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, Case No. 1:08-cv-00827
The Honorable Leonie M. Brinkema, United States District Judge

APPELLANT CACI PREMIER TECHNOLOGY, INC.'S PETITION FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING *EN BANC*

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I. INTRODUCTION

Rehearing or rehearing *en banc* is warranted for three reasons. *First*, the panel decision conflicts with Supreme Court precedent and *en banc* precedent from this Court holding that appellate jurisdiction over immunity denials turns on the *basis* for the district court's denial. *Johnson v. Jones*, 515 U.S. 304, 318-19 (1995); *Winfield v. Bass*, 106 F.3d 525, 529 (4th Cir. 1997) (*en banc*).

The district court denied immunity to CACI[1] based solely on its holding that the United States impliedly waived sovereign immunity for claims alleging violations of *jus cogens* norms. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 971 (E.D. Va. 2019). That holding – while casting aside two hundred years of Supreme Court precedent holding that sovereign immunity waivers must be statutory, express and unequivocal, and will not be implied – resolved a purely legal question. The panel decision, however, focuses on *dicta* regarding whether CACI's immunity defense ultimately would involve factual disputes, an issue on which the district court did not base its denial of immunity.

Second, the panel's decision conflicts with *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205 (4th Cir. 2012) (*en banc)* ("*Al Shimari II*"), in which this Court held:

> [I[nsofar as an interlocutory appeal of a denial of immunity requires resolution of a purely legal question . . . or an ostensibly fact-bound issue that may be resolved as a matter of law . . . we may consider and rule upon it.

679 F.3d at 221-22.

[1] "CACI" refers to Defendant-Appellant CACI Premier Technology, Inc.

The district court held that CACI was not eligible to seek derivative sovereign immunity *solely* because the United States lacks sovereign immunity as a matter of law. This means that, in the district court, CACI is *per se* ineligible to present evidence demonstrating its entitlement to derivative sovereign immunity. Whether a district court correctly applied substantive law is a pure question of law. *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency,* 804 F.3d 646, 653-54 (4th Cir. 2015). Accordingly, under *Al Shimari II*, this Court had jurisdiction to entertain CACI's interlocutory appeal.

Third, the panel's decision conflicts with and fails to give effect to Fourth Circuit decisions subsequent to *Al Shimari II* holding that derivative sovereign immunity is an immunity from suit and not a mere liability defense. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 343 (4th Cir. 2014) ("*Burn Pit*"); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018). The panel relied on a footnote in *Al Shimari II* observing that it was an open question whether denials of sovereign immunity (or derivative sovereign immunity) were immediately appealable. As the Court observed in *Al Shimari II*, this question turns on whether an immunity entails a right not to stand trial altogether, or only a right not to be subject to a binding judgment. 679 F.3d at 212 n.3. Whatever force that observation may have had in 2012, it was superseded by *Burn Pit* and *Cunningham*, both of which hold that derivative sovereign immunity is an immunity from suit, a jurisdictional bar to suit, and not a merits defense to liability.

In order to conform the decision in this case to the dictates of *Johnson* and *Winfield*, to the holding of *Al Shimari II*, and to the holdings of *Burn Pit* and

Cunningham, the Court should order panel rehearing or, alternatively, rehearing *en banc*.[2] Indeed, this appeal presents a compelling case for securing the uniformity of decisions in this Circuit through *en banc* review.

II. BACKGROUND

Plaintiffs are three Iraqis who allege mistreatment while in U.S. military custody in Iraq. They sued CACI, which provided civilian interrogators to the U.S. military. Plaintiffs did not sue the United States. This Court last decided an appeal in this case in 2016 when it remanded for a fact-intensive reevaluation of justiciability. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*"). Since 2016, there have been four developments of importance to this petition:

First, Plaintiffs abandoned, and the district court dismissed, their claims alleging that CACI personnel abused them. JA.1060, 1171-72, 1189. That left only claims seeking to hold CACI liable for abuses allegedly perpetrated by U.S. soldiers in a war zone. Because the case had evolved to one seeking to hold CACI liable for abuses inflicted by soldiers, CACI filed a third-party complaint against the United States and any John Does who actually mistreated Plaintiffs.[3]

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[2] To the extent that Circuit Rule 40(b) requires a specific statement that, in counsel's judgment, the panel decision conflicts with Supreme Court and Circuit case law and presents issues of exceptional importance, undersigned counsel so certifies.

