No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,

Defendant and Third-Party Plaintiff – Appellant

v.

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

Plaintiffs-Appellees,

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

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APPELLANTS' MOTION TO STAY THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF *CERTIORARI*

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Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Local Rule 41, Appellant CACI Premier Technology, Inc. ("CACI") respectfully requests that the Court stay issuance of the mandate in this appeal pending resolution of a petition for a writ of *certiorari*.[1] CACI's petition would seek Supreme Court review of the following question:

> Whether an order denying derivative sovereign immunity based on an abstract question of law is immediately appealable under the collateral order doctrine.

The importance of this doctrinal question is reflected in the circuit split on both this issue and on the issue of the appealability of sovereign immunity denials embedded in the Panel's decision, the tension between the Panel's decision in this case and Supreme Court precedent, and the Supreme Court's demonstrable interest in shaping the scope of appellate jurisdiction. Each of these factors makes it reasonably probable that the Supreme Court will grant the petition and reverse the Panel's decision.

CACI will suffer inevitable and irreparable harm in the absence of a stay. The district court's rejection of immunity based on a pure legal question renders CACI ineligible to develop a factual record at trial substantiating its claim to immunity. Moreover, as this Court has held, derivative sovereign immunity entails a right not to be sued. The absence of a stay would make it impossible for CACI to vindicate that right by seeking and obtaining Supreme Court review before trial.

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[1] Consistent with Local Rule 27(a), Defendant has informed Plaintiffs of the intended filing of this motion. Plaintiffs do not consent.

The context in which these questions of appellate jurisdiction arise amplifies the good cause for allowing the *certiorari* process to run its course before trial. This is a case about the Iraq war in which Iraqis detained by the U.S. military assert claims under international law against a contractor that served the U.S. military during that war. The action requires a determination whether a federal court may use international norms to regulate the United States' conduct of war. It raises profound issues bearing on the separation of powers and the foreign relations of the United States. Applying international norms to the U.S. military at war, and thereby injecting tort law onto the battlefield, has far-reaching implications for the national defense.

Moreover, tort and other claims are made with increasing frequency against those chosen to assist the Government. "Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag – facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky v. Delia*, 566 U.S. 377, 390-91 (2012). Thus, there is a clear national interest in affording immunity to contractors working alongside government employees, as immunity "serves to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Id.*; *see also Al Shimari v. CACI Intern. Inc*, 679 F.3d 205, 226 (4th Cir. 2012) (*en banc*) (Wilkinson, J., dissenting) ("*Al Shimari II*") ("Requiring consideration of the costs and consequences of protracted tort litigation introduces a wholly novel

element into military decisionmaking, one that has never before in our country's history been deployed so pervasively in a theatre of armed combat.").

While this case has spawned a number of issues that ultimately might warrant Supreme Court attention,[2] CACI's *certiorari* petition will be narrowly tailored to focus on the availability of appellate jurisdiction to review its denial of immunity. In addition, as explained below, CACI will unilaterally shorten its time to file a *certiorari* petition in order to expedite proceedings in the Supreme Court. This case's implications for U.S. wartime decision-making punctuates the good cause for staying the mandate for the short period of time required to resolve

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[2] *Al Shimari II*, 679 F.3d at 248 (Niemeyer, J., dissenting) ("It would appear that only the Supreme Court can now fix our wayward course."). The issues that might ultimately warrant Supreme Court review include whether the presumption against extraterritoriality precludes claims under the Alien Tort Statute based on injuries occurring solely in Iraq (*compare RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016), and *Roe v. Howard*, 917 F.3d 229, 240 (4th Cir. 2019), *with Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 533 (4th Cir. 2014) ("*Al Shimari III*")); whether the "vigilant doorkeeping" required before allowing claims brought under the Alien Tort Statute to proceed permits claims arising out of the U.S. military's conduct of war where Congress has repeatedly declined to create a private right of action (*Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1394 (2018)); whether the political question doctrine precludes private tort claims seeking to hold a private contractor liable for injuries allegedly inflicted by U.S. soldiers under U.S. military command in a war zone (*see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-82 (5th Cir. 2009)); and whether the U.S. Constitution's allocation of war powers and the federal interests underlying the FTCA preempt private tort claims seeking recovery from contractors whose employees acted under ultimate U.S. military control in a war zone (*see Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2018) ("*Burn Pit*")).

