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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	Case No. 1:08-cv-827 (LMB/JFA)
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PRECLUDE THE BORROWED SERVANT DEFENSE

In this, as one of the last legal filings the Court will review before the case goes back to a jury, it is worth remembering what this case is about, and what questions it is permissible for a jury to opine upon. This case is about violations of one of the most serious *jus cogens* prohibitions against the cruelty and pain of torture. And, because of its recognized horrors, as between its victims and those who would perpetuate or abet it, the law and the public interest heavily favor the former. This law and public interest explain why this Court determined that torture cannot be a sovereign act (*i.e.*, it is null and void) and why the Fourth Circuit emphasized that no one could lawfully order or authorize another to torture. This same law and public interest must foreclose CACI from invoking a defense that would give judicial recognition and imprimatur to the same legal impossibility—that the military could "borrow" CACI employees to commit torture and CIDT. Because this is not a question that can, consistent with the law and

public policy, be submitted to a jury, it should be barred as a matter of law.

In opposing Plaintiffs' motion *in limine* regarding the borrowed servant, first, CACI focuses on irrelevant doctrinal distinctions, rather than recognizing that this Court and the Fourth Circuit have wholly rejected the premise underlying CACI's borrowed servant defense, even if the courts did so in different contexts. Second, while conceding there are "uniquely federal interests" in ensuring a clear divide between civilians and combatants, which are reflected in the military law and regulations that Plaintiffs cite, CACI has no persuasive answer to what follows: that those federal interests supersede and displace the common law borrowed servant defense as a matter of law. CACI continues to run away from the operative contract in this case which required CACI—and not the Army—to supervise its employees, which necessarily included a duty to supervise and prevent *jus cogens* violations like torture. And, CACI's suggestion that its contract (which on its face actually defeats the borrowed servant defense) is somehow consistent with military regulations turns on case law that either long pre-dates the applicable military regulations at issue (including the *McLamb* case ***from 1935*** that CACI hangs its hat so heavily upon) and/or do not arise in a theater of armed conflict where the federal interests displacing the defense (*i.e.*, ensuring adherence to the laws of war) and ensuring contractor accountability for *jus cogens* violations—not negligence-related claims as in the cases CACI cites—are paramount.

CACI's primary strategy is to insist the Court cannot depart from its prior ruling. Not only is CACI wrong on the merits, but also it is the height of hypocrisy for CACI to move to reopen a bevy of issues that the Court ruled on in the last trial while simultaneously insisting that a single ruling on jury instructions is somehow the only ruling that is set in stone.

ARGUMENT

I. CACI'S HYPOCRITICAL INVOCATION OF LAW OF THE CASE IS WITHOUT MERIT

CACI's invocation of the law of the case doctrine is an exercise in projection that would have made Sigmund Freud raise an eyebrow. CACI does not bother trying to reconcile its position with its filing of ***six*** motions *in limine* challenging the Court's rulings from the April trial and its prior attempts to relitigate multiple stale legal questions over and over.

More importantly, CACI's complaint fails on the merits. As CACI notes, requests for reconsideration should be denied when they "raise[] no new arguments." ECF No. 1748 at 3. But Plaintiffs' motion *in limine* does raise new arguments, and in doing so, offers new compelling reasons to revisit the prior ruling. *See id.* at 4 (noting that Plaintiffs offer a "***new basis***" for precluding the defense) (emphasis added). The Court has not previously considered the argument that Plaintiffs make in their motion that the substantial federal interests embodied in military law and policy foreclose the application of the borrowed servant doctrine in this case, nor has it had before views of *amici* who are experts in military law and policy, and agency law, *see* ECF Nos. 1737-1 (Proposed Brief of *Amicus Curiae* Experts in Military Law and Policy), 1739-1 (Proposed Brief of *Amica Curiae* Professor Deborah DeMott). And, critically, the Court must likewise consider the argument that prior rulings by this Court and by the Fourth Circuit on the rationale underlying the borrowed servant defense foreclose CACI from invoking it, so as to ensure internal consistency across the law of this case.