[3] The district court stayed CACI's John Doe claims, and state secrets rulings make CACI's pursuit of John Doe defendants impossible because it will never discover their identities.

Second, Plaintiffs dismissed their common-law claims. That left only claims under ATS, a statute that creates no causes of action and provides district courts with an exceedingly limited power to create a private right of action.

Third, the controlling test for extraterritoriality changed. In *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014) ("*Al Shimari III*"), this Court applied a "touch and concern" test that considered "all the facts relevant to the lawsuit, including the parties' identities and their relationship to the causes of action." Under that test, the Court held that CACI's corporate presence, the citizenship of its employees, and contract with the United States, along with unsupported allegations of complicity by CACI executives in the United States, sufficed to permit ATS jurisdiction. *Id.* at 530-31. In 2016, however, the Supreme Court held that all that matters for an extraterritoriality analysis is whether the conduct relevant to ATS's "focus," *i.e.*, the tort committed in violation of international law, occurred domestically. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). In *Roe v. Howard*, 917 F.3d 229, 240 (4th Cir. 2019), this Court acknowledged that *RJR Nabisco*'s "focus" test, and not *Al Shimari III*'s "touch and concern" test, controls the extraterritoriality inquiry.

Fourth, the parties completed all of the discovery that the district court allowed. The Government, through Secretary of Defense Mattis, successfully invoked the state secrets privilege three times to withhold the identities of soldiers and civilians interrogating Plaintiffs, including CACI personnel, as well as interrogation plans and reports detailing the interrogation approaches approved for Plaintiffs' interrogations. JA.1235-36, 1267, 1302-04, 1420, 1438-40. The district

court limited CACI to pseudonymous depositions by telephone, with the deponents barred from disclosing facts that could identify them. *See, e.g.*, JA.2846-54, 4486-99. The state secrets rulings made it impossible to implement the remand instructions in *Al Shimari IV*, which required the district court to evaluate justiciability through a "discriminating analysis" of "the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." 840 F.3d at 160.

After CACI took the limited discovery allowed, the district court:

- Denied CACI's jurisdictional challenge based on the extraterritorial application of ATS, refusing to consider intervening precedent from the Supreme Court in *RJR Nabisco*, 136 S. Ct. at 240, and this Court in *Roe*, 917 F.3d at 240. Instead, the district court stated that "I'm not reversing the Fourth Circuit in this case. They may want to reverse themselves." JA.2227-28.

- Denied CACI's jurisdictional challenge based on the political question doctrine. The district court required CACI to assert its political question challenge in a pre-discovery Rule 12 motion, denied that motion based on Plaintiffs' allegations, then refused to consider CACI's post-discovery challenge on grounds that the motion to dismiss decision was the law of the case. The district court thereby failed to conduct the evidence-based justiciability inquiry this Court mandated in *Al Shimari IV*. JA.2275-76.

- Denied CACI's summary judgment motion on preemption without explanation. JA.2223. This was in spite of: (1) the D.C. Circuit's holding that federal interests embodied in the Constitution and the combatant activities exception to the FTCA preempted ATS and state law claims against CACI arising from the same operative facts as this case, *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009); and (2) this Court's express adoption of the *Saleh* standard for preemption in *Burn Pit*, 744 F.3d at 351.

- Denied CACI's motion to dismiss Plaintiffs' claims on the grounds that the state secrets privilege denied CACI a fair opportunity to defend itself. At the same time, the district court's sustainment of the state secrets privilege prevents CACI from presenting live or videotaped testimony from any participant in Plaintiffs' interrogations, including from CACI employees who are the alleged source of CACI's liability, or from discovering and presenting evidence of the interrogation approaches approved by the U.S. military for Plaintiffs' interrogations.

- Denied CACI's assertion of derivative sovereign immunity based on the district court's legal conclusion that "the United States does not enjoy sovereign immunity for these kinds of claims." *Al Shimari*, 368 F. Supp. 3d at 971.

CACI appealed the district court's denial of derivative immunity. Moreover, because this Court always must satisfy itself that it and the district court have subject-matter jurisdiction,[4] CACI included in its appeal its other challenges to subject-matter jurisdiction.