CACI's petition. For all of these reasons, the Court should stay issuance of the mandate.

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 or military personnel. Plaintiffs eventually abandoned their factually-unsupported claims that CACI employees abused them, and the district court therefore dismissed Plaintiffs' direct claims. This left only claims seeking to hold CACI liable on co-conspirator and aiding and abetting theories for abuses allegedly perpetrated by U.S. soldiers. Because Plaintiffs changed their theory to one seeking solely to hold CACI liable for abuses committed by soldiers, CACI filed a third-party complaint against the United States and any John Does who actually mistreated Plaintiffs.[3]

After completion of all of the discovery it was going to allow, the district court denied CACI's assertion of derivative sovereign immunity based solely on its legal conclusion that "the United States does not enjoy sovereign immunity for these kinds of claims." *Al Shimari*, 368 F. Supp. 3d at 971.[4] CACI appealed the district court's denial of derivative immunity and included in its appeal several

[3] The district court stayed CACI's John Doe claims, but its rulings denying CACI access to the John Does' identities based on the state secrets privilege makes it impossible for CACI to pursue these claims.

[4] The district court also granted the United States summary judgment on grounds other than sovereign immunity, meaning that the United States had no ability to appeal the district court's ruling that it lacked sovereign immunity.

other challenges to subject-matter jurisdiction. The Panel dismissed CACI's appeal in a 1½-page unpublished majority decision. Dkt. #75 ("*Al Shimari V*"). The Panel held that rulings denying derivative sovereign immunity are not immediately appealable even where they present pure questions of law. The Panel majority explained that the absence of jurisdiction "follows from the reasoning of *Al Shimari II*," where the Court explained that "fully developed rulings denying 'sovereign immunity (or derivative claims thereof) may not' be immediately appealable." *Al Shimari V* at 3. Judge Quattlebaum, in concurring, construed the majority opinion exactly that way: "I write separately because in contrast to the majority's reading of the case, *Al Shimari* 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.'" *Id.* at 5.

The Panel then ruled, in the alternative, 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." *Al Shimari V* at 3 (quoting *Al Shimari*, 368 F. Supp. 3d at 971). This observation does not detract from the force of the Panel's holding that orders denying derivative sovereign immunity based solely on a question of law are not immediately appealable.

ARGUMENT

The Court should stay issuance of the mandate pending CACI's application for a writ of *certiorari*, because (1) the petition will present a substantial question

and (2) "there is good cause for a stay." Fed. R. App. P. 41(d)(2)A); Local R. 41; *Beaver v. Netherland*, 101 F.3d 977, 978 (4th Cir. 1996) (extending stay of mandate pending filing of *certiorari* petition "[o]n the off-chance that something we have done might hinder Beaver's filing of a petition for *certiorari*"). Neither standard presents a high bar.

Under these standards, at the *certiorari* stage, the "substantial question" test does not ask if the movant is likely to succeed on the merits. Rather, the test is whether there is a "reasonable probability" of Supreme Court review and reversal. *Beaver*, 101 F.3d at 978. The "good cause" inquiry simply balances the equities on whether to preserve the status quo until the Supreme Court has opportunity to act. *See* Knibb, *Federal Court of Appeals Manual* § 34:13, at 924 (6th ed. 2013).

CACI easily meets these standards. The Panel's ruling deepens a circuit split regarding whether the collateral order doctrine extends to orders denying derivative sovereign immunity. It also conflicts with Supreme Court precedent holding that appealability rises and falls on the district court's *basis* for denying immunity. CACI would suffer irreparable harm in the absence of a stay because (1) it would be subject to all the burdens of litigating claims from which it claims an immunity from suit, and (2) it would be ineligible to develop a factual record at trial substantiating its claim to immunity. Given that the only consequence for Plaintiffs is a brief extension in a case that has been pending for well over a decade, the balance of the equities overwhelmingly supports maintaining the status quo pending the Supreme Court's decision.

