No. 25-1043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT
ALEXANDRIA

BRIEF OF *AMICI CURIAE* FORMER MILITARY LEADERS AND LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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—AND—

TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E,

PLAINTIFFS,

—V.—

CACI PREMIER TECHNOLOGY, INCORPORATED,

DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT

—AND—

TIMOTHY DUGAN; CACI INTERNATIONAL, INCORPORATED;

L-3 SERVICES, INCORPORATED,

DEFENDANTS,

—V.—

UNITED STATES OF AMERICA; JOHN DOES 1-60,

THIRD-PARTY DEFENDANTS-APPELLEES.

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INTERESTS OF *AMICI CURIAE*

Amici are former military leaders and lawyers who have held senior and staff positions in the U.S. Armed Forces and other government agencies.[1] Consistent with their fidelity to U.S. laws and the law of nations, they maintain a strong interest in preserving this Nation's long tradition of according humane treatment to detainees held by the United States. With a wealth of experience regarding the practical realities of military operations abroad, *amici* provide a unique perspective on the relationship between, and respective responsibilities of, U.S. military personnel and private military contractors hired to assist them.

This case raises issues cutting to the core of what defines us as a Nation: the values defended, through great and enduring sacrifices, by *amici* and others who have served. The unconscionable treatment of detainees at Abu Ghraib prison damaged the credibility of the U.S. military and the American people. The individuals responsible caused immeasurable damage to our security interests, our national honor, and the values and ideals essential to our country and armed forces.

Based on their training and experience in military operations, *amici* understand the realities of combat and the legal framework of warfare. As this training and experience reflect, the decision to torture detainees in Abu Ghraib prison could not lawfully have been directed or sanctioned by the U.S. military. And in fact,

[1] A list of the individual *amici* and their biographies appear in the appendix.

CACI's actions defied the explicit mandate in its contract to comply with all "Department of Defense, US Civil Code, and International Regulations," which all ban the torture and abuse of detainees.

Military personnel involved in such abuses are subject to military discipline and have been held accountable, sanctioned, and even imprisoned for their misconduct under the Uniform Code of Military Justice ("UCMJ"). This system of discipline and accountability is central to the hard-earned reputation and strength of the American armed forces. In contrast, private civilian military contractors like CACI, whose employees were at Abu Ghraib in 2003-2004, were not accountable under the military system of justice. Indeed, military regulations in effect at the time made clear that contractors were not under the direct supervision of military personnel within the chain of command and mandated that contractors like CACI directly supervise its employees. Accordingly, those civilian contractors must be held accountable in the United States courts.

Without this commensurate mechanism of accountability, civilian contractors face no repercussions for abuse that has rightly led to punishment for service members. Exempting civilian contractors from such accountability is not only incongruous and unjust, it removes a meaningful deterrent against future misconduct by those outside of the military chain of command and military justice system.

SUMMARY OF ARGUMENT

Throughout 16 years of litigation and six appeals to this Court, CACI, a private, civilian contractor has erroneously claimed the mantle of service members' status as combatants. This Court has rejected that lawless ploy for immunity and must do so again here.

CACI has repeatedly argued that it is entitled to derivative sovereign immunity, that contractors were engaged in combatant activities, that the Alien Tort Statute does not afford jurisdiction over violations of the fundamental international law norms against torture and other cruel, inhuman, or degrading treatment ("CIDT"), and that adjudication of these claims implicates military discretion that precludes judicial review. Indeed, at every interlocutory stage, CACI has argued that its contractors are, effectively, soldiers and therefore, immune from civil accountability. Each time, this Court rightly rejected those claims, ensuring that civilian contractors do not escape accountability for torture.

The military prosecuted numerous soldiers involved in the torture and CIDT at Abu Ghraib. Though civilian contractors like CACI's employees at Abu Ghraib could not be court-martialed, they are answerable for their unlawful acts in the civilian legal system. That system worked: the trial and jury verdict held CACI accountable, rejecting the baseless notion that soldiers should be punished but

civilians may violate with impunity fundamental international law norms against torture and CIDT.

In this appeal, CACI again seeks to turn the system on its head – insisting that only the military may be held responsible for wrongdoing while civilian contractors may escape all accountability. This is not the law. CACI's position would undermine the military's ability to maintain discipline across operations by allowing contractors to shirk their legal obligations. Most fundamentally, denying Plaintiffs a civil remedy for torture and CIDT would ignore this Nation's commitment to treating even its enemies with humanity and the U.S. military's steadfast commitment to accountability and the rule of law.

ARGUMENT

I. Under the Laws of War, Military Justice System, and Federal Regulations Civilian Contractors Are Not Soldiers Entitled to Combatant Status or Immunity.

