governmental conduct that is excluded from the FTCA because the FTCA's provisions "provide a strong indication of Congress' general approach to claims based on governmental misconduct, and suggest that it has considered and rejected the possibility of an additional exercise of its appropriation power to fund claims" that are barred by the FTCA. *Id.* at 429.

Decisions concerning state sovereign immunity under the Eleventh Amendment, or foreign sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), are inapposite to the requirements of federal sovereign immunity and cast no doubt on the settled principle that nothing short of clear statutory text can constitute a waiver of the federal government's sovereign immunity. Indeed, the Supreme Court specifically distinguished federal sovereign immunity from Eleventh Amendment immunity in the very case cited by the district court. See *Lapides* v. *Board of Regents*, 535 U.S. 613, 623 (2002). Moreover, insofar as cases involving foreign sovereign immunity bear on United States sovereign immunity, they only underscore the district court's error. The Supreme Court held thirty years ago that the ATS is not an independent waiver of foreign sovereign immunity. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435-437 (1989). The Court there concluded that, under the FSIA, "immunity is granted in those cases involving alleged violations of international

law that do not come within one of the FSIA's exceptions." *Id.* at 436. And several circuits have held that the FSIA does not provide for a jus cogens exception to foreign sovereign immunity. See, *e.g.*, *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1155-1156 (7th Cir. 2001); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 243-244 (2d Cir. 1996); *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 704, 718-719 (9th Cir. 1992). The Ninth Circuit recently observed, in rejecting a suit against federal officials based on allegations of jus cogens violations, that it should not be easier to override federal official immunity than foreign sovereign immunity. *Saleh* v. *Bush*, 848 F.3d 880, 893 (9th Cir. 2017). Similarly, it would make little sense for federal courts to disregard the sovereign immunity of the United States where a similar suit against a foreign sovereign would be barred by the FSIA.

The extent to which the district court departed from settled law is underscored by its suggestion that "by joining the community of nations and accepting the law of nations, the federal government has impliedly waived any right to claim sovereign immunity with respect to *jus cogens* violations when sued for such violations in an American court." JA 2327. Thus, in the court's view, the United States—merely by existing—has waived its immunity for all jus cogens claims, an untenable conclusion incapable of being cabined. The court similarly

erred in declaring that, "by becoming a party to the Convention Against Torture, the government has impliedly waived any sovereign immunity defense that would prevent" enforcement of claims concerning allegations that Americans engaged in torture. JA 2332. The court's reasoning misunderstands both the terms of the treaty and its effect on the law of the United States for a number of reasons, including because nothing in the treaty requires the parties to permit suits against themselves in their own courts. In any event, the Convention Against Torture is not self-executing. See, *e.g.*, *Mironescu* v. *Costner*, 480 F.3d 664, 666-667 (4th Cir. 2007). And Congress, in implementing the provisions of that treaty, has not waived the sovereign immunity of the United States for claims such as the plaintiffs' in this case. See Pub. L. No. 105-277, Div. G, 112 Stat. 2681-761 (1998); cf. *Goldstar*, 967 F.2d at 969 (Hague Convention did not waive sovereign immunity because it was not self-executing).

B. International Law Does Not, Of Its Own Force, Create Rights And Obligations Enforceable In United States Courts.

As we have explained, Congress has not waived sovereign immunity for claims under the ATS, and the district court erred in believing that a waiver could be implied. This Court therefore need not review the details of the district court's analysis of international law. If this Court undertakes such a review, however, it should hold that the district court misunderstood the nature of international law and

its relationship with the domestic law of the United States in defining the rights and obligations of private persons, let alone the United States itself.