Ultimately, the law-of-the-case doctrine is not as absolute as CACI suggests. The typical circumstances in which a court may revise a prior ruling are where there is (1) "a subsequent trial

producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Carlson v. Bost. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (citation omitted). The Fourth Circuit has made clear that these categories should be construed broadly, given that "a basic aim of rule 54(b) is to give district courts flexibility to revise their rulings as … new facts or arguments come to light." *Phoenix v. Amonette*, 95 F.4th 852, 857 (4th Cir. 2024) (citation omitted). Accordingly, in *Nadendla v. WakeMed*, the Fourth Circuit affirmed a district court that reversed itself after being alerted to a precedent that had existed at the time of the district court's initial ruling, even though the law had not actually changed. 24 F.4th 299, 304 (4th Cir. 2022); *see also United States v. Lentz*, 384 F. Supp. 2d 934, 939 n.4 (E.D. Va.) (rejecting the argument that "rulings made in the course of the first trial must be deemed binding and immutable law of the case for purposes of the second trial").

Plaintiffs' motion stands in obvious contrast to CACI's attempt to rehash already-rejected legal or evidentiary arguments with no new analysis. Based on governing law, this Court is authorized to revisit its borrowed servant instruction.

II. THE RATIONALE MOTIVATING PRIOR RULINGS IN THIS CASE FORECLOSES THE BORROWED SERVANT DEFENSE

CACI expends significant space in its opposition creating and then attacking an argument that Plaintiffs did not make. *See* ECF No. 1748 at 4-7. Plaintiffs did not, and are not, suggesting that the political question doctrine, sovereign immunity, or various exceptions to the FTCA are identical to the common law borrowed servant defense. Rather, Plaintiffs argued that the premise ***underlying*** CACI's borrowed servant defense—that the Army could have had authority to control CACI's employees during the alleged conspiracy and aiding and abetting of torture at issue in this case—is the same argument that has been rejected by this Court and the Fourth

Circuit. ECF No. 1718-1 at 3-6. Whether CACI sought to have the claims dismissed because of non-justiciability, preemption or derivative immunity is of no moment to the core question here when the outcome it sought is the same: responsibility and liability deflected from itself on to the military. That is so because the rationale underlying the Fourth Circuit's and this Court's rejection of CACI's arguments—for example, because acts of torture, as a *jus cogens* violation, are never sovereign acts and cannot be lawfully undertaken or ordered—similarly forecloses the availability of a borrowed servant defense in a case involving torture and CIDT, whether invoked in the context of immunity or liability.

For CACI to prove its borrowed servant defense, CACI is required to show that the military was controlling the CACI interrogators when they conspired with and aided and abetted military personnel to torture and abuse detainees.[1] But that situation is a legal impossibility. That is because torture cannot be considered a sovereign act. *Al Shimari v. CACI Premier Tech., Inc*., 368 F. Supp. 3d 935, 966-68, 970-71 (E.D. Va. 2019), *appeal dismissed*, 775 Fed. Appx. 758 (4th Cir. 2019). Similarly, the military is stripped by law of any authority to authorize or

[1] Attempting to avoid the force of this argument, CACI makes the novel—and wholly unsubstantiated—claim that the borrowed servant doctrine "does not require that the borrowing employer ordered the borrowed employee to engage in the specific act for which the employee is accused" but only to be in a "position[ ] to prevent" the tortfeasor's conduct. ECF No. 1748 at 6. That is clearly not the law. As CACI well knows, for the borrowed servant doctrine to preclude the general employer from incurring liability for the acts of its employee, the special employer must have "authoritative direction and control over a worker … encompass[ing] the servant's performance of the particular work in which he is engaged ***at the time of the accident [or tort or injury causing act]***." *White v. Bethlehem Steel Corp*., 222 F.3d 146, 149 (4th Cir. 2000) (emphasis added); *see also Ladd v. Rsch. Triangle Inst.*, 335 F. App'x 285, 288 (4th Cir. 2009) (explaining "[w]hen the borrowing employer possesses this authoritative direction and control ***over a particular act***, it in effect becomes the employer." (emphasis added)). Thus, the borrowed servant doctrine directly surfaces the legal impossibility of being "borrowed" to commit the wrongful acts at issue here—conspiring to commit and aiding and abetting torture and CIDT.