CACI's claim that their personnel are entitled to the immunity extended to soldiers defies foundational precepts of the law of war which mandates different legal status and treatment for people involved in armed conflict and those who are civilians. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 548 (2nd Ed. 2016); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III"), arts. 3(1), 4(A), 87, 99; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3, art. 43(2) ("AP 1"). Specifically, after 16 years of litigation and at least 25 dispositive motions, CACI still presses a claim long rejected by this Court and inconsistent with the laws of war: that it is shielded from responsibility for its torture and inhumane treatment of Plaintiffs by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. That Act permits suits against the United States for certain tortious acts of employees, while exempting claims "arising out of the combatant activities of the military or naval forces…during time of war." 28 U.S.C. § 2680(j). Congress expressly excluded contractors from the FTCA's definition of "Federal agency" stating that it does "not include any contractor with the United States." *Id.* § 2671. Excluding contractors from the FTCA's "combatant activities" immunity accords with the law of war, which distinguishes between civilians and combatants, recognizes that contractors are not part of the military chain of command, and contemplates that contractors like CACI will be held accountable civilly for their unlawful actions. *See* SOLIS, at 548.

A. International Humanitarian Law Categorically Distinguishes Between Combatants and Civilians and Precludes Immunity for Contractors.

Combatants and civilians are subject to different duties and privileges under the laws of war, which preclude immunity for contractors. SOLIS, at 548. This "principle of distinction" seeks to protect all persons, including U.S. soldiers, in a

theater of war by creating incentives for armed conflict to be conducted humanely. U.S. Army Judge Advocate General's Legal Ctr. & Sch., *Law of Armed Conflict Deskbook* 141 (2016) (stating that under the law of war, "military attacks should be directed at combatants and military property, and not civilians or civilian property"). The law of war recognizes that if conflict must happen, it should be undertaken only by soldiers of a regular state army or other specified militia members subject to law and a responsible chain of command. *See* GC III, arts. 4(A)(1)-(3).

For soldiers, protections and immunities follow under this structure. Specifically, combatants (as defined by GC III) are permitted to engage in hostilities against other combatants and to utilize lethal force without fear of criminal prosecution for their acts, provided that they observe the law of war. *See* GC III, arts. 3(1), 4(A), 87, 99; AP I, art. 43(2). Captured lawful combatants receive POW status and are entitled to additional legal and humanitarian protections not available to noncombatant civilians who engage in unprivileged belligerency. *See*, *e.g.*, GC III, Parts II-V.

Civilian status is also privileged and protected, albeit in a different way. Under the laws of war, civilians who do not participate in hostilities cannot be targeted with force. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 3(1) ("GC I"); Geneva Convention for the Amelioration of the

Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art 3(1) ("GC II"); GC III, art. 3(1). But civilians who act outside of a responsible chain of command are treated as unprivileged belligerents and denied the same immunity from prosecution that lawful combatants receive. SOLIS, at 226-27.[2] Unlike soldiers held accountable through courts martial, civilians remain accountable through regular civil law. *Id*.

Between the two categories of combatant and civilian, "[t]here is no intermediate status." ICRC, The Geneva Conventions of 12 August 1949: Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (Jean S. Pictet ed., 1958) (emphasis in original). Civilian contractors are not combatants and cannot lawfully engage in "combatant activities." *Id.* Thus, even if a civilian contractor is contracted by the military, under international humanitarian law ("IHL") they are not transformed into a soldier entitled to the same privileges or immunity. SOLIS, at 548 (noting that "contractors are civilians" and as such "are unprivileged belligerents who lack the combatant's privilege").

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[2] HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2006] IsrSC 57(6) 285 ¶¶ 31-40, *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 46-47 (2003).

The district court's decisions in this case accorded with these "longstanding law-of-war principles[,]" *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) and should not be disturbed. *Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 788-89 (E.D. Va. 2018) (rejecting CACI's argument that the "combatant activities" exception to the waiver of sovereign immunity accorded to the government in FTCA, 28 U.S.C. § 2680(j), preempted Plaintiffs' federal common law claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350)). Under longstanding law of war principles, civilian do not engage in "combatant activities" of the military and are accountable under applicable civil law.

B. The Military and Civilian Justice Systems Mandate Distinct Statuses and Forms of Accountability for Soldiers and Civilians.

CACI's unfounded claim to derivative sovereign immunity and the protection of the FTCA's "combatant activities" exception obscures the distinct systems of discipline and justice that hold soldiers and civilians like CACI's employees at Abu Ghraib accountable. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *see also Hencely v. Fluor Corp.*, 120 F.4th 412, 430 (4th Cir. 2024) (recognizing that this FTCA exemption "preserves the field of wartime decisionmaking exclusively for the federal government"). In contrast to members of the U.S. Armed Forces, civilian contractors do not adhere to a strict chain of command and at the time of the events of this case were not accountable under a robust system of military justice. *See* U.S.