III. THE PANEL'S DECISION

The panel dismissed CACI's appeal in a 1½-page unpublished majority decision. *Al Shimari v. CACI Premier Tech., Inc.*, 2019 WL 3991463 (4th Cir. Aug. 23, 2019) ("*Al Shimari V*"). The panel stated that the Court has "never held, and the United States does not argue, that a denial of sovereign immunity or derivative sovereign immunity is immediately appealable on interlocutory appeal." Panel Decision at 3. Notably, the panel did not assert that this Court has ever held that such rulings are *not* immediately appealable. Instead, the majority cited a footnote from *Al Shimari II* in which the Court noted that "fully developed" denials

[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

of derivative absolute official immunity, or *Mangold* immunity,[5] are immediately appealable, but that other circuits had reached differing conclusions as to whether denials of sovereign immunity or derivative sovereign immunity were immediately appealable. 679 F.3d at 212 n.3.

The panel majority continued by ruling that "even if a denial of derivative sovereign immunity may be immediately appealable, our review is barred here because there remain continuing disputes of material fact with respect to CACI's derivative sovereign immunity defenses." Panel Decision at 3. The panel did not identify the "continuing disputes of material fact." Rather, the majority quoted the district court's observation that even if the United States would have sovereign immunity, "it is not at all clear that CACI would be extended the same immunity." *Id.* (quoting *Al Shimari*, 368 F. Supp. 3d at 971).

Importantly, though, the district court did not ground its denial of immunity on any alleged factual disputes. Immediately after noting that a contractor seeking derivative sovereign immunity must show compliance with its contract, the district court reiterated that its ruling was grounded solely on its view that the United States lacks sovereign immunity. *Al Shimari*, 368 F. Supp. 3d at 971.

Judge Quattlebaum concurred in the judgment. In his view, *Al Shimari II* "explicitly held that the denial of derivative sovereign immunity may be appealable if the appeal involves an 'abstract issue of law' or a 'purely legal question.'" Panel Decision at 5 (Quattlebaum, J., concurring in the judgment) (quoting *Al Shimari II*,

[5] *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

679 F.3d at 221-22). Nevertheless, Judge Quattlebaum "reluctantly" concurred in the judgment because he perceived factual disputes regarding whether CACI personnel "engaged in any of the improper conduct as to these plaintiffs," *id.*, an issue on which the district court did not base its ruling. Judge Quattlebaum further noted that the panel's "narrow interpretation of the collateral order doctrine in this case has taken us down a dangerous road," one that "allowed discovery into sensitive military judgments and wartime activities," and "opened the door to an order that the United States has no sovereign immunity for claims that our military activities violated international norms – whatever those are." *Id.*

IV. ARGUMENT

A. The Panel's Decision Conflicts with Supreme Court and Fourth Circuit Precedent

1. Immediate Appealability Depends on the Basis for the District Court's Denial of Immunity

The panel's refusal to exercise appellate jurisdiction is irreconcilable with the Supreme Court's decision in *Johnson* and this Court's *en banc* decision in *Winfield*, which squarely hold that appealability depends on whether *the basis for the district court's decision* involves a question of law or a disputed issue of fact. *Johnson*, 515 U.S. at 318-19; *Winfield*, 106 F.3d at 529 ("The Supreme Court directed that in determining our jurisdiction in this area, we should consider the order entered by the district court to assess the basis for its decision."). By contrast, this Court does not review *dicta*. *See Canal Ins. Co. v. Dist. Servs., Inc.*,

320 F.3d 488, 493 n.5 (4th Cir. 2003); *United States v. Harris*, 183 F.3d 313, 317 n.4 (4th Cir. 1999).

Here, the district court recognized that there are two prongs that must be satisfied by a contractor asserting derivative sovereign immunity: (1) that the United States would have sovereign immunity for the claims brought against the contractor; and (2) that the contractor acted in conformity with the contract. *Al Shimari*, 368 F. Supp. 3d at 970. The district court's denial of derivative immunity to CACI, however, relied only on its ruling as to the first prong, with the district court finding as a matter of law that the United States impliedly waived sovereign immunity for claims such as Plaintiffs':

> Because this Court has ruled that sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms, the first prong of the derivative sovereign immunity test is not met, and CACI's Motion to Dismiss based on a theory of derivative immunity will be denied.