otherwise command others to torture. *Al Shimari v. CACI Premier Tech., Inc*., 840 F.3d 147, 157 (4th Cir. 2016). If torture cannot be a sovereign act and there can be no lawful authority to authorize or allow it, it follows that the sovereign (the Government) cannot "borrow" others to torture. If torture is non-derogable, it is non-delegable.

Put another way, having foreclosed the possibility, as a matter of law and public interest, that torture could ever be a valid act or lawfully authorized, the Court cannot likewise ask a jury to find that CACI was borrowed to commit a *jus cogens* violation. By analogy, if a court had before it a contract reflecting an agreement to hire private interrogators to torture, that agreement would be null and void as a matter of public policy, and the Court would never ask a jury to opine about whether that contract was in fact enforceable—because that would give judicial imprimatur over the subject matter embedded in that question is counter to public policy. *See* Res. (Second) of Contracts § 178(1) ("[A] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such term"); *McMullen v. Hoffman*, 174 U.S. 639 (1899) (voiding contracts as against public policy). Thus, any purported arrangement whereby the Government "borrows" civilians to engage in torture or abuse likewise cannot receive judicial imprimatur via the borrowed servant defense or, as this Court has already determined, even federal sovereign immunity. *See also* ECF No. 1737-1, Proposed Brief of *Amicus Curiae* Experts in Military Law and Policy at 8-10.

There is one more point about the public—and federal—interest surrounding the absolute prohibition against torture that bears emphasizing. As argued in Plaintiffs' opening brief and as

explicated by *amica* DeMott, in our system of tort liability, the borrowed servant doctrine does not operate as an immunity, as much as CACI wishes it were so; the doctrine is not designed to foreclose liability to a tort victim, it is designed to ***shift*** liability ***among*** or ***between*** responsible parties, to ensure that a tort victim receives remediation from ***some*** responsible party. *See* ECF No. 1739-1 at 8-9. Tt would therefore be perverse to permit CACI to escape any liability for violations of the most grievous of international law crimes. *See Al Shimari*, 368 F. Supp. 3d at 960–62.

Such impunity from liability for international law violations is particularly perverse in light of (a) CACI's express contractual ***obligation*** to undertake supervision of its employees in a manner consistent with military law and Geneva conventions—*i.e.*, to fulfill its obligation to prevent or credibly investigate instances of torture and abuse by its own employees; (b) CACI's willful ignorance of credible reports of torture by CACI employee Richard Arant and others; and (c) CACI's profiting of millions of dollars from this contract. If anything, the same public policy considerations this Court and the Fourth Circuit have considered in ensuring torture could not be outsourced or authorized should ***compel*** CACI to be held to the terms of its contract to supervise and prevent torture by its employees. It would be perverse for CACI to elide the obligation that it had in the contract to supervise and prevent *jus cogens* violations, feign ignorance of anything that happened on the ground—including its own employees' conduct[2]—and then leverage the

[2] CACI offers a typically cynical, alternative public policy. Rather than fulfill its contractual obligation to supervise employees and prevent torture CACI argues:

> The profound interest all governments and humans have in preventing torture is best served by holding the entity in the best position to do so responsible if it fails. Nothing is accomplished … by pinning liability on a lending employer who had no real ability

borrowed servant doctrine, even where CACI employees are responsible for Plaintiffs' suffering.