Dep't of the Army, *Field Manual 101-5: Staff Organization and Operations*, 1-1 (May 31, 1997).[3]

Indeed, the unique "hierarchical structure of discipline and obedience to command" that applies to the military is " wholly different from civilian patterns," and it ensures that combatant activities are performed in accordance with the laws of war. *Chappell*, 462 U.S. at 300. The principle of command responsibility represents the "legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit." Dep't of the Army, Field Manual 101-5, 1-1 (1997). At the top, soldiers are answerable to civilian authority via Congressional declaration-of-war powers and the President as Commander-in-Chief. U.S. Const. art. I, § 8, cl. 11; U.S. Const. art. II, § 2, cl. 1. Toward the bottom, they are subject to an elaborate system of training and discipline that obliges them to follow orders or face punishment or discharge in accordance with the UCMJ, art. 92, 10 U.S.C. § 892. The military's high standards of discipline and accountability distinguishes our fighting forces from mercenaries or unlawful combatants. *See* SOLIS, at 222-25.

The military justice system applied to the U.S. soldiers who committed abuses at Abu Ghraib; it had no applicability at the time to CACI as a civilian contractor. Specifically, eleven of the soldiers involved in abuse of detainees at Abu Ghraib—

[3] *available at* https://www.globalsecurity.org/military/library/policy/army/fm/101-5/f540.pdf.

including several of the CACI co-conspirators—were convicted of crimes pursuant to the military justice system. *Military Jury Reprimands Officer in Abu Ghraib Case*, Associated Press, August 30, 2007 (describing the case of the only officer charged in the Abu Ghraib scandal). And 251 officers and soldiers were punished in some manner for mistreating prisoners. Eric Schmitt & Kate Zernicke, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times, Mar. 22, 2006; Eric Schmitt, *Iraq Abuse Trial is Again Limited to Lower Ranks*, N.Y. Times, Mar. 23, 2006. As civilians, CACI employees at Abu Ghraib were not subject to the military justice system during the events in this case. They therefore escaped this same accountability.

Civilians like CACI's employees at Abu Ghraib in 2003-2004 were not subject to the military chain of command or the UCMJ. *See* Deborah Hastings, *Iraq Contractors Accused in Shootings*, Wash. Post, Aug. 11, 2007 (quoting Retired Marine Lieutenant Colonel Mike Zacchea's concern that contractors "are free agents on the battlefield. They're not bound by any law. . . . No one keeps track of them."). Military commanders can only direct the activities of contractor companies through the terms of a contract. U.S. Dep't of the Army, Field Manual 3-100.21 (100-21): Contractors on the Battlefield, ¶ 1-21; 4-45 (Jan. 2003) ("Field Manual on Contractors") (employees of private military contractors are not subject to military discipline and "[c]ommanders do not have direct control over contractors or their

employees"). Indeed, "contractor employees are not the same as government employees" and "only contractors manage, supervise, and give directions to their employees." *Id.* ¶ 1-22; *see also* Joint Chiefs of Staff, Joint Publication 4-0: Doctrine for Logistic Support of Joint Operations, V-8 (2000) ("Contract employees are disciplined by the contractor."). Nor do military contractors answer to an electoral constituency that could otherwise hold civilians responsible for wrongdoing outside of a judicial process. *See* Sudrasan Ragahavan & Thomas E. Ricks, *Private Security Put Diplomats, Military at Odds: Contractors in Iraq Fuel Debate*, Wash. Post, Sept. 26, 2007, at A01 (quoting Retired Army Colonel Teddy Spain as stating, "My main concern was their lack of accountability when things went wrong.").

Absent the coercive effect of tort liability, private military contractors have little incentive to prevent future abuses by their employees.[4] Even the reputational harm that might be visited upon a corporate entity for widespread misconduct may be largely avoided by a simple name change.[5]

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[4] The comments of former Blackwater CEO Erik Prince offer an illustrative example. In response to questions from Rep. Carolyn Maloney regarding an employee who shot and killed an Iraqi in the Green Zone while drunk, Prince answered, "He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else." Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. 59 (2007) (statement of Erik Prince, Chairman, the Prince Group, LLC and Blackwater USA).

[5] *See Blackwater Changes Its Name to Xe*, N.Y. Times, Feb. 13, 2009, at A10 (Blackwater Worldwide "abandon[ed] the brand name that has been tarnished by its work in Iraq, settling on Xe . . . as the new name for its family of two dozen businesses"); Nathan Hodge, *Company Once Known as Blackwater Ditches Xe for*

For this reason, the Defense Department explicitly warned contractors that they would be subject to traditional liability rules for their misconduct and would not derive protection from traditional notions of sovereign immunity accorded the government. Specifically, the Department advised military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation." 48 C.F.R. § 252.225-7040(b)(3)(iii) (2008). Recognizing the unfairness that would result if civilian contractors were deemed immune from tort liability, the Defense Department has taken the position that when contractors cause injuries to third parties, government immunities should not lead courts to "shift the risk of loss to innocent third parties." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (to be codified at 48 C.F.R. pt. 212, 225, and 252).

