19-1328

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,

Defendant and 3rd-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,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:08-CV-00827
HON. LEONIE M. BRINKEMA

BRIEF FOR PLAINTIFFS-APPELLEES [REDACTED]

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Plaintiffs,

—and—

UNITED STATES OF AMERICA; JOHN DOES 1-60,

Third-Party Defendants.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

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STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1350 (Alien Tort Statute, or "ATS"). This Court lacks appellate jurisdiction over CACI's interlocutory appeal because a final judgment has not been entered pursuant to 28 U.S.C. § 1291, the district court's derivative sovereign immunity ("DSI") order is not appealable under the collateral order doctrine and the orders denying CACI's subject matter jurisdiction and preemption defenses are not appealable independently or as pendent to CACI's DSI appeal.

STATEMENT OF THE ISSUES

1. May CACI immediately appeal under the collateral order doctrine an order denying its motion to dismiss based on DSI where the government's predicate sovereign immunity is not within that narrow class of immediately appealable orders, and where CACI's entitlement to DSI depends on resolution of material fact issues that are inextricably intertwined with the merits?

2. Is resolution of CACI's preemption defense "inextricably intertwined" with DSI so as to permit pendent appellate jurisdiction over the issue?

3. Can this Court assert jurisdiction over the remaining interlocutory orders related to subject matter jurisdiction, when those orders are neither final, collateral nor pendent?

If this Court has jurisdiction to review the merits of the orders CACI appeals:

4. Did the district court err in denying CACI's motion to dismiss based on DSI where (a) the record contains substantial evidence that CACI's conduct violated federal law and the government's instructions, and (b) CACI urged the district court to find that the United States was *not* entitled to sovereign immunity?

5. Did the district court err in concluding that Plaintiffs' claims are not barred by the PQD where those claims concern only CACI's unlawful conduct?

6. Are Plaintiffs' federal ATS claims "preempted" by federal statute or separation of powers?

7. Did the Supreme Court's rulings in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), abrogate *sub silentio* this Court's ATS analysis in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*")?

STATEMENT OF THE CASE[1]

After more than ten years of litigation—including four appeals to this Court—CACI, on the eve of trial, brings an improvident and meritless interlocutory appeal, recycling every argument that the courts have reviewed and rejected in this case. This last-ditch appeal is procedurally improper and belies a

[1] Docket entries for *Al Shimari v. CACI Premier Technology*, No. 08-CV-827 (E.D. Va.) are abbreviated "D.E."

record that demonstrates the diligence and competence of the courts to carefully manage complex cases and dispense justice where it is required.

Plaintiffs sued CACI Premier Technology, Inc. ("CACI") under the ATS, 28 U.S.C. § 1350, for conspiring with and aiding and abetting low-level U.S. military personnel to commit torture, cruel inhuman and degrading treatment ("CIDT") and war crimes against Plaintiffs at the Abu Ghraib "Hard Site" in 2003-2004. Following this Court's remand after *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"), the parties and the United States engaged in extensive discovery and CACI filed *six* post-remand dispositive motions, including multiple PQD motions and a motion for summary judgment. The district court ultimately denied all of CACI's motions, except to dismiss one Plaintiff, and concluded that the evidence supporting CACI's liability is sufficient to survive summary judgment on Plaintiffs' accessory liability theories and to proceed to trial, which was scheduled to commence on April 23, 2019.

I. STATEMENT OF FACTS

Plaintiffs are three Iraqi civilians who were among the thousands of individuals detained by U.S. Coalition Forces in 2003 as the United States and its allies sought to combat the insurgency that arose in the wake of the Iraq War. JA.1806-08. Plaintiffs were imprisoned in Tier 1A of the "Hard Site" at Abu Ghraib starting in November and December 2003. JA.353, 380, 394, 599, 635,

773, 820-21. All three were ultimately released without charges and "[t]he record does not contain any evidence that the plaintiffs were designated 'enemy combatants' by the United States government. In fact, Defense Department documents in the record state that plaintiff Al Shimari '*is not* an Enemy Combatant in the Global War on Terror.'" *Al Shimari III*, 758 F.3d at 521 n.2 (emphasis in original).

A. Plaintiffs Were Tortured and Subjected to Cruel, Inhuman, and Degrading Treatment While Detained in Tier 1A of the Hard Site at Abu Ghraib

Tier 1A was a confined area at the Abu Ghraib prison complex where detainees believed to have intelligence value were segregated. JA.1859. It was here that now infamous acts of torture were committed and captured in photographs. Plaintiffs and other detainees were subjected to "sadistic, blatant and wanton criminal abuses" meant to "soften [them] up" for interrogation. JA.1753, 2619-22, 2656-57.

While imprisoned there, Plaintiffs were shackled in painful stress positions for multiple hours on numerous occasions. JA.405, 408-09, 561-62, 653-58, 677-78, 800, 813-15, 826-27, 829, 876. They were subjected to isolation, sleep deprivation, and sensory deprivation. JA.415, 445-46, 562, 836, 845-49, 881. They endured repeated beatings and other forms of physical abuse. JA.423, 444-47, 537, 562, 625, 629-35, 681-83, 708-10, 714, 802-03, 807, 817. They were subjected to

hot and extreme cold temperatures, including having cold water poured on them during winter while they were naked. JA.444, 544, 629-32, 669-71, 827-28. Plaintiffs were threatened with and bitten by military working dogs. JA.545-46, 636, 822-23, 825, 836-37. They were sexually assaulted. JA.610-12, 621, 864-67, 884-85.

Exploiting cultural norms associated with their Muslim faith, Plaintiffs were also subjected to a variety of abuses intended to humiliate and degrade them. They were kept naked, including while in the presence of women, for multiple days at a time. JA.413-14, 612, 628, 640, 668, 704, 829, 877. They were forced to wear female underwear. JA.413. They were forcibly shaved to remove their facial hair. JA.826-29. They were forced to masturbate in front of others while having their picture taken. JA.610-12, 621.

Most of these abuses occurred between interrogations at the hands of military police guards who were acting on the directions and encouragement of interrogators, including CACI interrogators. *E.g.*, JA.433-34, 445, 649-54, 836; *see also* JA.1794-95, 1814.

B. CACI Employees Repeatedly Interrogated Plaintiffs

CACI was the only corporation hired by the U.S. government to supply civilian interrogators at Abu Ghraib. JA.4008. To perform these services, CACI hired interrogators such as Steve Stefanowicz, Tim Dugan, and Dan Johnson—

three individuals with little or no interrogation experience. JA.4041-44. By November 2003, CACI personnel were assigned to [redacted] of the interrogation cells at Abu Ghraib. JA.3091.

Plaintiff Al Ejaili, a reporter for the Al Jazeera news agency, was interrogated multiple times while he was held in Tier 1A. JA.399-400, 408, 417, 424.[2] His interrogators never documented these interrogations, including those conducted by CACI employee Stefanowicz. *See* JA.421, 424-25, 1245, 3486, 3497-98. On one occasion, CACI employee Johnson witnessed Mr. Al Ejaili being subjected to humiliating treatment and provided military police with instructions regarding their abusive treatment of him. JA.543-44. On another, a military interrogator noticed Stefanowicz interrogating Mr. Al Ejaili even though Stefanowicz was not assigned to interrogate him. JA.3486, 3497-98.

Plaintiffs Al-Zuba'e and Al Shimari testified that they were interrogated on several occasions by civilians (*i.e.*, CACI interrogators), who were distinguishable from military interrogators because they wore civilian clothing. JA.645, 680, 809, 879-80, 2515-16. The lead interrogator assigned to Mr. Al Shimari was a CACI employee identified in discovery as CACI Interrogator A. JA.1453-54, 4046.

[2] Government records do not match Plaintiffs' narratives as to how many times they were interrogated. That is likely because the government disclosed only formal "intelligence interrogations" that were documented, and not every interaction between interrogators and detainees. JA.1451-54.

Military records confirm that CACI Interrogator A interrogated Mr. Al Shimari on at least one occasion in December 2003. JA.1453-54, 4046. One of the interrogators assigned to Mr. Al-Zuba'e was a CACI employee identified during discovery as CACI Interrogator G. Military records show that CACI Interrogator G interrogated Mr. Al-Zuba'e on at least one occasion in December 2003. JA.1454, 4476, 4486-87.

C. CACI Employees Conspired with Soldiers to Abuse Plaintiffs and Other Detainees and Aided and Abetted Soldiers in Committing That Abuse

In the wake of the Abu Ghraib torture scandal, the Army appointed Major General Antonio Taguba, Major General George Fay, and Lieutenant General Anthony Jones to investigate allegations that military police and interrogators—both civilian and military—had participated in detainee abuse at Abu Ghraib. JA.1727-28, 1793. These investigations were "comprehensive and exhaustive," JA.1728, 1771-73, 1831, and, as this Court has previously noted, their findings are presumptively admissible in evidence, *Al Shimari IV*, 840 F.3d at 156 n.4 (citing Fed. R. Evid. 803(8)(A)(iii)). The investigations uncovered numerous instances of detainee abuse at the Hard Site, with detainee abuse "defined as treatment of detainees that violated U.S. criminal law or international law or treatment that was inhumane or coercive without lawful justification." JA.1794-95.