III. THE SIGNIFICANT FEDERAL INTERESTS IMPLICATED DISPLACE THE BORROWED SERVANT DEFENSE

The Court is aware of the prohibitions on command supervision of civilians contained in the military regulations and Army Field Manual. But Plaintiffs and *amici* sought most recently to explain that there are important ***reasons*** that so many military regulations and the Army Field Manual consistently mandate strict division of supervisory authority between the military chain of command on the one hand and civilian contractors on the other, and the import of those principles on the borrowed servant defense in the context of this torture case. Those regulations and authorities reflect the important federal interests in demarcating civilians from the military. Such interests include the constitutional necessity of civilian command of the military, *see* ECF No. 1737-1, Proposed Brief of *Amicus Curiae* Experts Military Law and Policy at 8, and the military's need to adhere strictly to the principle of distinction at the heart of international humanitarian law, *id*. at 7; ECF No. 1718-1 at 7. These strong federal interests must displace the potential invocation of a contrary common law that would frustrate them. *Id*. at 6-8.[3]

> to even know what was happening on a day-to-day basis with its employees, let alone control their work.

ECF No. 1748 at 9. The contention rests on an unsupported, if aspirational, factual premise and a distorted view of the public interest. To the contrary, the profound interest in preventing torture ***requires*** holding CACI to account under its contract and its duty to supervise and prevent torture—not to elide responsibility for its role in a conspiracy to brutalize human beings, while profiting handsomely from it.

[3] As to CACI claim that Plaintiffs are somehow trapped in a "cognitive dissonance" because of their reliance on *Boyle* displacement principles, Plaintiffs have been entirely consistent for 16 years. The ***reason*** Plaintiffs argued that the federal interest in the "combatant activities" exception to the FTCA should not foreclose their common law claims is ***exactly the same reason*** they argue CACI cannot benefit from the borrowed servant defense: in both situations, Plaintiffs have argued that civilians can never be in the military chain of command. In the *Boyle* context,

Indeed, the significant federal interests reflected in the regulations and policy (alongside federal law) ultimately derive from treaties via the Geneva Conventions and congressional ratification of such treaties, as well as the significant and profound federal interest in preventing and remediating the horrors of torture. Those powerful interests displace the common law borrowed servant doctrine, regardless of its state or federal common law provenance. Most importantly, far from disputing the premise of Plaintiffs' displacement argument, CACI appears to agree that the military regulations and authorities cited by Plaintiffs reflect a "general rule . . . that military personnel usually should not supervise contractor personnel." ECF No. 1748 at 9. The significance of this acknowledgment cannot be overstated as it fundamentally undermines CACI's argument.

CACI attempts several makeshift arguments to distract from the key inquiry at hand—which is the impropriety of CACI's borrowed servant defense—but none can save CACI from the force of Plaintiffs' argument. ***First***, CACI suggests that its borrowed servant defense somehow furthers the conceded federal interests, but CACI conveniently fails identify when these authorities took effect, which ***post***-date the events at issue here. *See* ECF No. 1748 at 9, n.3 (citing 48 CFR § 237.104(b) (effective May 5, 2011); DOD Instruction 1100.22 (dated Apr. 12, 2010); 10 U.S.C. § 801 (effective Dec. 27, 2023); 48 C.F.R. § 237.173-4 (effective Nov. 10, 2010)). To the extent that this "current law" suggests an arrangement like that theorized by

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that fundamental premise means CACI should not be deemed to have engaged in "combatant activities" (especially for acts of torture), so common-law claims should not be displaced. Similarly, because military law and policy mandate that civilians cannot be treated as soldiers, the borrowed servant doctrine is foreclosed.