I. CACI's *Certiorari* Petition Will Present a "Substantial Question" with a Reasonable Probability of Supreme Court Review and Reversal

CACI's *certiorari* petition would present the threshold question whether orders denying derivative sovereign immunity are within the categories of orders that are eligible for immediate appeal under the collateral order doctrine. In *Al Shimari V*, the majority declined to exercise jurisdiction over a district court ruling that denied derivative sovereign immunity on a pure question of law, finding that its refusal to exercise jurisdiction followed "from the reasoning of *Al Shimari II*." *Al Shimari V* at 3. Judge Quattlebaum disagreed, concluding that this Court had held in *Al Shimari II* that denials of derivative sovereign immunity *can* qualify for immediate appeal. *Al Shimari V* at 5 (Quattlebaum, J. concurring).

The Panel's decision in *Al Shimari V* exacerbates the circuit split on this question. *Compare McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 (11th Cir. 2007) (holding that the collateral order doctrine applies to orders denying derivative sovereign immunity), *with Martin v. Halliburton*, 618 F.3d 476, 485 (5th Cir. 2010) (holding to the contrary).[5] This circuit split enhances the prospects for Supreme Court review. Sup. Ct. R. 10(a).

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[5] There also is a circuit split regarding the related question whether orders denying sovereign immunity to the United States are immediately appealable, an issue to which the Panel majority attached significance (*see Al Shimari V* at 3). *Compare Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex.*, 481 F.3d 265, 279 (5th Cir. 2007) (no immediate appeal), *Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995) (same), *and Pullman Const. Indus.*, Inc. v. United States, 23 F.3d 1166, 1168-69 (7th Cir. 1994) (same), *with In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 191 (2d Cir. 2008) (immediate appeal available), *Woodruff v. Covington*, 389 F.3d 1117, 1121-25 (10th Cir. 2004) (exercising appellate jurisdiction over rejection of FTCA immunity), *and In re Sealed Case*,

(Continued …)

Moreover, the Panel's refusal to exercise appellate jurisdiction "decided an important federal question in a way that conflicts with relevant decisions of" the Supreme Court, another recognized basis for Supreme Court review. Sup. Ct. R. 10(c). In *Johnson v. Jones*, 515 U.S. 304 (1995), the Court squarely held that appealability of an order rejecting an immunity-based defense depends on whether *the basis for the district court's decision* involves a question of law or a disputed issue of fact. *Id.* at 318-19; *see also Winfield v. Bass*, 106 F.3d 525, 529 (4th Cir. 1997) ("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."). The district court based its denial of derivative immunity to CACI solely on its legal conclusion that "sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms." *Al Shimari*, 368 F. Supp. 3d at 970. Under *Johnson*, CACI has a right of immediate appeal because the district court's *basis* for denial controls appealability, and the Panel's decision to the contrary is thus inconsistent with settled Supreme Court precedent.

The subject matter of the Panel's decision increases the prospects for Supreme Court review. The Supreme Court has shown considerable recent interest in the proper bounds of appellate jurisdiction. It has repeatedly issued writs of *certiorari*, including in two cases to be heard this Term, to clarify the scope of appellate jurisdiction, with many of these cases concerning application of the

192 F.3d 995, 1000 (D.C. Cir. 1999).

collateral order doctrine. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1693 (2015); *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 905 (2015); *Plumhoff v. Rickard*, 572 U.S. 765, 772-73 (2014); *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 112 (2009); *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009); *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 628 (2009); *Osborn v. Haley*, 549 U.S. 225, 238 (2007); *Will v. Hallock*, 546 U.S. 345, 349 (2006); *see also Ritzen Group Inc. v. Jackson Masonry, LLC*, No. 18-938 (*cert. granted*, May 20, 2019); *Thryv, Inc. v. Click-To-Call Technologies, LP*, No. 18-916 (*cert. granted*, June 24, 2019). The Supreme Court's persistent interest in clarifying the proper scope of appellate jurisdiction only heightens the prospect for review of a question that, as here, involves both a circuit split and a departure from established Supreme Court precedent.