Al Shimari, 368 F. Supp. 3d at 970. As the panel majority notes, the district court went on to state that even if the United States had sovereign immunity, "it is not at all clear that CACI would be extended the same immunity," as derivative immunity "is not awarded to government contractors who violate the law or the contract." *Id.* The district court did not, however, base its denial of derivative immunity on such *dicta*. The district court even summed up this aside using "regardless" to make clear that its sole basis for denying immunity was its legal conclusion regarding the United States' sovereign immunity. *Id.* at 971

("Regardless, CACI's Motion to Dismiss fails because the United States does not enjoy sovereign immunity for these kinds of claims.").

Under *Johnson* and *Winfield*, CACI has a right of immediate appeal because the district court's *basis* for denial controls appealability. The panel thus was obliged under binding precedent to rule on the correctness of the district court's legal conclusion. *See, e.g.*, *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 462 (4th Cir. 2005) ("Federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.'" (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))). That is, the panel should have reviewed and reversed the district court's unprecedented conclusion that the United States impliedly waived sovereign immunity for *jus cogens* claims. It is that ruling, and only that ruling, which precludes CACI from even attempting to qualify for derivative sovereign immunity under the standards established in *Burn Pit* and *Cunningham*.

2. Denial of Derivative Immunity Based on a Question of Law Is Immediately Appealable

The panel majority treats *Al Shimari II* as equivocating on whether a denial of derivative sovereign immunity is immediately appealable because, at that time, it was unresolved in this Circuit whether derivative sovereign immunity is a true immunity from suit or merely a right not to be subject to a binding judgment. Panel Decision at 3. By contrast, Judge Quattlebaum characterized *Al Shimari II* as "explicitly [holding] that the denial of derivative sovereign immunity may be appealable if the appeal involves an 'abstract issue of law' or a 'purely legal

question.'" *Id.* at 5 (Quattlebaum, J. concurring in the judgment). Under either view, it is clear that *Al Shimari II*, when supplemented by subsequent decisions of this Court, permits immediate appeal of derivative sovereign immunity denials when they are based on questions of law.

In *Al Shimari II*, this Court held that the touchstone for immediate appealability is whether the defense at issue is a true immunity from suit:

> The "critical question" in determining whether the right at issue is effectively unreviewable in the normal course "is whether the essence of the claimed right is a right not to stand trial" – that is, whether it constitutes an immunity from suit. . . ." By contrast, if the right at issue is one "not to be subject to a binding judgment of the court" – that is, a defense to liability – then the right can be vindicated just as readily on appeal from the final judgment, and the collateral order doctrine does not apply.

Al Shimari II, 679 F.3d at 214 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988)).

Al Shimari II noted that it was at the time unresolved in this Circuit whether denials of derivative sovereign immunity were immediately appealable. *Id.* at 212 n.3. The Court referenced a few out-of-circuit decisions holding that sovereign immunity or derivative sovereign immunity were liability defenses that did not entail a right of immediate appeal,[6] and a more recent Second Circuit decision

[6] *Al Shimari II*, 679 F.3d at 12 n.3 (citing *Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex.*, 481 F.3d 265, 279 (5th Cir. 2007); *Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995); *Pullman Const. Indus., Inc. v. United States*, 23 F.3d 1166, 1168-69 (7th Cir. 1994)). The courts holding that denials of sovereign or derivative sovereign immunity were not immediately appealable held that the myriad statutory exceptions to sovereign immunity, combined with other factors such as that the federal courts were literally the United States' own courts,

(Continued …)

rejecting these cases on the grounds that sovereign immunity entails a right not to be sued and thus features a right of immediate appeal. *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 191 (2d Cir. 2008) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)).

Whether derivative sovereign immunity entails a right not to be sued is now settled in this Circuit. Since this Court decided *Al Shimari II*, it has twice held that derivative sovereign immunity is a true immunity from suit and not a mere liability defense. *Burn Pit*, 744 F.3d at 343 ("[T]he concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley*, and when the *Yearsley* doctrine applies, a government contractor is not subject to suit."); *Cunningham*, 888 F.3d at 650 ("This Court's express statements regarding *Yearsley* immunity and its implicit approval of using a Rule 12(b)(1) motion to dismiss to dispose of a case when the *Yearsley* doctrine applied compel us to conclude, once again, that the *Yearsley* doctrine operates as a jurisdictional bar to suit and not a merits defense to liability.").