CACI is permissible, such new law only emphasizes what was absent from the status quo ante, further undermining CACI's arguments.[4]

Second, CACI latches on to a pretrial response to an interrogatory by the United States as something that is conclusive. ECF No. 1748 at 10 (citing DX-2). But answers to pre-trial interrogatories—particularly by a non-party—are not binding. *See Marcoin, Inc. v. Edwin K. Williams & Co*., 605 F.2d 1325, 1328 (4th Cir. 1979). That is in contrast to, for example, the testimony of CACI's corporate representative under Rule 30(b)(6), which ***does*** bind CACI, and which is directly at odds with the interrogatory response. *See* ECF No. 1633 (Apr. 17, 2024 (afternoon)) Tr. 6:19-7:2. For example, CACI's Rule 30(b)(6) designee testified that "we were responsible for providing supervision to all our contractor personnel" and that CACI site lead Porvaznik was the "operational supervisor" who was "charged with supervising all aspects of interrogation activity at Abu Ghraib." ECF No. 1591, Ex. C., Morse Tr. 171:25-172:03, 172:14-20. There is significant other evidence reflecting many aspects of CACI's supervision and control of its personnel as they worked at Abu Ghraib, which likewise contradicts the non-party pretrial interrogatory response on which CACI fixates. *See* ECF No. 1718-1 at 19-21 (collecting evidence).[5]

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[4] *See, e.g.*, ECF No. 1718-4, Brief for the United States as *Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc*., No. 09-1335 (4th Cir. Jan. 14, 2012), Dkt. 146 at 28-29 (explaining development of post-Abu Ghraib torture-prevention and accountability measures, as well as improved contractor oversight, while stressing that "***at the time of the events at Abu Ghraib, the enhanced tools to hold contractors accountable had not yet been adopted***" (emphasis added)).

[5] CACI also relies upon a comment made by the Court in the jury's presence during the April 2024 trial. *See* ECF No. 1748 at 10. But CACI ignores that the Court was not engaged in any fact-finding and was simply, to move the trial along, reiterating that the jury had already heard enough from CACI's witnesses on the issue.

Third, CACI claims dismissively that the military regulations and doctrinal authorities cited by Plaintiffs are irrelevant because it claims no one considered them. ECF No. 1748 at 10. To begin, that is irrelevant to the question of whether federal interests foreclose judicial recognition of a defense that is contrary to federal law and policy. In any event, it's not true. The operative contract in the case reflected the military's requirement of contractor supervision. And, as Plaintiffs demonstrated in their opposition to CACI's motion *in limine* to exclude the Army Field Manual, Army Regulation 715-9, and the contract between CACI and the Government, relevant players—including the military Contracting Officer Representatives who managed the CACI contracts—relied upon and attempted to adhere to these military rules governing the work of civilian contractors. *See* ECF No. 1749 at 5.

Fourth, CACI's attempt to justify its borrowed servant defense by claiming that its contracts were "personal services contracts" falls flat. *See* ECF No. 1748 at 11. Again, that does not address the fundamental concern about federal interests displacing common law. As the October 1, 2002 version of the Code of Federal Regulations cited by Plaintiffs makes clear, the Government cannot circumvent the civil service laws by entering into personal services contracts without specific authorization by Congress, and there was no statutory authorization for CACI's contracts. ECF No. 1718-1 at 12-13.[6] CACI's reliance on 10 U.S.C. § 129b fails because CACI

[6] *See* ECF No. 1718-15, 48 C.F.R. § 37.104(a) (Oct. 1, 2002) ("The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract."); *id*. at § 37.104(b) ("Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so."); *see also* ECF No. 1718-16, FAR Part 37.104 (same).

ignores the opening provision, which provides that "the Secretary of Defense and the Secretaries of the military departments may procure the services of experts or consultants (or of organizations of experts or consultants)." 10 U.S.C. § 129b(a)(1). It is undisputed that the CACI contract here was a Blanket Purchasing Agreement with the General Services Administration, and the work orders were issued by the Interior Department. Thus, because CACI was not contracted by the Department of Defense, CACI's reliance on 10 U.S.C. § 129b is misplaced.[7]