The Generals' investigations found that this abuse had flourished because of ineffective military leadership that resulted in a command vacuum at Abu Ghraib. JA.1728.

Although MPs were not supposed "to set conditions for detainees for subsequent [military intelligence] interrogations," General Taguba found that this occurred "at lower levels" as interrogators coordinated with MPs to "soften up" and give "special" treatment to detainees in connection with interrogations. *E.g.*, JA.1506, 1749, 1775, 1785, 2619-22, 2656-57, 3280, 4278-80. CACI interrogators and soldiers understood that this "softening up" and "special" treatment equated to serious physical abuse and mental harm intended to make detainees more responsive to questioning. *E.g.*, JA.1506, 1749, 1775, 1785, 2619-22, 2656-57, 3280, 4278-80. This coordination among interrogators and MPs was done "with little oversight by commanders." JA.1775. General Taguba singled out Stefanowicz, finding that he "[a]llowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by 'setting conditions' which were neither authorized [nor] in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse."[3]

[3] Because of the United States' invocation of the state secrets privilege, Plaintiffs were prevented from discovering whether CACI Interrogator A or CACI Interrogator G were identified in the Taguba and Fay/Jones Reports as having participated in detainee abuse. Although CACI Interrogator A denied any involvement in detainee abuse, one of the interrogators who worked with him

JA.1785. According to the Taguba Report, the interrogators and MPs were [redacted] JA.4090, in which detainee abuse was not only tolerated but encouraged.

Generals Fay and Jones concluded that, among the 27 interrogators that, among other things, "requested, encouraged, condoned or solicited . . . [MPs] to abuse detainees," at least three were CACI employees—Stefanowicz, Johnson, and Dugan.[4] JA.1795, 1955-59.

The Taguba Report found that two MPs—Cpl. Charles Graner and Sgt. Ivan Frederick II—were [redacted] of the abuse who [redacted] with other soldiers and U.S. civilian contract interrogators (*i.e.*, CACI personnel). JA.4090. As part of this collaboration, CACI interrogators directed Graner and Frederick to "set the conditions" at the Hard Site and mistreat detainees. JA.2441-42, 2452-55, 2466-67, 2563-77, 2582-84. Frederick testified in this case that Stefanowicz talked to MPs [redacted] and directed MPs to [redacted] JA.2556, 2562. The sorts of abuses that CACI employees directed Frederick and Graner to use on detainees were many of the same sorts of abuses that

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testified that he witnessed CACI Interrogator A abusing a detainee during an interrogation. JA.3620, 3642-43.

[4] These three CACI interrogators are identified in the Fay/Jones Report as CIVILIAN-05, CIVILIAN-11, and CIVILIAN-21. JA.2219-20.

Plaintiffs experienced while they were held in Tier 1A in November and December 2003. JA.2460-61, 2470, 2650-51, 2656-57.

D. CACI Controlled Its Employees and Retained Discretion Regarding How Its Employees Conducted Interrogations

CACI contracted with the United States to supply personnel to "function[] as ***resident experts***" for interrogation matters, JA.1342 (emphasis added), and thus, "to assist, supervise, coordinate, and monitor all aspects of interrogation activities," JA.1342. CACI's contract made it "responsible for providing supervision for all contractor personnel." JA.1342-43. To meet these requirements, CACI implemented a supervisory structure in Iraq composed of CACI employees with managerial responsibilities and with a duty to report back to the company. JA.4179, 4186, 4097-104. CACI also maintained significant discretion to plan and execute interrogations. JA.1342-43, 1390-91.

Military commanders confirmed that CACI was responsible for supervising and controlling its own personnel at Abu Ghraib. Captain Carolyn Wood (Holmes) testified that she "relied heavily" on CACI's Site Lead "to manage the CACI personnel." JA.4346. Col. William Brady also testified that [redacted]. JA.4333-34, 4336-37. And Col. Thomas Pappas—the highest-ranking military intelligence officer at Abu Ghraib—testified that [redacted]

[redacted].

JA.4355-56.

Interrogators who interacted with Plaintiffs confirmed the substantial discretion afforded them. CACI Interrogator A readily admitted that "the whole idea was to improvise" during interrogations and that he was not required to strictly follow interrogation plans that had been prepared in advance of an interrogation. JA.3015; *see also* JA.3753-54. In addition, military officials did not personally supervise CACI interrogators during the conduct of interrogations, JA.4247; *see also* JA.3442, 3744-75, 4336-37. CACI employees were not in the military chain of command and not subject to military discipline. JA.4106-08, 4149-51, 4165-66, 4171, 4172, 4355-56.

E. The Military Instructed CACI Personnel to Comply with Prohibitions Against Torture and Cruel, Inhuman, and Degrading Treatment

As the district court noted, CACI's contract with the United States required personnel to act "[in accordance with] Department of Defense, U.S. Civil Code, and International Regulations" in performing their duties under the contract. JA.1342. This included laws and regulations prohibiting torture and "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." JA.1618.

The military's instructions were also incorporated into the interrogation rules of engagement in force at Abu Ghraib. These rules directed all interrogation personnel to treat detainees humanely and abide by the Geneva Conventions, JA.2282, and imposed strict limits on certain interrogation techniques such as stress positions and use of dogs, JA.2283-85.[5]

The record contains no evidence that military commanders instructed CACI employees to carry out illegal acts, or even knew about the orders that CACI personnel gave to MPs to abuse detainees. Had they given such illegal instructions, CACI employees were free—and by contract, required—to disregard them. JA.1985, 4146.

II. RELEVANT PROCEDURAL HISTORY

The lengthy procedural history of this case has already been set forth in opinions of this Court. For this appeal, the following is most relevant.

A. *Al Shimari II*

Following the district court's 2009 denial of CACI's motion to dismiss Plaintiffs' state law claims in their First Amended Complaint, D.E. 94, CACI brought an interlocutory appeal arguing that adverse rulings on its asserted

[5] Although CACI complains that it was denied access to certain records based on the United States' assertion of the state secrets privilege, it fails to disclose that none of the withheld material "discusses or describes the use of . . . techniques not authorized by Army Field Manual ("FM") 34-52," such as torture and cruel, inhuman, and degrading treatment. JA.1424, 1618.

"combatant activities" preemption, law-of-war and PQD defenses—as well as its asserted absolute official immunity under *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996)—were immediately appealable. In a 12-3 *en banc* ruling, this Court dismissed CACI's appeal for lack of jurisdiction under the "collateral order" doctrine, finding that CACI's asserted combatant-activities preemption "falls squarely on the side of being a defense to liability and not an immunity from suit," *Al Shimari v. CACI Int'l Inc.*, 679 F.3d 205, 217 (4th Cir. 2012) ("*Al Shimari II*"), and that resolution of CACI's asserted *Mangold* immunity would depend on a factual determination of whether CACI was acting "within the scope of its agreement" with the government and thus did not constitute a "final resolution of the issue" suitable for immediate appeal. *Id.* at 220.

This Court also noted that most courts hold that orders denying derivative federal sovereign immunity are not immediately appealable, *id.* at 211 n.3, and, where facts regarding the availability of the immunity are "subject to a genuine dispute" the Court "lack[s] jurisdiction to consider them on an interlocutory appeal," *id.* at 223.

Following *Al Shimari II*, the district court reinstated Plaintiffs' ATS claims and the parties engaged in discovery. In 2013, the district court dismissed Plaintiffs' ATS claims under *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013),

concluding that Plaintiffs' claims did not sufficiently "touch and concern" the United States, and also dismissed Plaintiffs' common law claims. D.E. 460.

B. *Al Shimari III* and *IV*

In *Al Shimari III*, this Court rejected CACI's contention that *Kiobel* categorically bars ATS claims involving tortious conduct abroad, concluding that a claim may survive where a claim touches and concerns the United States with sufficient force. 758 F.3d at 530. Given Plaintiffs' claims' substantial connections to the U.S., this Court held that adjudicating them would advance the central purpose of the ATS which is to avoid "international discord" that would result from not remediating serious violations of international law associated with the U.S. *Id.* at 529-30.

Al Shimari III also rejected CACI's PQD defense, concluding that this defense would require further factual development, including on the question of military control of CACI "outside the context of required interrogations, which is particularly concerning given Plaintiffs' allegations that 'most of the abuse' occurred at night." *Id.* at 536. On remand, after additional jurisdictional discovery, the district court dismissed the case on PQD grounds. D.E. 547.

