UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*., Plaintiffs, *v*. CACI PREMIER TECHNOLOGY, INC. Defendant.	Case No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	

PLAINTIFFS' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MOTION TO STAY PROCEEDINGS PENDING FILING AND DISPOSITION OF A PETITION FOR A WRIT OF *CERTIORARI*

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PRELIMINARY STATEMENT

CACI has already succeeded in derailing one impending trial date in this case, by filing an improper interlocutory appeal of this Court's fact-dependent denial of derivative sovereign immunity. Plaintiffs objected that such an appeal—and CACI's attempt to dislodge this Court's jurisdiction and avoid trial—was frivolous, Dkt. No. 1267, because it was plainly foreclosed by the 12-3 *en banc* decision in *Al Shimari v. CACI International, Inc.*, 679 F.3d 205 (4th Cir. 2012) ("*Al Shimari II*") which itself stemmed from CACI's previous, meritless appeal. Plaintiffs were correct. Following the command of *Al Shimari II* and Supreme Court rulings, the Fourth Circuit summarily dismissed CACI's appeal for lack of jurisdiction in a two-page opinion—one that CACI nevertheless considers *cert*-worthy. Not a single circuit judge voted in favor of CACI's request for *en banc* review—not even the judges whose dissenting opinions from *Al Shimari II* CACI resuscitates again in support of its repeatedly recycled, and rejected, claims of urgency and military necessity. CACI presents no substantial issue meriting further delay.

The circuit split CACI seeks to conjure on an obscure legal question is non-existent. Here, the Fourth Circuit held that continuing factual disputes prevent it from assuming interlocutory jurisdiction over the appeal of a denial of derivative sovereign immunity ("DSI"). No court has held to the contrary. All circuits to consider whether denial of DSI of the kind claimed by CACI is immediately appealable as a collateral order uniformly reject interlocutory appellate jurisdiction. *See Al Shimari II*, 679 F.3d at 211 n.3 (citing cases).[1] Even the United

[1] In briefing before the Fourth Circuit, CACI cited none of the cases it now invokes in arguing that DSI is immediately appealable. It based its assertion of jurisdiction through an unexplained and obviously incorrect citation to *Ashcroft v. Iqbal*, 556 U.S. 662 (2008). In its reply, CACI shifted course and asserted (again, incorrectly) that the Fourth Circuit specifically recognizes the immediate appealability of DSI. *Compare Al Shimari v. CACI Premier Tech., Inc.*, No. 19-1328, Reply Br. at 9 (May 24, 2019), *with Al Shimari V*, August 23, 2019 slip op. at 3 ("Indeed, we have never held, and the United States government does not argue, that a denial of sovereign

States, which did not appeal this Court's order denying it sovereign immunity, conceded in an *amicus* brief that, as a "defense to liability," the federal sovereign immunity upon which CACI seeks to piggy-back does not fall under the collateral order doctrine, and the United States as a matter of course does not seek to appeal orders denying it sovereign immunity.

Apart from the absence of a circuit split, there is a vanishingly remote possibility that the Supreme Court would wish to review the Fourth Circuit's summary denial of appellate jurisdiction. Contrary to CACI's rendering of the DSI question as turning on an abstract question of law, the Fourth Circuit recognized the obvious: CACI cannot prevail on its claim to DSI if it "violate[d] both federal law and the Government's explicit instructions." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *see Al Shimari V*, slip op. at 4 (noting "continuing factual disputes regarding whether CACI violated the law or its contract" that prevented its jurisdiction). Those questions are hardly "completely separate from the merits," as every interlocutory order must be to fall under the collateral order doctrine, *see Will v. Hallock*, 546 U.S. 345, 349 (2006). The claimed immunity is almost completely coterminous with the factual questions of whether CACI violated its contract and federal law prohibiting abuse of detainees that survived summary judgment and are ready for trial. *See Al Shimari V*, slip op. at 4 ("Given these continuing factual disputes, this appeal does not turn on an abstract question of law and is not properly before us."). The Supreme Court will not be interested in the Fourth Circuit's proper application of the collateral order doctrine.