Lastly, the few cases that CACI cites do not suffice to overcome Plaintiffs' argument that military regulations and authorities implicate substantial federal interests that foreclose the application of borrowed servant as a matter of law. Most important, none of the cases cited by CACI involve torture and CIDT, with the military operating in a theater of armed conflict, where the federal interest in adhering to international humanitarian law's principle of distinction is paramount. Other cases ***predate*** the relevant proscriptive military law and policy or prove Plaintiffs' point.[8] For example, CACI describes at length a ***case from 1935*** involving the Army Corps of Engineers and a construction site in the United States. ECF No. 1748 at 12-13 (citing and describing *McLamb v. E. I. Du Pont De Nemours & Co.*, 79 F.2d 966 (4th Cir. 1935)). Yet, in what CACI calls a "particularly instructive" case, CACI neglects to mention that the injured

[7] CACI also cites 48 C.F.R. § 2.101(b) and § 37.104(c) to support its assertion, but ignores the fact that the first regulation simply sets forth the same definition of a personal services contract, and the second simply sets forth specific parameters under which a contract could be considered as one for personal services, so that the relevant officials can identify when ***proposed*** contracts are for personal services and, if so, determine whether there is any authorization for such a contract. *See* ECF No. 1718-15, 48 C.F.R. § 37.104(d) (Oct. 1, 2002).

[8] *See, e.g.*, *United States v. N. A. Degerstrom, Inc.*, 408 F.2d 1130 (9th Cir. 1969).

plaintiff had been in the general employment of the Army Corps of Engineers and was seeking to be deemed a borrowed servant of a private company, ***not the other way around*** as in this case.

CACI appeals to a single district court ***negligence*** case in the Fifth Circuit where the borrowed servant doctrine was invoked in a domestic peacetime setting to suggest that the "legality" of the relationship between the Government and the contractor is "irrelevant." ECF No. 1748 at 11. But CACI fails to point out that the district court in that case found that "[i]t is legally impermissible for the government to contract non-governmental employees who are merely to receive their assignments from government personnel because this is a violation of the Civil Service laws." *Trevino v. Gen. Dynamics Corp*., 626 F. Supp. 1330, 1339 (E.D. Tex. 1986), *aff'd in part, vacated in part*, 865 F.2d 1474 (5th Cir. 1989). In any event, the court held that contractor employees were not borrowed servants of the government because, among other reasons, the contractor was hired because it was experienced and did not need and because "cooperation between the employee and the alleged borrowing employer, as distinguished from subordination, is not enough to create an employment relationship." *Id.* Likewise here, the borrowed servant defense cannot apply because the contract required CACI to provide "resident experts" who would be supervised by CACI, and by law and practice, CACI employees did not and ***could not*** take orders from the military.

IV. FOURTH CIRCUIT PRECEDENT MANDATES A DUAL SERVANT INSTRUCTION IF THERE IS A BORROWED SERVANT INSTRUCTION

CACI barely mentions the agency law and authorities discussed in Plaintiffs' opening brief in support of their argument that, should the Court permit CACI to try the issue of borrowed servant to be tried (which it should not), then Plaintiffs are entitled to an instruction on the dual servant doctrine. *See* ECF Nos. 1718-1 at 14-22, 1718-2, App'x A. While CACI

continues to cite comments made by the Court in the context of the jury instructions before a mistrial was declared, Plaintiffs respectfully submit that, at that time, the Court did not have the benefit of either the arguments that Plaintiffs make now or the insightful views proffered by the *amici* in support of Plaintiffs' motion *in limine*.