International law does not by itself, without some basis in domestic law, create legal rights or obligations enforceable in United States courts. "[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellin* v. *Texas*, 552 U.S. 491, 504 (2008). Thus, non-self-executing treaties are not judicially enforceable absent implementing legislation. *Id.* at 520-521. As the Supreme Court explained over a century ago, a "treaty is primarily a compact between independent nations," and "[i]t depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884) ("It is obvious that with all this the judicial courts have nothing to do and can give no redress."). Even self-executing treaties that create individual rights do not necessarily create corresponding remedies as a matter of United States domestic law. "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 552 U.S. at 506 n.3 (quotation marks and brackets omitted); see also, *e.g.*, *Sanchez-Llamas* v.

Oregon, 548 U.S. 331, 343-350 (2006) (a violation of a treaty obligation does not entitle a defendant in a criminal prosecution to suppression of evidence).

These principles apply with at least equal force in analyzing the extent to which customary international law is enforceable in our courts. "[C]ustomary international law is not a source of judicially enforceable private rights in the absence of a statute conferring jurisdiction over such claims." *Serra* v. *Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010); see also, *e.g.*, *Igartúa-De La Rosa* v. *United States*, 417 F.3d 145, 151 (1st Cir. 2005) (en banc) (rejecting a claim under customary international law seeking judicial enforcement of a right to vote in the United States). International law is not "a self-executing code that trumps domestic law whenever the two conflict." *United States* v. *Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991). "[T]he role of judges * * * is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *Ibid.* See also *United States* v. *Yousef*, 327 F.3d 56, 91 (2d Cir. 2003) ("United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law").[4]

[4] The academic community has debated the extent to which international law is distinct from or might be incorporated in the domestic law of the United States, referred to as dualist and monist (or internationalist) views, respectively. See, *e.g.*, Curtis A. Bradley, *Breard, Our Dualist Constitution, And The Internationalist Conception*, 51 Stan. L. Rev. 529 (1999). But "[n]otwithstanding academic claims to the contrary, the U.S. approach to international law has been and continues to be fundamentally dualist." *Id.* at 531.

It is not sufficient to note "the basic axiom that where there is a right, there must be a remedy." JA 2325. Indeed, even the ATS, which provides an express statutory basis to look to customary international law in certain circumstances, does not incorporate every international law norm, and the Supreme Court has emphasized the need "for great caution in adapting the law of nations to private rights." *Sosa*, 542 U.S. at 728; see also *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402-1403 (2018) (quoting *Sosa* and emphasizing appropriateness of judicial deference to legislative authority to create new actions). *Sosa* confirmed that international law enters into domestic U.S. law primarily through an affirmative act of the political branches. In the context of torture claims, Congress has enacted specific legislation creating an express cause of action for certain victims of torture and extrajudicial killing, the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, note following 28 U.S.C. § 1350.[5] The Supreme Court has emphasized the significance of that legislation, and in particular its limits, in understanding the scope of claims that can be brought under the ATS.

[5] Plaintiffs have not brought a claim under the TVPA, which applies only to an "individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects a person to torture or extrajudicial killing. TVPA § 2(a)(1). The Supreme Court has recognized that the TVPA does not create an exception to foreign sovereign immunity. See *Mohamed* v. *Palestinian Auth.*, 566 U.S. 449, 453 (2012). And by its terms the statute neither waives the sovereign immunity of the United States nor applies to the conduct at issue in this case.

See *Jesner*, 138 S. Ct. at 1403 ("The TVPA reflects Congress' considered judgment of the proper structure for a right of action under the ATS.").

Although jus cogens norms occupy a higher plane of *international law*, and give rise to obligations under international law, the same principles that differentiate United States law from treaties and customary international law apply as well to jus cogens norms. Thus, even if the district court had been correct in its assumption that the jus cogens prohibition against torture create an individual right as a matter of international law, the existence of such a right by itself would not compel any particular remedy, and it would not establish the judicial enforceability of that right in United States courts even against private persons.

CONCLUSION

For the foregoing reasons, this Court should hold that Congress has not waived the sovereign immunity of the United States with respect to the claims in this case.

Respectfully submitted,

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April 2019

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s/ H. Thomas Byron III
H. THOMAS BYRON III

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s/ H. Thomas Byron III
H. THOMAS BYRON III

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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