And, *even if* the Supreme Court were to grant *cert* on whether DSI, as an abstract legal question, is immediately appealable (which is not the actual posture of this case) it is doubtful it would reverse. The Court has consistently admonished that, out of fealty to the congressionally

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immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal.").

imposed requirements of the final judgment rule, the collateral order doctrine must be interpreted with "utmost strictness." The Court has recognized only two new types of collateral orders in twenty-five years, while rejecting scores of others implicating interests far weightier that CACI's desire to avoid a judgment.

CACI's hyperbolic claim that it—a multibillion-dollar corporation that has engaged in years of scorched-earth, and frequently frivolous, litigation tactics—would suffer irreparable harm from the "immense burden" associated with a trial cannot be taken seriously. Had CACI felt genuinely about the need to prevent exposure to the burdens of litigation, it should have sought Supreme Court review of *Al Shimari II*.[2] And while it now protests such burdens, CACI had no qualms attempting to force the United States—upon whose sovereign immunity CACI seeks to derive—into this case and through a year of onerous discovery. Indeed, CACI argued that the United States had no sovereign immunity, thereby advocating the very rule it now seeks to overturn. (*See* Dkt. No. 731, at 15 (arguing, *inter alia*, "the United States explicitly *waived* its status-based immunity" (emphasis in original)).)

Unlike a sovereign entity, CACI bears no public responsibilities or accountability. It does not exist for public benefit; by nature, it exists solely for profit. CACI obtained the benefit of its bargain with the United States—a $35 million payment for interrogation services, during which CACI caused shocking human rights abuses. After ten years of litigation, including five trips to the Fourth Circuit, Plaintiffs—and the public—are entitled to a full trial.

[2] In arguing for a stay of the mandate in 2012, CACI represented to the Fourth Circuit that it would seek *certiorari*. *See Al Shimari v. CACI Int'l, Inc.*, No. 09-1335 (4th Cir. May 31, 2012), Dkt. No. 179. It did not do so.

Unless the Court determines that appearance of counsel would be helpful or would like to discuss scheduling of trial or other matters, Plaintiffs respectfully suggest that Defendant's motion can be decided on the papers.

RELEVANT PROCEDURAL BACKGROUND

The Court is already familiar with the lengthy procedural history of this case. Plaintiffs briefly describe the two Fourth Circuit decisions that are relevant to the issues here.

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, Dkt. No. 94, CACI brought an interlocutory appeal arguing, *inter alia*, that an adverse ruling on its asserted derivative official immunity under *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), was immediately appealable.

In a 12-3 *en banc* ruling, the Fourth Circuit held, among other things, that CACI's asserted derivative *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. *Al Shimari II*, 679 F.3d 205, 220 (4th Cir. 2012) (internal quotation marks omitted) (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)). The Fourth Circuit 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 genuine dispute," the court "lack[s] jurisdiction to consider them on an interlocutory appeal," *id.* at 223.

After the *en banc* decision, CACI filed a motion to stay the mandate, in which it asserted it would file a petition for *certiorari*. *Id.*, Dkt. No. 179, at 1. The Fourth Circuit denied CACI's motion, *id.*, Dkt. No. 185, at 5, and CACI did not file a petition for *certiorari*.