In *Al Shimari IV*, this Court reversed again, ruling that conduct "that was unlawful when committed is justiciable, irrespective whether that conduct occurred under the actual control of the military," and that Plaintiffs' claims are subject to

judicially manageable standards. *Al Shimari IV*, 840 F.3d at 151. This Court directed the district court to identify whether CACI's alleged conduct was unlawful—*i.e.*, "in violation of settled international law or criminal law"—and thus not foreclosed by the PQD. *Id.* at 160. The level of military control over CACI would be relevant only to non-ATS claims that fell into a discretionary "grey area" of lawfulness. *Id.*

C. Post *Al Shimari IV* Remand Proceedings

1. PQD Discovery and Decision

After remand, the district court[6] ordered video-depositions of the un-deposed Plaintiffs and requested briefing on the legal standards that would apply to Plaintiffs' ATS claims. JA.1159-60. Plaintiffs also voluntarily dismissed their common law claims leaving only the ATS claims. JA.1160. The district court ruled that torture, CIDT, and war crimes all constituted violations of the law of nations and were actionable pursuant to the ATS. *Id.*

Next, the district court instructed CACI to file a motion raising any Rule 12 arguments it intended to make, including its PQD defense. JA.1161. CACI moved to dismiss on a variety of grounds, including PQD, failure to state a claim, and preemption. JA.1161. The district court issued a lengthy opinion in February 2018,

[6] After *Al Shimari IV* was issued, Judge Lee recused himself *sua sponte*; the case was assigned to Judge Leonie M. Brinkema. JA.1159.

concluding that the Plaintiffs stated cognizable ATS claims and that the PQD is therefore inapplicable. JA.1170-71.

The opinion was based on the extensive evidentiary record, which included: (1) Plaintiffs' testimony regarding their abuse, (2) expert medical reports corroborating Plaintiffs' physical and mental injury and expert reports regarding torture, (3) depositions taken from military police guards at Abu Ghraib, and (4) military investigative reports implicating CACI in abuses. JA.1136-51, 1163 & n.15, 22. Judge Brinkema made clear that her ruling relied on record facts, and not just the allegations in the Third Amended Complaint ("TAC").[7] JA.1143 n.13.

The district court concluded that the PQD jurisdictional and merits issues merged in this case. The court found that "plaintiffs' allegations—*and the evidence they have produced in support of those allegations*—describe sufficiently serious misconduct to constitute torture, CIDT, and war crimes, all of which violated settled international law at the time—and still do." JA.1170-71 (emphasis added). Thus, because the evidence showed CACI's conduct was unlawful under the ATS, then—pursuant to the Court's holding in *Al Shimari IV*—"the political question doctrine is inapplicable." *Id.*

[7] The court noted that Plaintiffs' conspiracy and aiding and abetting allegations were "supported by substantial evidence, including depositions taken of military personnel before the TAC was filed, and the jurisdictional evidence developed since the filing of the TAC has aligned with these allegations." JA.1163 n.22.

Furthermore, the district court determined that Plaintiffs stated a claim against CACI for ATS violations under conspiracy and aiding and abetting liability theories, JA.1172-1179, while dismissing Plaintiffs claims for direct liability, JA.1171-72. The district court also rejected CACI's so-called preemption argument. JA.1179-1187. It declined to follow the "conclusory" statement in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), regarding ATS preemption "on the battlefield," finding that it "fails to consider the nature of the ATS as a federal statute—and, as such, as a congressional choice to incorporate principles of international law into domestic law." JA.1184 n.36.

2. CACI's Third-Party Complaint and Discovery Against the United States

Following its loss on this motion to dismiss, CACI impleaded the United States for claims of contribution, indemnification, exoneration, and breach of contract. JA.1120-1133. The United States moved to dismiss on sovereign immunity grounds and CACI opposed the motion, taking a position opposite of the one it takes on appeal. It argued that "[u]nder the reasoning of the Fourth Circuit's holding in *Yousuf* [*v. Samantar*, 699 F.3d 763 (4th Cir. 2012)], the United States' claim of immunity can have merit *only* if it is a status-based immunity," and not conduct-based immunity, *and* that "the United States explicitly waived its status-based immunity as a sovereign in the Federal Tort Claims Act." JA.1209-10 (emphasis added).

While that motion was pending, CACI proceeded with months of aggressive party discovery against the United States, obtaining detailed interrogatory responses regarding Plaintiffs' documented intelligence interrogations, JA.1241, receiving *over 60,000 pages* of documents and 220 native files, JA.1567, and conducting depositions of numerous interrogators, interpreters, and General Antonio Taguba, JA.1235, 3833.

3. CACI's Repetitive Dispositive Motions

Following its unsuccessful motion to dismiss, CACI brought five additional dispositive motions. First, in mid-2018, CACI renewed its challenge to ATS jurisdiction based on *Jesner*, a decision that the district court recognized foreclosed ATS claims against *foreign* corporations only. The district court rejected CACI's claim that *Jesner* requires a *Bivens* special-factor analysis for all ATS claims, and concluded that even under CACI's framework, *Al Shimari III* and *IV* demonstrate that Plaintiffs' ATS claims present no separation of powers or foreign policy concerns. JA.1287-91.

CACI then filed three separate dispositive motions in rapid succession, all of which were argued and decided at the February 27, 2019 hearing: (1) a motion to dismiss based on the United States' invocation of the state secrets privilege; (2) a motion for summary judgment based on numerous issues, including the factual sufficiency of Plaintiffs' ATS conspiracy and aiding-and-abetting claims and

preemption; and (3) yet another challenge to subject matter jurisdiction that argued that *Al Shimari III*'s ATS-extraterritoriality analysis has been abrogated, and that also asked the court to once again consider PQD. JA.2223; JA.2224.

At oral argument, the district court denied CACI's motion for summary judgment as to three of the plaintiffs and found that sufficient evidence existed regarding their ATS conspiracy and aiding-and-abetting claims to go to trial, including evidence that CACI employees directed and participated in detainee abuse. JA.2238-40. In denying the state secrets motion, the district court recognized that the issue affects both parties and that any prejudice could be addressed through jury instructions. JA.2229. The district court also denied CACI's subject matter jurisdiction motion because both extraterritoriality and PQD had already been decided against CACI and were law of the case.[8] JA.2227-29; JA.2275.

Following the hearing, the district court issued its order denying CACI's motions for the reasons stated in open court and granted CACI's summary judgment motion with respect to one Plaintiff, Taha Yaseen Arraq Rashid, because

[8] By this time, Plaintiffs had also stated that they were not pursuing any claims related to misconduct that might fall into the "grey area" and require inquiry as to military control. D.E. 1008, at 2.

many of the abuses he suffered occurred before CACI arrived at Abu Ghraib.[9] JA.2223.

The very next day, CACI filed its *sixth* post-remand dispositive motion, seeking dismissal based on its purported DSI. The court denied this motion after deciding the United States' motion to dismiss, concluding that sovereign immunity did not bar the claims against the United States relating to *jus cogens* violations, and so also did not bar claims against CACI. JA.2345.[10] The district court expressed skepticism that CACI would be entitled to DSI even if the United States had immunity because Plaintiffs' claims—which it had found presented triable issues of fact—are based on CACI's violation of law and its contracts with the government, which required compliance with U.S. and international law. JA.2346.

Following this flurry of unsuccessful dispositive motions, [11] and three weeks before the start of trial, CACI filed this interlocutory appeal based on the denial of its DSI motion.

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[9] The dismissal of Mr. Rashid's claims gives lie to CACI's insinuation that the district court did not give their duplicative dispositive motions due consideration. CACI Br. 15.

[10] The district court granted the United States' motion to dismiss the breach of contract claim, and, granted its motion for summary judgment as to all claims, thereby dismissing the Third-Party Complaint. JA.2295.

[11]On March 4, 2019 CACI filed a frivolous petition for mandamus regarding the PQD ruling, which a panel of this Court denied. No. 19-1238, Doc. 13.

STANDARD OF REVIEW

Assuming the Court has appellate jurisdiction to address the merits of CACI's appeal, pure questions of law are reviewed *de novo*. *Warfaa v. Ali*, 811 F.3d 653, 658 (4th Cir. 2016). Conclusions of fact are reviewed for clear error. *Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 645 (4th Cir. 2018). To the extent any of the underlying decisions arose from the summary judgment posture, this Court must take the evidence and all reasonable inferences drawn therefrom in the light most favorable to Plaintiffs and reverse only if the district court committed a clear error in finding there are triable issues of fact. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 537 (4th Cir. 2017).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over each of the numerous interlocutory orders CACI appeals. The district court's denial of CACI's motion to dismiss on DSI grounds is not immediately appealable under the collateral order doctrine because: (i) as the United States observes, DSI is a defense, and not a "right not to be tried"; and (ii) the DSI defense requires resolution of two fact-bound elements—compliance with federal law and governmental instructions—rendering the defense inextricably intertwined with the merits and thus, as the Supreme Court and *Al Shimari II* instruct, not subject to interlocutory appeal. These glaring defects are fatal to CACI's entire appeal and mandate summary dismissal.