Despite CACI's repeated insistence otherwise, Fourth Circuit precedent mandates an instruction on the dual servant doctrine in the circumstances of this case. In its opposition, CACI again focuses on *Estate of Alvarez*—although, it seems, on only a portion of it. *See* ECF No. 1748 at 8. Plaintiffs agree that *Estate of Alvarez* merits careful consideration but submit that the Fourth Circuit's opinion should be assessed in its entirety and understood in the context of the distinguishable contracting relationship at issue there. In the *Estate of Alvarez*, the Fourth Circuit stated "[A] person may be the servant of two masters ... ***at one time as to one act***, if the service to one does not involve abandonment of the service to the other." *Est. of Alvarez v. Rockefeller Found.*, 96 F.4th 686, 693 (4th Cir. 2024) (quoting *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94–95 (1995) and Restatement (Second) of Agency § 226) (emphasis added)). ***After*** considering whether the employee, Dr. Soper, was a borrowed servant, *Est. of Alvarez*, 96 F.4th at 694, the Fourth Circuit went on to consider the issue of whether Dr. Soper was a dual servant of both the Rockefeller Foundation and the PASB:

> Finally, there is insufficient evidence to support Appellants' argument that Dr. Soper was a dual agent of TRF [the original employer] and the PASB [the borrowing employer] because, though TRF did not exercise control over him, it maintained the ability to do so. As previously stated, there is no indication that TRF had the ability to exercise control over Dr. Soper while at the PASB. Though TRF paid his salary, Dr. Soper appeared at all times to be doing the work of the PASB. Finally, the PASB's constitution, the general terms of which were adopted by the PASB in January 1947, prohibited Dr. Soper from taking outside direction.

Id. at 695. Ultimately, on the particular facts presented, the Fourth Circuit concluded that Dr. Soper's original employer had no control and Dr. Soper was contractually prohibited from taking direction from that employer. Tellingly, in its opposition CACI does not acknowledge, let alone attempt to address, this part of the Fourth Circuit's opinion in *Estate of Alvarez*.

While the law in *Estate of Alvarez* clearly favors Plaintiffs, the facts are additionally distinguishable. First, whereas TRF had no duty to supervise Dr. Soper in Guatemala, CACI had an express ***contractual obligation*** to maintain supervision over its interrogators assigned to Abu Ghraib (a duty it incorporated in its corporate Code of Conduct). Second, Dr. Soper considered himself no longer a TRF employee and there were little communications between the two, while there is no dispute that CACI interrogators were ***always*** clearly CACI employees and there was copious communication and direction given by CACI and its employees. Third, TRF had no site manager on location, unlike Porvaznik's on-site presence at Abu Ghraib. Finally, the public policy interests are different. At the time of the events in *Estate of Alvarez* (early-to-mid 1940s), the normative and legal prohibitions against non-consensual medical experimentation were only starting to be reified, in light of the horrors emerging from the recently empaneled Nuremburg trials. In contrast, the absolute prohibition against torture has held *jus cogens* status for decades.

As Plaintiffs explained in their opening brief, if the Court disagrees with Plaintiffs as to the applicability of the borrowed servant doctrine and permits CACI to again advance that defense at trial, then Plaintiffs respectfully submit that the Court must provide an instruction to the jury about dual servant to properly reflect agency law and Fourth Circuit precedent. *See* ECF No. 1718-1 at 14-22; *see also* ECF No. 1739-1 at 5 (Proposed Brief of *Amica Curiae* Professor

DeMott).[9] Such an instruction should explain that CACI remains liable if its employees were performing work on behalf of both CACI and the Government (albeit not the alleged misconduct in relation to the latter), who both had some control over those employees. ECF Nos. 1718-1 at 14-22, 1718-2, App'x A (Plaintiffs' possible instruction); *see also* Res. (Second) of Agency § 226 (allowing for liability on the part of the general employer where the general and special employers share control over the employee); Res. (Third) of Agency § 7.03 cmt. d(2) (explaining that some courts "allocate liability to both general and special employer on the basis that both exercised control over the employee and both benefited to some degree from the employee's work").