B. *Al Shimari V*

Following this Court's denial of CACI's second attempt to dismiss the case based on an alleged derivative immunity, Dkt. No. 1183, CACI again brought an interlocutory appeal—without addressing the Fourth Circuit's jurisdiction under *Al Shimari II*—arguing that it met all "requirements for derivative immunity."[3] *Al Shimari V*, No. 19-1328 (4th Cir. filed Apr. 23, 2019), Dkt. No. 19, at 16. CACI used its putative appeal of the DSI question to bootstrap a number of this Court's other interlocutory rulings, including: (i) the denial of the United States' sovereign immunity; (ii) the denial of CACI's motion to dismiss the Alien Tort Statute claims under (a) *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016) and (b) *Jesner v. Arab Bank, PLC*, 198 S. Ct. 1386 (2018); (iii) the denial of its motion to dismiss on political question grounds and state secrets; and (iv) the denial of its motion to dismiss on "preemption" grounds. In a two-page, unpublished opinion, the Fourth Circuit concluded it was bound by its "prior en banc decision." *Id.*, Dkt. No. 75, slip op. at 3. Moreover, it noted that the Fourth Circuit has "never held, and the United States government does not argue, that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal." *Id.*

Finally, it concluded 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." *Id.* In a footnote, the court noted that even if it determined "whether CACI would be entitled to derivative sovereign immunity if the plaintiffs succeed in proving their factual allegations, we would not,

[3] CACI's interlocutory appeal followed on the footsteps of a petition for mandamus to the Fourth Circuit to challenge this Court's denial of CACI's motion to dismiss on political question grounds, which the Fourth Circuit rejected. *In re: CACI Premier Tech., Inc.*, No. 19-1238 (4th Cir. Mar. 27, 2019), Dkt. No. 13.

and do not, have jurisdiction over a claim that the plaintiffs have not presented enough evidence to prove their version of events." *Id.* at 3 n.*. Here, the court found that there were "continuing factual disputes regarding whether CACI violated the law or its contract" and since "these factual disputes are substantially related, if not identical, to the elements of CACI's derivative sovereign immunity defense," "this appeal does not turn on an abstract question of law and is not properly before us." *Id.* at 4.

In a concurring opinion, Judge Quattlebaum agreed that *Al Shimari II* bound the panel's decision. *Id.* at 5 (Quattlebaum, J., concurring). Moreover, he separately concluded that there was sufficient "evidence [that] representatives of CACI engaged in . . . the alleged improper conduct as to these plaintiffs" and thus "the requirements for us to exercise appellate jurisdiction for an interlocutory appeal are lacking." *Id.*

CACI then filed a series of petitions and motions to prevent the return of jurisdiction to this Court. First, CACI filed a petition for rehearing or rehearing *en banc*, but no judge voted for CACI's *en banc* petition, including judges who dissented in *Al Shimari II*. *Id.*, Dkt. No. 83. Then, CACI filed a motion to stay the mandate, which the Fourth Circuit denied without requesting briefing from Plaintiffs. *Id.*, Dkt. No. 87. Finally, CACI filed a motion to stay the mandate with Chief Justice Roberts, who denied it without prejudice because CACI had ignored Supreme Court Rule 23.3, which requires the applicant "to set out with particularity why the relief sought is not available from any other court or judge." *See CACI Premier Tech., Inc. v. Al Shimari*, No. 19A430 (U.S. filed Oct. 23, 2019). CACI now seeks a stay from this Court.

ARGUMENT

Contrary to CACI's assertion, this Court *has* articulated a standard for deciding whether to grant a stay in cases where a party intends to file a petition for *certiorari*.

> In determining whether to grant a stay of proceedings pending an appeal, the court must consider four factors:
> (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and
> (4) where the public interest lies.

Dumas v. Clarke, 324 F. Supp. 3d 716, 717 (E.D. Va. 2018) (quoting *Wolfe v. Clarke*, 819 F. Supp. 2d 574, 578 (E.D. Va. 2011)). CACI does not satisfy any factor. *Cf. Conkright v. Frommert*, 556 U.S. 1401, 1401 (2009) (Ginsburg, J.) ("relief is granted only in 'extraordinary cases'" (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers))).

I. CACI HAS NOT MADE A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS

For cases seeking *certiorari* in the Supreme Court, there are two components CACI must meet to show a likelihood of success on the merits. First, CACI must make a strong showing that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Second, CACI must make a strong showing that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Id.* CACI has not made either strong showing.