Even if an appeal of the DSI order were permitted, the Court would still lack jurisdiction to resolve the numerous issues CACI seeks to bootstrap on to this appeal. CACI's preemption defense is not "inextricably intertwined" with DSI so as to render it "pendent," and CACI's alternative theory to manufacture appellate jurisdiction over rulings related to the district court's subject matter jurisdiction is unprecedented, unlimitable, and incoherent.

Should the Court assume jurisdiction over any of the interlocutory orders, it should affirm on the merits or remand because the issues implicate triable issues of fact. On the question of the United States' immunity that underlies CACI's DSI defense, CACI argued below that the United States was not entitled to sovereign immunity and CACI is therefore estopped from asserting on appeal an argument that it has waived. But this Court need not reach that issue or resolve the weighty question of the United States' entitlement to sovereign immunity, because the separable question of CACI's derivative immunity can be resolved independently. Because the scope of DSI—which includes whether CACI violated federal law and the government's contract/instructions—overlaps with the merits and because the district court found voluminous evidence that would allow a jury to find for Plaintiffs on those questions, they must be resolved at trial.

In any event, the district court correctly questioned whether the United States enjoys sovereign immunity under federal common law. As this Court has

already held, at common law, *jus cogens* violations are not sovereign acts. CACI's and the United States' exclusive focus on the requirement of express *statutory* waivers of immunity thus misses the mark.

The "focus" test in *RJR Nabisco* also did not displace *Kiobel*'s "touch and concern" test—as the subsequent ATS decision in *Jesner* proves—or otherwise abrogate *Al Shimari III*. The tests are harmonious. In short: if a claim sufficiently touches and concerns the United States, it meets the "focus" of the ATS, which is to provide "a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1390. And *Jesner*, which is limited to the possibility of discord attended to suits against *foreign* corporations alone, supports jurisdiction over Plaintiffs' claims against a U.S. corporation.

With respect to the PQD, the record evidence in this case demonstrates a triable fact issue on unlawful conduct which cannot—according to this Court in *Al Shimari IV*—constitute a political question. As CACI correctly conceded earlier, under conspiracy law, Plaintiffs do not have to show that CACI personnel mistreated Plaintiffs directly.

Finally, in contrast to the possible preemption of state-law claims, a federal statute and generalized assertions about separation of powers cannot "preempt" claims under the ATS, also a federal statute.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER ALL OF THE ISSUES IN CACI'S APPEAL

Despite *Al Shimari II* and its conclusion that a denial of DSI "may not be [immediately] appealable," 679 F.3d at 211 n.3, CACI does not even attempt to explain how its appeal meets the "stringent" requirements of the collateral order doctrine, or how vaguely articulated concerns over "warmaking" are inextricably intertwined with the putatively appealable DSI issue to permit pendent appellate jurisdiction over the "preemption" question. And, CACI simply makes up a novel theory of appellate jurisdiction to seek review of the district court's interlocutory jurisdictional rulings. By this compounded bootstrapping, CACI—as it did nearly a decade earlier—is attempting to transform an (improper) interlocutory appeal of a narrow DSI issue into a plenary review of virtually every legal ruling—including discovery rulings—made below.

CACI's current appeal is Exhibit A for the wisdom of the final judgment rule and Congress' command to avoid "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

A. The District Court's Denial of DSI Is Not Immediately Appealable Under the Collateral Order Doctrine

CACI immediately appealed the district court's DSI order and did not seek to certify the question pursuant to 28 U.S.C. § 1292(b).[12] Thus, the only basis for this Court's jurisdiction over the interlocutory DSI order is the collateral order doctrine set out in *Cohen v. Beneficial Industrial Loan Corp.*, 347 U.S. 541 (1949), which requires CACI to show that the district court's rulings: "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006).

This Court is "charged with keeping a tight rein on the types of orders suitable for appeal consistent with *Cohen*." *Al Shimari II*, 679 F.3d at 213. This is because the Supreme Court has consistently described the collateral order doctrine as "narrow and selective," of "modest scope," *Will*, 546 U.S. at 350, and to be interpreted with "utmost strictness," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989), all in order to underscore the point that, "the narrow exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has

[12] In 2009, CACI filed a 1292(b) application only *after* the Fourth Circuit granted rehearing *en banc* on the question of the appellate court's jurisdiction, in an attempt to retrofit its grounds for appeal only when it appeared doomed. D.E. 127.

been entered," *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) (citations and quotation marks omitted). As *Al Shimari II* observed, *Cohen*'s "modest scope is apparent from the short list of orders approved by the Supreme Court for immediate review." 679 F.3d at 213 n.7. Denials of DSI have not yet been placed on that small list, while a number of courts have rejected it. *Id.* at 211 n.3; *see infra* Argument § I(A)(1).

Instead of explaining how the DSI order meets each of the three *Cohen* factors, CACI offers a conclusory—and irrelevant—citation to *Ashcroft v. Iqbal*, 556 U.S. 662 (2008). *Iqbal* merely restates the long-standing rule that a "den[ial] of a *Government officer*'s claim of qualified immunity *can* fall within" the *Cohen* factors, *id.* at 671-72 (emphasis added), and it "*can*" only where the appealable question turns on abstract questions regarding "clearly established" law, but not where it involves contested facts. *See Al Shimari II*, 679 F.3d at 223. By contrast, DSI has never been recognized to be immediately appealable by a court, nor should it be for the first time here where CACI's entitlement to DSI turns on adjudication—at trial—of contested facts that are intertwined with the merits of the claims, *see infra* Argument § I(A)(2).

1. DSI Does Not Implicate a Right Not to Be Tried Under the Third *Cohen* Factor

The third *Cohen* factor is typically met through a showing of a "right not to be tried," *i.e.*, that the order "involves an asserted right the legal and practical value

of which would be destroyed if it were not vindicated before trial." *Midland Asphalt Corp.*, 489 U.S. at 799.

CACI does not argue that a DSI defense amounts to a "right not to be tried." *Id.* at 801. Nor could it given how it has litigated this case. It filed a third-party complaint against the United States and vigorously and successfully pursued discovery for over a year until the government was dismissed on the eve of trial. Indeed, the United States *itself* has twice suggested to this Court that even its own sovereign immunity is not an immediately appealable issue. In its amicus brief filed here, the government refers to sovereign immunity as a "jurisdictional *defense* to *claims*"—not a wholesale immunity from *suit*. Br. for the United States as Amicus Curiae, No. 19-1938, Dkt. 25 at 2 (April 30, 2019) ("U.S. Br.") (emphasis added). And, in *Al Shimari II*, the government cautioned that a virtual consensus of courts has found that orders denying federal sovereign immunity are not immediately appealable—which this Court underscored. *Al Shimari II*, 679 F.3d at 211 n.3 (citing cases); Brief for the United States as Amicus Curiae, *Al Shimari II*, No. 09-1335, Dkt. 146 at 9 (4th Cir. Jan. 14, 2012) ("U.S. Br. in *Al Shimari II*").[13]

[13] This Court on occasion has stated that sovereign immunity questions are immediately appealable, *Yousuf v. Samantar*, 699 F.3d 763, 768 n.1 (4th Cir. 2012); *Rux v. Republic of Sudan*, 461 F.3d 461 n.1 (4th Cir. 2006), but those cases involved *foreign* sovereign immunity, which is distinct, as *Pullman Constructions*, *infra* Argument § I(A)(1) explains.

In *Pullman Constructions Industries, Inc. v. United States*, the Seventh Circuit held that federal sovereign immunity is not an immunity from trial because, unlike claims of Eleventh Amendment immunity and foreign sovereign immunity which are grounded in "a governmental body's right to avoid litigation in another sovereign's courts," the United States "is no stranger to litigation in its own courts," and the "United States Code is riddled with statutes authorizing relief against the United States and its agencies." 23 F.3d 1166, 1168 (7th Cir. 1994).

In *Alaska v. United States*, the Ninth Circuit concurred, observing that federal sovereign immunity claims are not akin to claims of double jeopardy, qualified immunity, or official immunity, because "[i]n the latter type of cases, the judicial inquiry itself, rather than just a merits judgment, causes the disruption that the doctrine of immunity was designed to prevent." 64 F.3d 1352, 1357 (9th Cir. 1995); *see also Martin v. Halliburton*, 618 F.3d 476, 485 (5th Cir. 2010) ("[A] denial of [derivative] sovereign immunity is not subject to immediate review under the collateral order doctrine."); *CSX Transp. Inc. v. Kissimmee Util. Auth.*, 153 F.3d 1283, 1286 (11th Cir. 1998).