As Plaintiffs explained in their opening brief, the evidence at the prior trial raised serious questions about the degree to which the Army's chain of command had ***any*** control at all at the Hard Site at Abu Ghraib (let alone at the time of the alleged misconduct) while there was substantial evidence of the many ways that CACI had control over its employees. Accordingly, CACI remains liable for its employees' conduct so long as, by the service rendered to another—here, the Army—they were performing the business entrusted to them by CACI, even if they

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[9] As *amica* DeMott, the Reporter of the Restatement (Third) of Agency, explains:

> Agency law recognizes the reality of relationships in which the same employee, by simultaneously performing work on behalf of multiple employers, can subject each of the employers to liability for tortious acts committed within the scope of employment. The Court's April 2024 instructions to the jury, which *amica* has reviewed, may have led the jury to believe that agency law requires that only one employer can be subject to liability even when an employee's conduct serves multiple employers. This is inconsistent with agency law as articulated by the American Law Institute ("ALI") in multiple Restatements of the relevant law.

ECF No. 1739-1 at 5.

were also providing some ***lawful*** services for the Army, as the company was hired and paid to do. *See*, *e.g., Sharpe v. Bradley Lumber Co.*, 446 F.2d at152, 155 (4th Cir. 1971) (explaining "an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a ***common or joint participation in the work and benefit to each from its rendition***") (emphasis added); *Vance Trucking Co. v. Canal Ins. Co.*, 395 F.2d 391, 393 (4th Cir. 1968) (affirming district court's finding "that, at the time of the accident, [the employee] was then and there the agent and servant of both Vance and Forrester," such that the original employer remained responsible). This is particularly so because, the interrogators were acting within their scope of employment with CACI and their work was also for the benefit of CACI.

Continuing to ignore the explication of the agency principles offered by *amica* DeMott, CACI summarily insists that the Fourth Circuit cases cited by Plaintiffs on the dual servant doctrine should be ignored because they involve state law. *See* ECF No. 1748 at 15. Yet CACI in its opposition relies on a number of cases that are not only out-of-circuit, but also involve questions of state law. *Id*. at 12-13. Indeed, nearly all of the cases that CACI cites involve the interpretation of state workers' compensation statutes.[10] Further, at least one of the state statutes at issue actually supports Plaintiffs' position that the original employer remains liable for the acts of its employees even if they are also doing work for another entity. *See Luna*, 454 F.3d at 634

[10] *See Al-Khazraji v. United States*, 519 F. Ap''x 711 (2d Cir. 2013) (New Jersey's Workers' Compensation Act); *Luna v. United States*, 454 F.3d 631 (7th Cir. 2006) (Illinois Workers' Compensation Act); *Dumais v. United States*, 2024 WL 406576 (D.N.H. Feb. 2, 2024) (New Hampshire's workers' compensation law).

("A loaning employer is thus jointly and severally liable for workers' compensation benefits with the borrowing employer.").

Ultimately, CACI has no answer to Plaintiffs' argument that it is appropriate, and in fact necessary, for the Court to explain to the jury that where an employee is performing services for both the "general" (CACI) and "special" (Army) employers, the general employer (CACI) remains liable, if the employee was acting simultaneously for the benefit of both employers when that employee conspired and aided and abetted torture and CIDT. Where CACI contractually agreed to supervise (and accordingly to fulfil a duty to prevent detainee mistreatment) and where it financially benefitted from the performance of the work—that is, the provision of interrogation services that CACI contracted to do—CACI's liability under the dual servant doctrine becomes all the more obvious. Given the prior jury's repeatedly expressed confusion about how to apply the borrowed servant doctrine, and a paramount concern for enforcing the duty prevent of torture and the profound interests in remediating torture, an instruction on dual servant is necessary in this case.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, Plaintiffs respectfully request that the Court grant their motion *in limine* as to the borrowed servant defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendant.

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