A. CACI Has Not Made A Strong Showing That There Is A Reasonable Probability That The Supreme Court Will Grant *Cert*

In support of its argument that there is a reasonable probability four Justices will grant *certiorari*, CACI argues that the issue it presents, "whether orders denying claims of derivative sovereign immunity are immediately appealable under the collateral order doctrine," has "divided the circuits." Dkt. No. 1315, at 9. That is not so, for two reasons. First, CACI does not correctly identify the issue presented. And second, even if it had, there is no such circuit split.

The collateral order doctrine, which stems from the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), sets out three requirements for appellate jurisdiction: the collateral order must "[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).

Here, the Fourth Circuit decision from which CACI seeks *certiorari* held that the second requirement was not met "because there remain continuing disputes of material fact with respect to CACI's derivative sovereign immunity defenses." *Al Shimari V*, slip op. at 3. Specifically, there are "continuing factual disputes regarding whether CACI violated the law or its contract." *Id.* at 4. Even Judge Quattlebaum's concurrence recognized that Plaintiffs had presented "evidence [that] representatives of CACI engaged in . . . the alleged improper conduct as to these plaintiffs" thus "the requirements for [the court] to exercise appellate jurisdiction for an interlocutory appeal are lacking." *Id.* at 5 (Quattlebaum, J., concurring). Therefore, the issue for *certiorari* is not, as CACI suggests, an abstract one of whether DSI is an immediately appealable order under *Cohen*. Rather, it is the Fourth Circuit's actual holding: that a denial of derivative sovereign immunity which turns on continuing factual disputes (and thus is not "completely separate from the merits of the action") is not immediately appealable.

There is no circuit split on this issue because the Supreme Court has already applied the *Cohen* factors to a similar case where defendants invoked a qualified immunity defense but were denied summary judgment on that defense because of genuine factual disputes. In a unanimous decision, the Supreme Court held that defendants were not allowed to immediately appeal in such circumstances. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) ("[W]e hold that a

defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."). Here, *Al Shimari V*, relying on *Al Shimari II*, merely applies the *Cohen* factors and the reasoning of *Johnson* to conclude that, where the denial of an alleged derivative immunity turns on "continuing factual disputes," there is no appellate jurisdiction over such a collateral order.

There are no other cases—let alone circuit decisions—that hold to the contrary. Every collateral order case CACI cites has used the *Cohen* factors and other Supreme Court precedent to determine if the immunity before it is immediately appealable. None of them found that an immunity denial based on factual disputes—the actual ruling by the Fourth Circuit that CACI would seek the Supreme Court to review—is immediately appealable.[4] Therefore, there is no circuit split with the Fourth Circuit's decision here.

CACI argues that *Al Shimari V* "exacerbate[s]" an alleged circuit split between the Fifth Circuit's decisions in *Martin v. Halliburton* and *Houston Community Hospital v. Blue Cross & Blue Shield of Texas, Inc.* and the Eleventh Circuit's decision in *McMahon v. Presidential*

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[4] *See Martin v. Halliburton*, 618 F.3d 476, 481-87 (5th Cir. 2010) (holding no jurisdiction to consider defendants' immunity defenses for not satisfying at least one of the other *Cohen* factors without needing to address whether the defenses were "completely separate from the merits"); *Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 268 (5th Cir. 2007) (same); *Alaska v. United States*, 64 F.3d 1352, 1355 (9th Cir. 1995) (same); *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994) (same); *McCue v. City of New York (In re World Trade Ctr. Disaster Site, Litig.)*, 521 F.3d 169, 193 (2d Cir. 2008) (holding denial of derivative Stafford Act immunity "satisf[ied] [all three] prongs of the *Cohen* collateral order rule"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1340 (11th Cir. 2007) (holding denial of derivative *Feres* immunity was immediately appealable, in part, because the decision "does not significantly overlap with the merits"); *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 999 (D.C. Cir. 1999) (per curiam) (holding denial of a federal agency's immunity from criminal contempt charges immediately appealable, in part, because "[t]hat determination resolves an important issue separate from the merits of the contempt charge").