These decisions reflect the Supreme Court's admonishment to "view claims of a right not to be tried with skepticism, if not a jaundiced eye." *Digital Equip.*,

511 U.S. at 873.[14] Ultimately such a right must be one that "rests upon an *explicit statutory or constitutional guarantee* that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added); *see Digital Equip.*, 511 U.S. at 879, 880; *see also* JA.2315 n.7 ("[F]ederal sovereign immunity is a creature of federal common law rather than any statute or the Constitution.").[15]

Here, there is no express statutory or constitutional provision in play nor is there a value of a high order that would be "irretrievably lost" were CACI to wait a few months for a final judgment. *Cf. Abney v. United States*, 431 U.S. 651, 661 (1977) (double jeopardy protections reflect "deeply ingrained" public values). As a private company that profited handsomely from selling its interrogation services to the United States, and which therefore already obtained the benefit of its contractual bargain, there is no *public* benefit from CACI avoiding trial. While "there is value . . . in triumphing before trial, rather than after it," *Van Cauwenberghie v. Biard*, 486 U.S. 517, 524 (1998), that preference is not enough

[14] That the Court in *Cunningham* referred to DSI as a "jurisdictional immunity" does not resolve the question of appealability. *See S.C. State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 446 (4th Cir. 2006) (rejecting similar argument about terminology); *see also Segni v. Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987).

[15] In *McCue v. City of N.Y. (In re World Trade Ctr. Disaster Site, Litig.)*, the court found a form of federal sovereign immunity immediately appealable, because, unlike here, the immunity was grounded in a statute that protected a "'particular value of a high order.'" 521 F.3d 169, 192 (2d Cir. 2008) (quoting *Will*, 546 U.S. at 352).

to dislodge the final judgment rule. The Supreme Court has denied collateral order review for interests far weightier and irretrievable than CACI's.[16]

2. CACI Cannot Meet the First and Second *Cohen* Factors Because the District Court's DSI Decision Was Not Final and Is Fully Intertwined with the Merits

As the district court correctly observed, JA.2346, CACI is not entitled to the sovereign's immunity if it is found to "violate[] both federal law and the Government's explicit instructions." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). That determination has not yet been finally made, nor could it be since CACI's compliance with the law and the government's instructions are fact issues a jury was about to resolve.

To satisfy the threshold *Cohen* factor, a "district court must issue a fully consummated decision" that is "the final word on the subject addressed." *Al Shimari II*, 679 F.3d at 220 (quotation marks and citations omitted). Issues turning on "facts that have been designated as outcome determinative yet subject to genuine dispute" may not be finally resolved prior to trial and are not appealable. *Id.* at 223. Here, the district court denied CACI's DSI defense because the United States lacked predicate immunity, and observed (without finally resolving the

[16] *See Mohawk Indus., Inc., v. Carpenter*, 558 U.S. 100, 107-11 (2009) (attorney-client privilege); *Will*, 546 U.S. at 353-54 (refusal to apply FTCA judgment bar); *Midland Asphalt*, 489 U.S. at 801-02 (nondismissal of grand jury indictment); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (order disqualifying criminal counsel).

question) that ultimately, "it is not at all clear that CACI would be extended the same immunity" given Plaintiffs' claims that CACI is liable for torture, CIDT and war crimes that would violate the law and CACI's contract with the government. JA.2346. Indeed, to the extent CACI questions the sufficiency or genuineness of Plaintiffs' evidence, CACI Br. 27-28, it only proves the question is fact-determinative.

The *reason* the district court did not finally resolve this question turns on the second *Cohen* factor: the question is not "completely separate from the merits." Whether CACI is entitled to DSI overlaps precisely with the merits questions the jury was about to resolve. *Al Shimari II*'s analogy to qualified immunity and the prohibition on interlocutory appeals from questions of "genuineness," 679 F.3d at 221-23, conclusively demonstrates this. In *Johnson v. Jones*, the Court explained that when addressing a denial of qualified immunity, unlike pure questions of law—"[w]here [ ] a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." 515 U.S. 304, 313-14 (1995). Thus, the "question of 'evidence sufficiency, *i.e.* which facts a party may or may not be able to prove at trial . . . is not appealable." *Id.*; *accord Winfield v. Bass*, 106 F.3d 525,

529-30 (4th Cir. 1997); *Buonocore v. Harris*, 65 F.3d 347, 359-60 (4th Cir. 1995); *cf. S.C. State Bd. of Dentistry*, 455 F.3d at 442-43.

In these situations, the defense must be resolved at trial. *See Demetres v. E.W. Const., Inc.*, 776 F.3d 271, 272 n.2 (4th Cir. 2015) (explaining that if subject-matter jurisdiction turns on contested facts and "[i]f satisfaction of an essential element of a claim for relief is at issue, [then] the jury is the proper trier of contested facts" (quotation marks omitted)); *ACLU of Md., Inc. v. Wicomico Cty., Md.*, 999 F.2d 780, 784 (4th Cir. 1993) (if "defendant's entitlement to immunity turns on a factual dispute, that dispute is resolved by the jury at trial"); *accord In re: KBR, Inc.*, 893 F.3d 241, 254 n.3 (4th Cir. 2018).

This case—with its multiplicity of fact-bound issues and voluminous record, exemplifies the policy wisdom underlying the *Johnson v. Jones* rule. Trial judges have "comparative expertise" over appellate judges in evaluating questions of factual sufficiency and doing so "can consume inordinate amounts of appellate time," and it makes little sense for this Court to canvass the 4,500+-page record now, and then possibly again in several months after conclusion of a trial, when presented with a "record that will permit a better decision." 515 U.S. at 316-17.

B. This Court Lacks Pendent Appellate Jurisdiction Over the "Preemption" Issue

The Supreme Court has specifically cautioned against CACI's gambit here, *i.e.*, "parlay[ing] *Cohen*-type collateral orders into multi-issue interlocutory appeal

tickets." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50 (1995). Accordingly, pendent appellate jurisdiction remains a "narrow" exception to the final judgment rule, applying only "where issues are (1) so intertwined that [the Court] *must* decide the pendent issue in order to review the claims properly raised on interlocutory appeal or (2) resolution of the issue properly raised on interlocutory appeal *necessarily* resolves the pendent issue." *Rux*, 461 F.3d at 476 (quotation marks omitted) (emphasis added). Overlap of common issues of fact and law are insufficient because they may "nevertheless present quite distinct factual and legal issues at the retail level." *Bellotte v. Edwards*, 629 F.3d 415, 427 (4th Cir. 2011).

CACI's suggested overlap between the preemption and DSI issues is too abstract. CACI Br. 1-2. That the questions—as *CACI has overbroadly characterized* them—may generally implicate "warfighting" does not prove the logical antecedence or necessity of resolving all of them now. *Id.*; *see Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013); *cf. Nero v. Mosby*, 890 F.3d 106, 123 (4th Cir. 2018). The question whether claims under federal common law clash with the separation-of-powers or distinct federal statutory law (CACI's so-called preemption argument) is hardly inextricably intertwined with the question of whether CACI performed its contract in accordance with its terms requiring it to comply with the law (DSI).

C. This Court Lacks Jurisdiction to Review the District Court's Subject Matter Jurisdiction Rulings

In an effort to obtain appellate jurisdiction over *all* of the contested questions CACI lost below, CACI claims this Court has jurisdiction—independent of its theory of pendent jurisdiction—to review the district court's subject matter jurisdiction, into which bucket it tosses rulings on the state secrets privilege, ATS, and PQD, because this "Court [must] always . . . satisfy itself" of jurisdiction. CACI Br. 1.[17] This is an empty tautology, with zero support in law or logic.

The collateral order doctrine permits review only of the precise *legal* question *collateral* to the merits and *unreviewable* after final judgment, and those contained within it or otherwise inextricably intertwined with that question. That exhausts the boundaries of this Court's interlocutory review. No court has ever held that an appellate court has jurisdiction to review any and all decisions related to the district court's subject matter jurisdiction in an interlocutory appeal at any time. The unprecedented theory of appellate jurisdiction that CACI invokes obliterates the narrowly defined limits of appellate jurisdiction mandated by Congress and the Court.

CACI cannot find support for its made-up jurisdictional theory from the banal legal proposition in *Steel Co. v. Citizens for a Better Environment*, 523 U.S.

[17] CACI made the same conclusory argument *Al Shimari II*, CACI Br. in *Al Shimari II* 6-7, which the Court ultimately did not credit.

83 (1998). Because the appeal in *Steel* arose from a final judgment, 523 U.S. at 88, it stands only for the proposition that when issues are already *properly* before an appellate court after *final judgment*, the court should resolve non-interlocutory jurisdictional questions ahead of merits questions—nothing more.

II. CACI IS NOT ENTITLED TO DSI

Even if this Court were to review the DSI decision on the merits, because DSI is not coterminous with sovereign immunity, this Court can dispose of this appeal by rejecting CACI's DSI appeal without deciding the weighty issue of the government's sovereign immunity on the truncated briefing presently before the Court.

A. By Urging the District Court to Deny the United States' Sovereign Immunity, CACI Has Waived or Should Otherwise Be Estopped from Challenging the Decision

While CACI now admonishes the district court for concluding that the United States lacks status-based sovereign immunity for *jus cogens* violations, CACI Br. 19-24, it directly urged the opposite below. CACI's argument—a reflection of its gamesmanship with the courts—should be deemed waived under the invited error doctrine or otherwise estopped.