II. There Is Good Cause for Staying Issuance of the Mandate

A. Without Immediate Appeal, CACI Will Be Permanently Barred from Creating a Factual Record Demonstrating Immunity

Derivative sovereign immunity is a true immunity from suit – not a mere liability defense. *Burn Pit*, 744 F.3d at 343; *see also Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir. 2018). Thus, delaying an appeal "would defeat [CACI's] claim that [it] 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). Loss of that privilege, by itself, constitutes irreparable harm. This court has held as much, noting that "an

immunity from suit confers a right not to bear the burdens of litigation and cannot be 'effectively vindicated' after litigation." *Nero v. Mosby*, 890 F.3d 106, 121 (4th Cir. 2018) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985)).

This prejudice is amplified because the trial in this case would lack many of the features considered fundamental to fair trials in this country. Plaintiffs cannot appear in person at trial; since 2013, the United States has consistently rejected every request they have made to set foot in this country. CACI cannot call as witnesses any of the individuals who actually participated in Plaintiffs' interrogations. The identities and backgrounds of the interrogation personnel interacting with Plaintiffs – even those of the CACI employees who form the basis of CACI's alleged liability – are classified state secrets, with such identities and backgrounds withheld from the parties in discovery and unavailable to the jury at trial.

CACI cannot introduce evidence regarding any interrogation techniques approved by the United States for use in connection with Plaintiffs' interrogations, or the fruits of those interrogations. The records regarding interrogation approaches approved by the U.S. military and used for Plaintiffs' specific interrogations are also classified state secrets that have been withheld from the parties and cannot be presented at trial. This makes it impossible for a jury to make an informed assessment on the merits, and prevents compliance with this Court's remand instructions to address the political question doctrine through a factual review 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." *Al Shimari IV*, 840 F.3d at 160-61. As one judge of this Court observed, "none of us have seen any litigation quite like this." *Al Shimari II*, 679 F.3d at 225 (Wilkinson, J., dissenting).

Much worse, however, the Panel's ruling prevents CACI from making the very record on immunity the Panel found to be lacking in declining to exercise jurisdiction over this appeal. *Al Shimari V* at 3. By denying immediate appeal, the Panel left intact the district court's holding that, as a matter of law, the United States would not have sovereign immunity from Plaintiffs' claims and, therefore, CACI cannot be derivatively immune *under any circumstances*. This legal conclusion makes CACI ineligible to develop a factual record on immunity at trial, as the district court's ruling makes evidence bearing on an immunity assertion irrelevant. This makes the prospect of a post-judgment appeal of the immunity denial illusory.

Thus, allowing the district court's legal ruling to stand renders CACI's assertion of derivative sovereign immunity "effectively unreviewable" after trial such that failure to review immediately will cause irreparable harm. *Johnson*, 515 U.S. at 311. The proper way to avoid this irreparable harm is to stay issuance of the mandate for the modest period of time required to determine whether the Supreme Court will review the Panel's decision.

B. Any Harm to Plaintiffs from a Delay Is Slight or Nonexistent

Maintaining the status quo will protect CACI *and Plaintiffs* from expending the tremendous time and resources that will be required to litigate this case through trial only to discover through post-judgment proceedings that the district court had

erred in rejecting derivative immunity. Two of the three Plaintiffs remaining in this case were denied entry into the United States for depositions and medical examinations. None of the Plaintiffs has been able to secure permission to enter the United States in order to attend or otherwise participate in the trial, despite what they describe as herculean and ongoing efforts to do so. It is unknowable at this point if any of the Plaintiffs will be able to provide live testimony even via video link, but it is certain that whatever efforts they put forth to do so will, at least according to them, be arduous in the extreme. The parties should not be put through the burdens required for a trial of this action without fully resolving whether CACI is entitled to immunity from suit. If a final determination on immunity cannot be made in advance of trial, a final resolution as to whether the district court's legal ruling is correct, and whether CACI is at least eligible to create a factual record at trial on its entitlement to immunity, should precede any trial of this action.