Airways, Inc. and the Second Circuit's decision in *McCue v. City of New York (In re World Trade Center Disaster Site, Litigation)*. CACI Br. at 9-10. But, for the reason just described, none of these cases creates a circuit split with *Al Shimari V*, because none of them holds that, when an immunity defense is intertwined with the merits, it is immediately appealable.

And even if CACI were correct that there is an abstract legal issue of whether "rulings denying derivative sovereign immunity are immediately appealable under the collateral order doctrine," CACI Br. at 9, these decisions do not create a circuit split on that issue either. In *Martin* and *Houston Community Hospital*, the Fifth Circuit held that the various immunities raised by defendants—official immunity, derivative federal sovereign immunity, and Defense Production Act immunity—did not meet all three *Cohen* factors either (a) because their claim of immunity was not substantial or (b) because their asserted immunity defense was not an immunity from suit. *Martin*, 618 F.3d at 483-85; *Houston*, 481 F.3d at 268. In *McMahon*, on the other hand, the Eleventh Circuit held that a denial of derivative *Feres* immunity—an immunity *not* raised in either Fifth Circuit case—met all three *Cohen* factors. 502 F.3d at 1339. Likewise, in *McCue*, the Second Circuit held that a denial of derivative Stafford Act immunity—also not an immunity at issue in either Fifth Circuit case—met all three *Cohen* factors. 521 F.3d at 192-93. Thus, each case addressed the particular immunity raised (which in *McCue and McMahon* was, notably, not the precise DSI at issue in this case) and faithfully applied the *Cohen* factors to the case before it. This does not create a circuit split.

At most, there is a more limited, unrelated circuit split on whether federal sovereign immunity for the United States is an immunity from suit or an immunity from liability. *Compare Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) ("[I]t is difficult to speak of federal sovereign immunity as a 'right not to be sued.' . . . Federal sovereign

immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it . . . ."), *with In re Sealed Case No. 99-3091*, 192 F.3d 995, 999 (D.C. Cir. 1999) (per curiam) ("[F]ederal sovereign immunity is an immunity from suit, not simply a defense to liability on the merits."). *But see Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 279 (5th Cir. 2007) ("[In *In re Sealed Case*,] [t]he Court of Appeals for the District of Columbia . . . reached the opposite conclusion [on whether a denial of sovereign immunity is immediately appealable], yet under circumstances too distinguishable to create a circuit split [with *Pullman*]."). But that is not this case. *Al Shimari V* does not decide whether sovereign immunity—or derivative sovereign immunity—is an immunity from suit or immunity from liability. Therefore, even if the Supreme Court wanted to address this unrelated circuit split, this would not be the case to do so. Accordingly, CACI has not made a strong showing that four Justices would vote to grant *certiorari*.

B. CACI Has Not Made A Strong Showing That There Is A Fair Prospect That The Supreme Court Will Reverse

There can be no appeal under the collateral order doctrine unless the order at issue "resolve[d] an important issue completely separate from the merits of the action." *Will v. Hallock*, 546 U.S. 345, 349 (2006). The Supreme Court has consistently described the collateral order doctrine as "narrow and selective," of "modest scope," *Will v. Hallock*, 546 U.S. 345, 350 (2006), 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 as been entered," *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) (citations and quotation marks omitted).

The Fourth Circuit correctly determined that CACI's entitlement to DSI turns on factual questions, and thus is not "completely separate from the merits." The Supreme Court will not likely choose to review—let alone reverse—that summary disposition.