The invited error doctrine "is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." *Simms v. Bayer*

Healthcare LLC, 752 F.3d 1065, 1072 (6th Cir. 2014) (quotation marks omitted); *see United States v. Jackson*, 124 F.3d 607, 617 (4th Cir. 1997) ("The 'invited error' doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request.").

When it suited CACI's interests, CACI opposed the government's motion to dismiss CACI's third-party claims against it on ground that the United States had "explicitly waived its status-based immunity" and suggested that conduct-based immunity was not available under *Yousuf*. JA.1209-10. CACI thus urged the district court to conclude that the United States does not enjoy sovereign immunity for the *jus cogens* claims at issue.

CACI never argued below the position it takes now,[18] as CACI was hedging between laying its money on retaining its third-party claims against the United States (anti-sovereign immunity) or on dismissal of Plaintiffs' claims against it based on DSI (contingent on sovereign immunity). If anything, it argued the

[18] In arguing for DSI, CACI only partially walked back its position, by observing that the U.S. government had previously argued (in opposition to CACI's earlier position) in support of sovereign immunity. D.E. 1150, at 9 ("CACI PT is unaware of any judicial decision holding that the United States lacks sovereign immunity with respect to" *jus cogens* violations) (citations omitted). But CACI took no position on whether the United States was actually immune from such suits. This does not defeat waiver. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (observing the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

opposite of the position it now takes. Viewed either way, CACI's new position on appeal should be deemed waived or foreclosed under the invited error doctrine. The waiver cannot be cured by the U.S. amicus brief. *United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001).

In addition, CACI should be judicially estopped from now arguing that the United States enjoys sovereign immunity. *Zedner v. United States*, 547 U.S. 489, 504 (2006) (judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase"). CACI filed its third-party action against the United States—which constituted a representation that it believed it had a good faith basis to assert claims against the United States—seeking to maximize its discovery rights against the government; and it did so. This gave CACI the advantage it sought since the government was required to (and did) provide far more discovery as a party than it would have under the discretionary and limited *Touhy* procedures. *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989).

Having procured these advantages by suing the United States, CACI is now estopped from asserting a position at odds with its own pleading, which it certified was filed in good faith. CACI should not be rewarded for manipulating the courts in this manner. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (because judicial estoppel "prevents parties from 'playing fast and loose with the courts'" by

"prohibiting parties from deliberately changing positions according to the exigencies of the moment," a court may invoke it in its discretion).

B. Even if the United States Enjoys Sovereign Immunity, CACI Would be Foreclosed from Obtaining DSI

1. CACI Cannot Obtain the Government's Immunity as a Matter of Law

Even if sovereign "immunity confers upon those within its aegis the right not to stand trial," contractors are still required to "establish their entitlement to it." *Al Shimari II*, 679 F.3d at 223; *see also Campbell-Ewald Co.*, 136 S.Ct. at 672 (there is "no authority for the notion that private persons performing Government work acquire the Government's embracive immunity"); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 345 n.8 (4th Cir. 2014) ("simply being the government's common law agent does not entitle a contractor to derivative sovereign immunity").

"[C]ourts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved," and thus, "courts have extended derivative immunity to private contractors" only when they are performing government functions that are protected by an immunity. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see Burn Pit*, 744 F.3d at 344 ("*Yearsley* recognizes that private employees can perform the same *functions* as government employees and concludes that they should receive immunity from suit when they perform these *functions*." (emphasis

added).) As the Court has already recognized, "unlawful conduct in violation of settled international law or criminal law" is "not a *function* committed to a coordinate branch of government." *Al Shimari IV*, 840 F.3d at 158 (emphasis added). Because Plaintiffs' claims against CACI arise from activity that cannot constitute a "government function," CACI cannot establish DSI against such claims, as a matter of law.[19]

2. At Most, the Contested Merits of the DSI Defense Have to Be Resolved at Trial

CACI misunderstands the law governing DSI and fantastically simplifies the deeply contested factual record—which swells to 4,500+ pages before this Court. CACI now contends, at a high level of abstraction, that it generally carried out the government's instructions because "it located, hired, and sent interrogators to Iraq" to undertake interrogations, CACI Br. 27-28. But it is not enough to "stay[] within the thematic umbrella of the work that the government authorized . . . to render the contractor's activities 'the act[s] of the government.'" *Burn Pit*, 744 F.3d at 345. The Supreme Court has clarified that there is no DSI if a "contractor violates both federal law and the government's explicit instructions." *Campbell-Ewald*, 136 S. Ct. at 672; *cf. Cunningham*, 888 F.3d at 647 (granting DSI when government

[19] This also demonstrates that CACI cannot establish a "substantial" claim of immunity, rendering the denial of DSI unappealable. *Al Shimari II*, 679 F.3d at 223 (citing *Martin*, 618 F.3d at 483 (claims of immunity must be "substantial," and not "merely colorable" to fulfill *Cohen*)).

exercised detailed control over contractor, including providing specific call list and ordering contractor to follow government's call script exactly, but not giving authority to obtain prior consent from each individual as plaintiff alleged was legally required).

Because the question of immunity is coterminous with the merits—compliance with federal law and the government contract—and because the district court denied CACI's motion for summary judgment and sent the contested factual questions to trial, this Court cannot resolve them now. *Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009). The Supreme Court has expressly reminded courts of appeal that on appeals from summary judgment denials (for the analogous area of qualified immunity where the question is the genuineness or sufficiency of the evidence regarding unlawful conduct, rather than whether the legal violation was clearly established) the appellate court must take all inferences in the light most favorable to the plaintiffs and remand for trial if there are material issues of fact. *See Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (summarily reversing Fifth Circuit's evaluation of officer's qualified immunity because it "weigh[ed] evidence and reach[ed] factual inferences contrary to [plaintiff's] competent evidence" and thus failed to "adhere to the fundamental principle" requiring reasonable inferences be drawn in favor of nonmoving party at summary

judgment); *accord Childress v. City of Charleston Police Dep't*, 657 Fed. App'x 160, 162 (4th Cir. 2016) (unpublished).

Plaintiffs adduced substantial evidence demonstrating that (1) under its contract, CACI assumed significant discretion in conducting interrogations and was required to comply with international and U.S. law; (2) under the then-present "command vacuum" at Abu Ghraib, CACI assumed positions of authority and ordered, aided and otherwise conspired with MPs to abuse detainees in precisely the manner plaintiffs were abused; and (3) as a result, Plaintiffs endured treatment that meets the statutory definition for torture and CIDT. *See supra* Statement of the Case § 1; *see also Al Shimari IV*, 840 F.3d at 156 (contrasted with CACI's claims, "[o]ther evidence in the record, however, indicated that the military failed to exercise actual control over the work conducted by the CACI interrogators" and that "CACI interrogators ordered low-level military personnel to mistreat detainees").

On the voluminous record in this case, the district court found sufficient evidence in support of Plaintiffs' ATS claims to go to trial. JA.2238-40. It would be inappropriate for this Court to second-guess that evidentiary conclusion and issue judgment in favor of CACI. *Tolan*, 572 U.S. at 659.

C. The District Court Correctly Assessed the United States' Sovereign Immunity for *Jus Cogens* Violations

Because of CACI's waiver and estoppel, as well as the district court's decision that CACI's third-party claims fail for separate reasons, this Court need not decide whether the United States would enjoy sovereign immunity in this appeal.[20] If it does so, it should affirm.

In finding that "sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms," JA.2345, the district court conducted its analysis under the "common law doctrine" of sovereign immunity, JA.2302-03 n.4. This approach follows this Court's instructions in *Goldstar (Panama) S.A. v. United States* that, because the ATS is a jurisdictional statute only, "any party asserting jurisdiction under the [ATS] must establish, *independent of that statute*, that the United States has consented to suit." 967 F.2d 965, 968 (4th Cir. 1992) (emphasis added). Because *jus cogens* claims are derived from customary international law incorporated into federal common law, and not from a federal statute or single international treaty, *see* JA.2320; JA.2328 n.11, common law is the source for the existence and scope of sovereign immunity.

[20] The United States has elected not to immediately appeal the ruling adverse to its interests, no doubt because it recognizes the "defense" of sovereign immunity is not immediately appealable.

This approach—and result—is also supported by *Yousuf*, 699 F.3d at 776, where, in the absence of a statute governing foreign official immunity, the court examined common law to determine the existence and scope of the immunity; and, held that, because "as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign," under common law, a foreign official, like U.S. officials here, would not be entitled to conduct-based immunity for *jus cogens* violations. *Cf. Saleh v. Bush*, 848 F.3d 880, 893-94 (9th Cir. 2017) ("*Congress* [ ] can provide immunity for federal officers for *jus cogens* violations" under the Westfall Act) (emphasis added)).