Al Shimari II held that immediate appealability turns on whether derivative sovereign immunity is a true immunity from suit. In *Burn Pit* and *Cunningham*, this Court held that it is. Therefore, the district court's denial of derivative sovereign immunity, if based on an abstract question of law, is immediately appealable, as delaying an appeal "would defeat [the defendant's] claim that he

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made these immunity defenses more akin to liability defenses than a right not to be sued.

should not be put to trial, which is the initial protection of absolute privilege." *Smith v. McDonald,* 737 F.2d 427, 428 (4th Cir. 1984), *aff'd*, 472 U.S. 479 (1985).[7]

The existence of appellate jurisdiction further obligated the panel to consider whether the district court lacks subject-matter jurisdiction, both as a general matter and because it informs any decision to remand. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004).

By premising appellate jurisdiction on questions not decided by the district court, the panel failed to exercise its own properly-invoked jurisdiction while remanding the case to a district court that lacks jurisdiction for torts allegedly occurring in Iraq. *RJR Nabisco*, 136 S. Ct. at 2101. Panel rehearing or rehearing *en banc* is necessary to conform the decision in this case to the dictates of *Johnson* and *Winfield* that appellate jurisdiction rises or falls on the actual basis for the district court's decision, and to *Al Shimari II*, *Burn Pit*, and *Cunningham*, which hold that denial of a right not to be sued, such as derivative sovereign immunity, brings with it a right of immediate appeal.

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[7] Moreover, fully-developed denials of *Mangold* immunity are immediately appealable. *Mangold*, 77 F.3d at 1446; *Al Shimari II*, 679 F.3d at 212 n.3. CACI's immunity assertion relied on *Mangold* in addition to the *Yearsley* line of cases typically characterized as derivative sovereign immunity. CACI Br. 25; Dist. Ct. Dkt. #1153 at 5. To the extent that the Court can identify a principle distinguishing *Mangold* immunity from the derivative sovereign immunity line of cases, an exercise with which CACI has struggled, the district court's refusal to dismiss based on *Mangold* is immediately appealable.

B. This Appeal Involves Matters of Exceptional Importance

The Court recognized that this case presents important issues in granting *en banc* rehearing of the first appeal in this case, which resulted in the *en banc* Court resolving the appeal on appellate jurisdiction grounds. *Al Shimari II*, 679 F.3d at 220-21. This appeal is no less compelling. As Judge Quattlebaum observed, this case raises "important questions" that are "potentially quite significant." Panel Decision at 6 (Quattlebaum, J., concurring in the judgment). The panel's failure to exercise its appellate jurisdiction leaves undisturbed a first-of-its-kind district court ruling that flies in the face of two centuries of Supreme Court precedent. This case also presents important issues regarding subject-matter jurisdiction, including the district court's obligation to apply intervening Supreme Court precedents.

Moreover, "[t]his proceeding has allowed discovery into sensitive military judgments and wartime activities"[8] and, as the case has evolved, now squarely raises the question of whether a contractor can be held civilly liable for injuries inflicted by U.S. soldiers in a war. *See Al Shimari II*, 679 F.3d at 225 (Wilkinson, J., dissenting) (failure to exercise appellate jurisdiction "gives individual district courts the green light to subject military operations to the most serious drawbacks of tort litigation"); *id.* at 268 (Niemeyer, J., dissenting) ("To entertain the plaintiffs' claims would impose, for the first time, state tort duties onto an active war zone, raising a broad array of interferences by the judiciary into the military functions textually committed by our Constitution to Congress, the President, and the Executive Branch."). These are not issues that should be remanded to a district

[8] Panel Decision at 5 (Quattlebaum, J., concurring in the judgment).

court lacking jurisdiction by a Court in which appellate jurisdiction has been properly invoked.

V. CONCLUSION

The Court should order rehearing or, alternatively, rehearing *en banc*.

Respectfully submitted,

/s/ John F. O'Connor

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September 5, 2019

CERTIFICATE OF COMPLIANCE

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

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

2. This petition is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the petition (excluding the cover page, table of contents, table of authorities, certificates of compliance and service, and signature block) contains 3,897 words.

/s/ John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2019, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record:

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