1. The Fourth Circuit Correctly Concluded The Presence Of Unresolved Factual Questions Precludes Interlocutory Review

As this Court and the Fourth Circuit recognized, CACI is not entitled to DSI if it "violate[d] both federal law and the Government's explicit instructions." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *see* Dkt. No. 1183, at 52 ("[T]he Supreme Court has held that derivative sovereign immunity is not guaranteed to government contractors and is not awarded to government contractors who violate the law or the contract."). Thus, CACI's claim to immunity and the merits of the case fully merge, as the very question about to go to the jury following denial of summary judgment was whether CACI's conduct violated the government contract requiring obedience to international law and violated federal law prohibitions on torture, war crimes, and cruel, inhumane, and degrading treatment. All three judges recognized the factual interdependence of CACI's claim to immunity. Thus, as the Fourth Circuit held, the district court order CACI seeks to review cannot be "completely separate from the merits" so as to permit interlocutory review. It explained:

> Below, the district court concluded that even if the United States were entitled to sovereign immunity, "it is not at all clear that CACI would be extended the same immunity" due to continuing factual disputes regarding whether CACI violated the law or its contract. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 970 (E.D. Va. 2019).[[5]] The district court also denied CACI's motion for summary judgment on plaintiffs' ATS claims based on evidence showing "material issues of fact that are in dispute," J.A.

[5] Because this Court did not actually resolve the question, properly leaving it for the jury, this Court's DSI order also fails under the second, related prong of the collateral order doctrine: that the district court "conclusively determine[]" the disputed question. *Al Shimari II*, 679 F.3d at 220 (citing *Will*, 546 U.S. at 349); *see id.* ("district court must issue a fully consummated decision," that is "the final word on the subject addressed").

> 2238–50, and these factual disputes are substantially related, if not identical, to the elements of CACI's derivative sovereign immunity defense. Given these continuing factual disputes, this appeal does not turn on an abstract question of law and is not properly before us.

Al Shimari V, slip op. at 4; *see also id.* at 5 (Quattlebaum, J., concurring) ("from my review of the record," there remain factual disputes regarding CACI's compliance with law that foreclose appellate review).

The Fourth Circuit's distinction between "abstract questions of law" that may be appealable, from questions of factual sufficiency, which are not, follows directly from an admonition by the Supreme Court. *See Al Shimari II*, 679 F.3d at 221-22 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009); *Johnson v. Jones*, 515 U.S. 304, 317 (1995)). In *Johnson v. Jones*, the Court explained that, in the analogous qualified immunity context, a pure question of law is immediately appealable, but "[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." 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 v. F.T.C.*, 455 F.3d 436, 442-43 (4th Cir. 2006) (finding that the analysis involved in determining state action antitrust immunity "is intimately intertwined with the ultimate determination that anticompetitive conduct has occurred" (internal quotation marks and alteration omitted)); *ACLU of Md., Inc. v. Wicomico County, Md.*, 999 F.2d 780, 784 (4th Cir. 1993) (if "the defendant's entitlement to immunity turns on a factual dispute, that dispute is resolved by the jury at trial").

Given this Court's summary judgment determination—not under review—and the Supreme Court's fact-bound test for determining DSI, turning as it does on compliance with law, it inconceivable that the Supreme Court would review the Fourth Circuit's disposition let alone reverse its determination.

2. Even If The Supreme Court Were To Somehow Consider CACI's DSI Appeal To Turn On An Abstract Question of Law, It Is Unlikely To Reverse

Even if the Supreme Court were to ignore the obvious conclusion that CACI's DSI appeal is not completely separate from the merits, and somehow choose to review whether orders denying DSI are, in the abstract, immediately appealable, it would still likely not reverse. To find DSI is immediately appealable the Court would have to consider that it implicates 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. v. United States*, 489 U.S. 794, 799 (1989). Advising that courts should "view claims of a right not to be tried with skepticism, if not a jaundiced eye," *Digital Equip.*, 511 U.S. at 873, the Court has limited the collateral order doctrine to a small handful of orders.[6] 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).[7]

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[6] *See Osborn v. Haley*, 549 U.S. 225, 238-39 (2007) (denial of substitution of United States under Westfall Act); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (denial to state of claimed Eleventh Amendment immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 809, 817–18 (1982) (denial of qualified immunity from suit pursuant to 42 U.S.C. § 1983); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (denial to president of absolute immunity); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (denial of Speech and Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 660 (1977) (denial of double jeopardy bar).