None of the ATS cases upon which CACI or the United States relies conducted the required common law analysis. *See, e.g.*, *Goldstar*, 967 F.2d at 968-71 (examining whether the U.S. waived sovereign immunity for ATS claims arising from the breach of a specific treaty (1907 Hague Convention)); *Perez v. United States*, 2014 WL 4385473, at *5-7 (S.D. Cal. 2014) (observing that plaintiffs cite no authority to compel a common law analysis of U.S. sovereign immunity); *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014) (same).

Cases holding that waiver of sovereign immunity "must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted), reflect the basic principle that, where a statute has affirmatively waived

sovereign immunity by giving rise to a federal duty, the express language of *that* statute is determinative of the scope of the waiver. *See Williams v. United States*, 242 F.3d 169, 173 (4th Cir. 2001) (where U.S. waives "immunity against liability for violation of its own statutes," the waiver must be expressed in "specific language in the substantive federal statute allegedly giving rise to the duty").[21] Similarly, where a statute affirmatively grants foreign sovereign immunity, the scope of the immunity and waiver thereto is expressly carved out by the statute, and may not extend beyond it. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (because FSIA affirmatively grants immunity to foreign sovereigns and serves as the "sole basis for obtaining jurisdiction over a foreign state in our courts," claims that do not fit FSIA's express categories of waiver must be dismissed).

Claims brought under the ATS are distinct. The ATS neither gives rise to a federal duty, expressly waiving sovereign immunity like substantive federal statutes, nor affirmatively grants immunity, like FSIA or the Westfall Act. The ATS solely confers jurisdiction over claims that arise from common law, which

[21] The cases on which CACI and the United States rely look for express waiver in the statute under which the specific claims arose. *See, e.g.*, *Lane*, 518 U.S. 187 (Rehabilitation Act); *FAA v. Cooper*, 566 U.S. 284 (2012) (Privacy Act); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (Administrative Procedure Act); *FDIC v. Meyer*, 510 U.S. 471 (1994) ("sue-and-be-sued" clause of the Federal Savings and Loans Insurance Corporation's organic statute); *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019) (Fair Credit Report Act).

incorporates *jus cogens* norms. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *Yousuf*, 699 F.3d at 777. Thus, to determine if the U.S. possesses sovereign immunity for *jus cogens* claims, courts must examine the common law.

In conducting its common law analysis, the district court considered the content and status of the *jus cogens* norms at issue here—torture, CIDT, and war crimes—and the right to a remedy inherent in these norms. JA.2319-27; *accord Yousuf*, 699 F.3d at 775-77. The basic truism that the United States asserts as amicus that "[i]nternational law does not by itself . . . create legal rights or obligations enforceable in United States courts," U.S. Br. in *Al Shimari V* 14-16, overlooks that Plaintiffs' claims are enforceable through the ATS. *See Sosa*, 542 U.S. at 732.[22]

III. THE DISTRICT COURT POSSESSED JURISDICTION OVER PLAINTIFFS' ATS CLAIMS

Plaintiffs briefly address CACI's PQD and ATS arguments here, but given the novelty of CACI's theory of appellate jurisdiction, which it failed to explain, Plaintiffs respectfully request an opportunity for supplemental briefing in the event

[22] The district court's discussion of the U.S.'s ratification of the Convention Against Torture was to show that the right to a remedy forms part of the *jus cogens* norm prohibiting torture, and not to suggest a legal duty arose from breach of that treaty. *Compare Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 176 (2d Cir. 2009) ("Agreements that . . . have not been executed by federal legislation . . . are appropriately considered evidence of the current state of customary international law."), *with Goldstar*, 967 F.2d at 968 (rejecting plaintiffs' claims that arose directly from a treaty).

the Court wishes to address the merits of these presumptively unappealable questions.

A. *RJR Nabisco* Did Not Change *Kiobel's* "Touch and Concern" Test or Undermine *Al Shimari III*'s Extraterritoriality Analysis

CACI argues that the "focus" analysis set forth in *RJR Nabisco* regarding RICO displaced, *sub silentio*, the "touch and concern" analysis of *Kiobel* and mandates the same extraterritoriality analysis CACI presented—and this Court expressly rejected—in *Al Shimari III*. In fact, as the analysis in *Al Shimari III* shows, the one analysis simply forms part of the other.

In support of the "touch and concern" test, *Kiobel* cited directly to Part IV of *Morrison*, which first adopted the "focus" analysis. *See Kiobel*, 569 U.S. at 125-126 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-273 (2010)). *RJR Nabisco* later explained that, in *Kiobel*, the Court "did not need to determine, as we did in *Morrison*, the statute's focus" because "all relevant conduct" associated with the claim occurred abroad—*i.e.* there was *no* relevant domestic conduct for step two of the "focus" test. 136 S.Ct. at 2101. Even *after RJR Nabisco*, the Court expressly affirmed *Kiobel*'s "touch and concern" test in the ATS case, *Jesner*—an obvious point that CACI ignores since it renders CACI's analysis impossible.

Thus, it is hardly "curious," CACI Br. 33, that the Fourth Circuit recently concluded, in evaluating the extraterritoriality of the Trafficking Victims

Protection Act, that "*RJR Nabisco* did not overturn *Kiobel* and—in step two—retains a similar emphasis on the relevant claim's connection to U.S. territory." *Roe v. Howard*, 917 F.3d 229, 240 n.6 (4th Cir. 2019). CACI also ignores *Warfaa v. Ali*, which expressly affirmed *Al Shimari III*'s "touch and concern" analysis and reinforced the strength of Plaintiffs' U.S.-based "relevant conduct." 811 F.3d at 660 (in contrast to *Al Shimari*, "[n]othing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States").

Although the Supreme Court continues to use the "touch and concern" test for ATS claims, that test is harmonious with the "focus" test: conduct "relevant" to an ATS "claim" must "touch[] and concern[]" the United States with "sufficient force" to displace the presumption against extraterritoriality. *Kiobel*, 569 U.S. at 124-25. What is considered "relevant" to the claim is determined by the "focus" of the ATS, which can include the conduct it "seeks to 'regulate,'" as well as the parties and interests it "seeks to 'protec[t]' or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S.Ct. 2129, 2137 (2018).

CACI argues the ATS's focus is "unquestionably the tort committed in violation of the law of nations," which must "occur[] in the United States." CACI Br. 35. This *ipse dixit* is *exactly* what CACI argued to this Court five years ago, and which this Court expressly rejected because it represented the view of only the two-vote concurring opinion in *Kiobel* that was "far more circumscribed than the

majority opinion's requirement that 'the claims touch and concern the territory of the United States.'" *Al Shimari III*, 758 F.3d at 527 (quoting majority opinion of *Kiobel*, 133 S.Ct at 1669); *see also Kiobel*, 569 U.S. at 125 (Kennedy, J.) (emphasizing ATS may still remediate "human rights abuses committed abroad" in cases not covered by *Kiobel*'s holding).

CACI concedes, CACI Br. 48, that, as *Jesner* explained, the "objective" of the ATS is:

> To avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.

Jesner, 138 S.Ct. at 1397; *id.* at 1390; *accord Kiobel*, 569 U.S. at 123; *Sosa*, 542 U.S. at 715; *Al Shimari III*, 758 F.3d at 529-30.

This Court has held that it *advances* the objective of the ATS to provide a remedy for claims arising out of universally condemned conduct used on foreign nationals who were under the authority of the United States, during an occupation and in a location over which the United States has full jurisdiction and control (such that there could be no conflict with foreign law), and which were caused by a U.S. corporation, under contract with the U.S. government, in a conspiracy with U.S. soldiers. *See Al Shimari III*, 758 F.3d at 529-31. *Compare Jesner*, 138 S.Ct. at 1406-07 (detailing ways in which international "discord" may follow by extending ATS to *foreign*

corporations), *with* JA.1292 (unlike government's opposition to *Jesner* suit, "United States is currently a party in this lawsuit" and has identified no "significant foreign-relations problems").

B. *Jesner* Does Not Disturb this Court's Prior Ruling

After first ignoring it, CACI deploys *Jesner*'s narrow ruling to repurpose nearly every separation-of-powers and "warmaking" argument it has made throughout this litigation. But the courts in this case have already been vigilant in guarding the ATS door—including Judge Brinkema in thoroughly analyzing and rejecting CACI's *Jesner* argument—and have concluded these claims can proceed consistent with separation of powers. *See, e.g.*, JA.1287-91.

First, despite being urged to decide the broader question of corporate immunity from ATS suits, *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 domestic-law liabilities on *foreign* corporate forms because it would "create unique problems" with U.S. allies and risk creating "significant diplomatic tensions" that would contravene the central object of the ATS. *Id.* at 1406-07 (stressing Jordanian government considered suit

a "grave affront" to sovereignty and complicated U.S.-Jordanian counterterrorism efforts).