Plaintiffs are fond of crying "Delay!" whenever CACI exercises its right to challenge the legal bases for Plaintiffs' claims. CACI does not seek this stay for purposes of delay, but rather because the absence of a stay functionally would deny CACI the opportunity to vindicate its asserted right not to be sued or to stand trial or even to develop an immunity record at trial. There have been five decisions by the Court in this case, all of which had the effect of delaying proceedings in the district court. Of those five decisions, only the panel decision in this expedited

appeal and one other[6] came at CACI's request. The other three decisions issued by this Court were the result of Plaintiffs' request for review based on their dissatisfaction with decisions by the district court or a panel of this Court.[7]

To the extent the Court could imagine any harm caused by the brief delay associated with CACI's *certiorari* petition, CACI is willing to mitigate that harm by filing its petition swiftly. CACI is permitted 90 days to file its *certiorari* petition, making it due on Monday, December 30, 2019. As a condition for staying the mandate, CACI would commit to filing its petition within 45 days, such that it would be submitted by Friday, November 15, 2019. This will enable the Supreme Court to grant review and issue a ruling on the merits by June 2020.

C. The Battlefield Context of Plaintiffs' Claims Also Provides Good Cause to Stay Issuance of the Mandate

Plaintiffs are seeking to hold CACI liable for mistreatment they allegedly suffered at the hands of U.S. soldiers under U.S. military command at a battlefield detention facility in an active war zone. While the wartime context of Plaintiffs' claims does not directly implicate the narrow question of law CACI would present in its *certiorari* petition, this context does affect the advisability of a stay of the mandate.

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[6] *Al Shimari v. CACI Intern. Inc*, 658 F.3d 413 (4th Cir. 2011) ("*Al Shimari I*").

[7] *Al Shimari II*, 679 F.3d at 248; *Al Shimari III*, 758 F.3d 516, 533; *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*").

No federal power is more clearly committed to the political branches than the war-making power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (*en banc*). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

As Judge Wilkinson aptly observed, this case "inflicts significant damage on the separation of powers, allowing civil tort suits to invade theatres of armed conflict heretofore the province of those branches of government constitutionally charged with safeguarding the nation's most vital interests." *Al Shimari II*, 679 F.3d at 225 (Wilkinson, J. dissenting). Since *Al Shimari II*, Plaintiffs dropped their unsupported claims of direct abuse by CACI personnel, proceeding instead on theories seeking to hold CACI secondarily liable for abuses inflicted solely by U.S. soldiers. Plaintiffs also dropped their common-law claims, meaning that all of their existing claims seek to impose their (and the district court's) view of international norms on the conduct of war by the branches of government constitutionally assigned the war powers of this Nation. If anything, then, the separation of powers concerns implicated by this case have metastasized.

Moreover, a trial of this case would tax the resources of the United States. The identities of military and CACI interrogation personnel interacting with Plaintiffs are classified state secrets, as is any information concerning interrogation approaches approved for use with these Plaintiffs. The district court's rulings shielding this information from disclosure and use at trial make it impossible for

CACI to fairly defend itself, but also will require active United States involvement in any trial of this action.

While the identities of interrogation personnel interacting with Plaintiffs remain protected from disclosure, the identities of the current and former soldiers who comprised the chain of command at Abu Ghraib or who served in a military police role are not state secrets. A number of them would testify at trial. Thus, while it is no longer a party to this case, counsel for the United States would have to participate actively at trial to prevent disclosure by witnesses of any information the United States regards as a classified state secret. This process comes with the attendant risk that, despite the Government's best efforts, a witness might unexpectedly and unintentionally disclose classified state secrets while on the stand. Given the separation-of-powers implications of this case, and the state secrets concerns that would permeate any trial, the sensible approach is to stay the mandate, so CACI can seek Supreme Court review on an expedited basis, rather than hurrying the case to trial before all avenues for appellate review have been explored.

CONCLUSION

CACI respectfully requests that the Court stay issuance of the mandate in this appeal pending CACI's filing of a petition for a writ of *certiorari* in the United States Supreme Court.

Respectfully submitted,

/s/ John F. O'Connor

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October 7, 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, certificates of compliance and service, and signature block) contains 4,135 words.

/s/ John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 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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