[7] For example, in *McCue v. City of N.Y. (In re World Trade Ctr. Disaster Site, Litig.)*, 521 F.3d 169 (2d Cir. 2008), the court found a form of federal sovereign immunity immediately appealable, but that immunity was, unlike here, grounded in a statute: the Stafford Act protected a right that is a "'particular value of a high order'"—"the right of federal agencies to make

Here, there is neither an express statutory or constitutional provision in play, nor 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) (denial of claim of double jeopardy immediately appealable because "deeply ingrained" public values preclude suffering uncertainty of second, possibly unnecessary criminal trial). As a private company that profited handsomely from 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 . . . triumphing before trial, rather than after it," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988), that preference is not enough to dislodge the final judgment rule. The Supreme Court has denied collateral order review for interests far weightier and irretrievable than CACI's.[8]

Indeed, it is remarkable that the United States *itself* has suggested to the Fourth Circuit that even the denial of its own sovereign immunity (which is indisputably positioned as an abstract question of law) is not an immediately appealable order. In its *amicus* brief filed in the latest appeal, the government referred to sovereign immunity as a "jurisdictional *defense* to *claims*"—but not a wholesale immunity from *suit*. Br. for the United States as Amicus Curiae, No. 19-1938, Dkt. 25, at 2 (Apr. 30, 2019) (emphasis added). As the Fourth Circuit explained,

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discretionary decisions where engaged in disaster relief efforts without fear of judicial second-guessing." *Id.* at 192 (quoting *Will*, 546 U.S. at 352).

[8] *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 109 (2009) (order requiring disclosure of attorney-client materials not immediately appealable, even if benefits of privilege would be irretrievably lost while awaiting final judgment); *Will*, 546 U.S. at 353-54 (no review of order denying immunity under FTCA judgment bar despite analogy to qualified immunity); *Midland Asphalt*, 489 U.S. at 801-02 (no immediate appeal of motion to dismiss grand jury indictment even though dismissal would avert burdens of criminal trial altogether); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (order disqualifying criminal counsel not immediately appealable despite arguably irreversible Sixth Amendment interests at stake).

after the government conceded at oral argument that as a practice the United States does not appeal orders denying it sovereign immunity, "we have never held, and the United States government does not argue, that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal." *Al Shimari V*, slip op. at 3.

II. CACI HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE HARM ABSENT A STAY

CACI, a multi-billion-dollar corporation that has litigated this case for over a decade, will suffer no irreparable harm from the denial of its stay motion. CACI's claim of irreparable harm is belied by its own decision earlier in this action when, after the *en banc* court in *Al Shimari II* held that CACI's denial of derivative *Mangold* immunity was not immediately appealable, CACI chose not to file a writ of *certiorari* despite initially seeking a stay from the Fourth Circuit for that purpose. Whatever arguments CACI may have had in 2012 that it needs a stay to prevent the burden of litigation pending its petition for *certiorari* have been mooted by the subsequent years of discovery and motion practice. CACI speculates that there are nevertheless three types of harm that would come from denial of a stay: the "immense burdens of litigating this case through trial" that CACI would face; infringement by the judiciary on the political branches; and the unfairness CACI would suffer from having to litigate this case in light of the United States' limited assertion of the state secrets privilege. Dkt. No. 1315, at 18-20. None of these purported harms comes close to being the type of irreparable injury that would warrant a stay.