By contrast, this case would not risk "international discord" because the substantive norm against torture is universally recognized and because there is no risk of haling foreign nationals into U.S. courts, "given that the defendants are United States citizens." *Al Shimari III*, 758 F.3d at 530. The United States has been a party to this case for over a year, and far from registering any foreign-policy objections, has previously told this Court that it believes adjudicating Plaintiffs' torture claims would advance federal interests. U.S. Br. in *Al Shimari II* 2-3.

Second, despite surface similarities between implied causes of action under *Bivens* and under the ATS, *Jesner* (which only passingly mentions *Bivens*) does not support CACI's attempt to engraft fully the judicial caution associated with the former onto the latter—nor could it. In *Bivens* cases, judicially-implied causes of action directly from the Constitution are in tension with the congressional lawmaking function, *see Ziglar v. Abassi*, 137 S.Ct. 1843 (2017), while 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 732. Congress affirmatively endorsed recognition of torture-based claims under the ATS, when it created a

parallel cause of action for U.S. citizens under the Torture Victims Protection Act. *Al Shimari III*, 758 F.3d. at 531.

Third, this Court has rejected the argument that the wartime context in which these claims arise would preclude judicial relief. *Al Shimari IV*, 840 F.3d at 157 ("the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity"). Finally, CACI's literalist reading of the ATS's purpose to exclude only post-war claims, CACI Br. 48, is bizarre. The law of war already is precisely designed to regulate war as it happens, and war crimes, which are recognized ATS claims, are typically addressed retrospectively; and, not all "diplomatic strife" leads to war.

C. CACI's Appeal of the District Court's PQD Ruling is Meritless

This, CACI's *fifth* attempt to have this Court review its PQD defense before trial,[23] is foreclosed by this Court's legal rulings and the district court's fact-finding.

CACI ignores this Court's admonition that conduct "that was unlawful when committed is justiciable, *irrespective* of whether that conduct occurred under the actual control of the military." *Al Shimari IV*, 840 F.3d at 157-59 (emphasis

[23] *See Al Shimari II*, 679 F.3d at 215; *Al Shimari III*, 758 F.3d at 520-22 (declining to review PQD arguments raised by CACI); *Al Shimari IV*, 840 F.3d at 157 (reversing dismissal of Plaintiffs' case on PQD grounds); No. 19-1238, Doc. 13 (summarily denying CACI's petition for a writ of mandamus).

added). The Court observed—and "counsel for CACI conceded at oral argument" that—"some of the alleged acts [we]re plainly unlawful at the time they were committed." *Id.* at 160. CACI's singular focus on this Court's other instruction—"to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place"—is relevant *only* to the *alternative* theory then at issue, regarding discretionary acts in the "grey area." *Id.* at 160. Plaintiffs, however, dropped their common law claims which could be considered such "grey area" conduct. JA.0271; D.E. 1008, at 2. Thus, CACI's arguments concerning military control and sensitive military judgments—in its briefing below and on this appeal—are irrelevant.[24]

CACI's remarkable assertion that "the district court refused to conduct the evidence-based jurisdictional inquiry this Court directed," CACI Br. 38, ignores both the district court's 2018 PQD opinion—based on "substantial evidence" from Plaintiffs—and its recent summary judgment ruling (argued the same day as CACI's renewed PQD motion) identifying triable issues of fact on intertwined merits questions. *See supra* Statement of the Case, §§ II(C)(1), (3). Instead, disregarding much of the 4,500+-page factual record on appeal, CACI presents a

[24] Plaintiffs dispute CACI's arguments under both prongs of the PQD analysis and vigorously contest the level of military control over CACI given, among other things, the "command vacuum" that permitted abuses outside of interrogations to occur. *See supra* Statement of the Case, § I(C).

conclusory, one-sided factual recitation of supposedly helpful pseudonymous testimony to argue that Plaintiffs lack *any* proof of their conspiracy and aiding and abetting claims. CACI Br. 41.

In so arguing, CACI incorrectly operates on the false premise that Plaintiffs must show that CACI interrogators physically harmed Plaintiffs. This is not what the law requires, however, as CACI itself previously—and correctly—conceded in this case:

> [a] fundamental feature of conspiracy claims is that a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, ***even if the defendant had no involvement with the actions that injured the plaintiff***.

JA.0181 (emphasis added) (citing cases).

The district court concluded that CACI's alleged conduct was unlawful and thus—pursuant to *Al Shimari IV*—PQD does not apply. JA.1170-71. Because the merits and jurisdictional facts are intertwined (*i.e.*, facts relating to whether CACI violated international law) and the district court found genuine issues of fact on those issues, both issues must be resolved at trial by a jury. *See Al Shimari IV*, 840 F.3d at 160; *Kerns*, 585 F.3d at 193.

Finally, CACI's appeal of the denial of its state secrets motion to dismiss is frivolous. *First*, CACI cites no authority—and there is none—to support the proposition that a defendant's inability to access some evidence deprives the court of subject matter jurisdiction. *Second*, there is no basis for appellate jurisdiction

over an appeal of this evidentiary ruling. *Third*, CACI's reliance on testimony obtained through pseudonymous depositions throughout its brief here (and in support of its motion for summary judgment) belies its claim that it was deprived completely of potentially useful evidence—an "irony" the district court stressed. *See* JA.2230 ("CACI is arguing we couldn't get enough information to defend ourselves, and yet they're moving for summary judgment on an argument that we have enough evidence . . . ."). *Finally*, even if the United States' state secrets assertion did impose a burden on CACI, it imposed an equal or greater burden on Plaintiffs. *See* JA.2256 (recognizing that if there was prejudice, "both sides have problems").

In any event, when state secrets are invoked to deny discovery, the effect is the same as if evidence became unavailable for any other reason—the case proceeds without it. *See In re Sealed Case*, 494 F.3d 139, 144-45 (D.C. Cir. 2007); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001).

IV. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED

As the district court correctly observed, federal preemption, a doctrine that emerges from the Supremacy Clause, only operates to displace state laws. JA.1179-1187; *Al Shimari II*, 679 F.3d at 218 ("The right conferred through federal preemption . . . is the right not to be bound by a judgment stemming from state law duties."). Federal preemption thus cannot extend to ATS claims because they are

brought under federal common law pursuant to a federal *statute*, not state law. JA.1183-84; *Sosa*, 542 U.S. at 732; *Yousuf*, 699 F.3d at 777.

The FTCA also cannot preempt the ATS since one federal statute cannot "preempt" another. JA.1183-84 (harmonizing the FTCA and the ATS, citing *Al Shimari IV*'s discussion of the federal interest in eliminating torture, 840 F.3d at 158). To the extent that federal statutory law can displace federal common law, the statute must "speak directly to [the] question" that federal common law addresses. *See Am. Elec. Power Co. v. Massachusetts*, 564 U.S. 410, 424 (2011). The FTCA was enacted to waive federal sovereign immunity for claims sounding in state tort law, *Williams*, 242 F.3d at 173, *Burn Pit*, 744 F.3d at 348, and expressly excludes contractors from its scope, 28 U.S.C. § 2671. Thus, it cannot serve to displace federal common law incorporating international law norms.

Contrary to CACI's false assertion that the district court misread *Saleh* as only dealing with state law preemption, the court also considered and correctly rejected *Saleh*'s claim that the ATS was preempted because it was "conclusory and fails to consider the nature of the ATS as a federal statute." JA.1184 n.36. Notably, the 2-1 decision in *Saleh* came without the benefit of the United States' position that there is a strong federal interest in remediating the kind of torture claims Plaintiffs assert.

Even if Plaintiffs' ATS claims could be subject to preemption, in *Burn Pit*, this Court expressly rejected as too broad *Saleh's* view that the federal interest underlying the FTCA's "combatant activities" exception was to completely "eliminat[e] [] tort from the battlefield"; it identified the interest instead as "foreclos[ing] *state* regulation of the military's battlefield conduct and decisions." *Burn Pit*, 744 F.3d at 348 (emphasis added). Preemption would be proper only for conduct that the military authorized. *Burn Pit*, 744 F.3d at 350-51. Whether the military authorized the conduct giving rise to Plaintiffs' torture claims is a contested issue that needs to be determined by a trier of fact. *See supra* Argument, § II(A)(2). Nevertheless, even if the military had purported to authorize such conduct, there would be serious doubts as to whether preemption would apply. *Al Shimari IV*, 840 F.3d at 157, 159-60; *see also id*. at 162 (Floyd, J. concurring).

As the district court reasoned below, and *Burn Pit* and *Al Shimari IV* clarify, Plaintiffs' ATS claims also cannot be "preempted" by the Constitution's allocation of war powers. *See* JA.1180-82.

CONCLUSION

For the foregoing reasons, the Court should summarily dismiss CACI's appeal for lack of jurisdiction or, in the alternative, affirm the district court's rulings below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 12,937 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

/s/ Peter A. Nelson

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May 14, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2019, I caused a true copy of the foregoing to be filed through the Court's CM/ECF system, which will automatically serve the below-listed counsel of record. I also caused to be served a copy of the sealed version of the brief by e-mail to the same below-listed counsel:

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