First, CACI's allegation that it will "incur the immense burdens of litigating this case through trial" is irrelevant to the present motion. As the Fourth Circuit recognized in denying CACI's most recent appeal, even if CACI were to prevail on the narrow legal question of whether a denial of DSI is immediately appealable, there are material issues of fact involving the merits of the case that "are substantially related, if not identical, to the elements of CACI's" DSI

defense. *Al Shimari V*, slip op. at 4. These factual disputes can only be resolved at trial. CACI will have to bear the burden of trial at some point, and the fact that it may need to bear that burden sooner rather than later does not result in irreparable harm.

Nor do the specific litigation burdens cited by CACI make sense in this litigation. CACI identifies the costs of trial, distraction from duties, and "deterrence of able people from public service." Dkt. No. 1315, at 18 (quoting *Mitchell*, 472 U.S. at 526). CACI has litigated this case for over a decade, including filing two untimely appeals, impleading the United States late in the litigation and taking discovery against it for a year, and filing six dispositive motions since the 2016 remand following *Al Shimari IV* alone. CACI's litigation strategy has never shown any sign of concern for costs before now, and whatever expenses it may yet incur from trial will not be an irreparable harm to it. It is not clear who CACI has in mind when it claims that trial will be a "'distraction' from duties," Dkt. No. 1315, at 18, but any such potential harm from trial is theoretical at this point and can be addressed by the parties and the Court when scheduling witnesses and appropriate use of the voluminous discovery record already available in this case. Finally, CACI's insinuation that it will suffer irreparable harm from trial because a trial will act as "deterrence of able people from public service" is irrelevant as CACI is not the government and its employees are not public servants.

Second, CACI has no claim to irreparable harm from purported "[j]udicial interference with military operations." Dkt. No. 1315, at 19. CACI's argument is yet another repackaging of its political question doctrine defense, a defense that has now been rejected by this Court on multiple occasions. There is no judicial infringement on the political branches from holding a trial to determine whether CACI is liable for the gross violations of international law that occurred at Abu Ghraib, which involved conduct that the military and political branches have all

condemned. CACI will have an adequate opportunity post-trial to appeal the political question rulings. In any event, CACI makes no claim as to how this purported infringement amounts to irreparable harm to *CACI*, a private, for-profit corporation.

Third, CACI's claim that it will be unable to defend itself at trial due to the case's "national security setting" and will be pressured to settle is similar to its "infringement" argument above—a hollow attempt to re-raise its unsuccessful state secrets motion. CACI has an adequate remedy for the state secrets rulings in a post-trial appeal.

CACI's purported "irreparable harms" are based on nothing more than its dissatisfaction with the Court's denial of its many dispositive motions and the fact that CACI may, at long last, have to defend itself at trial. Nothing CACI presents warrants staying proceedings in this Court while it makes its long-shot petition for a writ of *certiorari*.

III. GRANTING A STAY WOULD IMPOSE IRREPARABLE HARM ON PLAINTIFFS AND HARM THE PUBLIC INTEREST

The final two factors—whether issuance of the stay will substantially injure the other parties and where the public interest lies—both favor rejecting a stay. It has been sixteen years since the abuses at Abu Ghraib, and over eleven years since Mr. Al Shimari first filed his complaint. Plaintiffs have waited long enough for their day in court. A stay is also against the public interest in prompt resolution of claims. It is time to move forward with this trial.

CONCLUSION

For the foregoing reasons, Defendant's motion to stay proceedings pending filing and deposition of its petition for a writ of *certiorari* should be denied. As noted above, unless the Court determines that appearance of counsel would be helpful or would like to discuss scheduling of trial or other matters, Plaintiffs respectfully suggest that Defendant's motion can be decided on the papers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I electronically filed Plaintiffs' Opposition to Defendant's Motion to Stay Proceedings Pending Filing and Disposition of a Petition for a Writ of *Certiorari* through the CM/ECF system, which sends notification to counsel for Defendant.

/s/ John Kenneth Zwerling
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