In sum, given that soldiers are subject to a unique system of military training, responsibility, and justice, it makes sense for Congress to have exempted those

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Yet Another New Name, Wall St. J., Dec. 12, 2011, at B1 ("Xe plans to unveil a new name—Academi—and new logo. . . . [CEO Ted] Wright said Academi will try to be more 'boring.'"); Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, N.Y. Times, Jun. 5, 2005, at C2, (reporting that the Titan Corporation was acquired by L-3 Communications and now operates under the "L-3" moniker, under which name it is sued in the present case).

subject to a military chain of command from tort liability under the FTCA. 28 U.S.C. § 2680(j). It is only the military chain of command, enforced through "normal military discipline," *id*., that entitles members of the military engaged in "combatant activities" during a "time of war" to immunity from a system of civilian liability. 28 U.S.C. § 2680(j). Contractors like CACI's employees at Abu Ghraib are not subject to a similar system of discipline or military justice and have no similar basis for tort immunity.

C. Military Regulations Prohibit Military Control of Contractors, Preserving the Line Between Combatants and Civilians and the Distinct Methods for Holding Them Accountable.

CACI's argument that its contractors should be treated as soldiers entitled to "combatant activities" immunity because they were subject to control of the U.S. Military is both legally and factually baseless. First, the claim flies in the face of military regulations, which, consistent with IHL, make clear the U.S. military does not control civilian contractors. JA8324; JA8471 (stating that "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command"). These regulations, which include Army Regulation 715-9 in effect during the Abu Ghraib scandal, align with IHL's unambiguous distinction between soldiers and contractors and the corresponding consequences of operating within or outside of a responsible military chain of command. *See* JA8324, JA8377, JA8399, JA8471, JA8471-8572, JA8547-8548, JA8551, JA8040, JA8091, JA8481-8484.

JA8324. That is, soldiers are subject to accountability under the laws of war and military justice system; civilian contractors are subject to "prosecution and civil liability." 48 C.F.R.§ 252.225–7040(b)(4).

These regulations make clear that CACI, not the military, bore sole responsibility for its employees' activities. Specifically, Army Regulation 715-9 stated that "[c]ontracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." JA8324. It further specified that "[t]he commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees," and that "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command." *Id.*

Similarly, the 2003 Army Field Manual 3-100.21 declared that "[o]nly the contractor can directly supervise its employees," and that "[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command." Field Manual on Contractors, at ¶ 1-21.[6] The manual emphasized that "commanders do not have direct control over contractors or their employees" and that "only contractors manage, supervise, and give directions to their employees." *Id.*

[6] *available at* https://irp.fas.org/doddir/army/fm3-100-21.pdf

Other military regulations underscore that CACI's claim of military control is legally indefensible. For example, a Department of Defense ("DOD") regulation from 2005 treats contingency contractors as "civilians accompanying the force" who are barred from "inherently governmental" functions and duties. U.S. Dep't of Defense, *Instruction 3020.41*: *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, at 8 ¶¶ 6.1.1, 6.1.5 (Oct. 3, 2005).[7] In explaining a later adopted regulation, DOD was explicit that in relying upon contractors "the Government is not contracting out combat functions." Defense Federal Acquisition Regulation Supplement, 73 Fed. Reg. at 16,764-65. The final regulation made clear that "Service performed by Contractor personnel subject to this clause is not active duty or service" 48 C.F.R. § 252.225–7040(b)(5), and "inappropriate use of force by contractor personnel supporting the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability." 48 C.F.R. § 252.225–7040(b)(4); *see also* 48 C.F.R. § 52.247-21(a) ("The Contractor assumes responsibility for all damage or injury to persons or property occasioned through . . . the action of the Contractor or the contractor's employees and agents.").

Likewise, the U.S. State Department has noted that "the United States is committed to ensuring that its contractors are subject to proper oversight and held

[7] *available at* https://irp.fas.org/doddir/dod/i3020_41.pdf

accountable for their actions."[8] A 2022 regulation governing DOD and the State Department makes clear that "Contractors, including those performing private security functions, are not authorized to perform inherently governmental functions" such as combat. 32 C.F.R. § 159.3. All these regulations show that CACI's claims based upon purported military control are legally baseless.

As the trial showed, they are factually baseless too. Based upon the trial record, the district court and jury found that CACI interrogators at Abu Ghraib were controlled by CACI. The contract that governed CACI incorporated the settled principles set forth in the above regulations. It provided that CACI was "responsible for providing supervision for all contractor personnel." JA8026-8027; *see* JA7366-7367. The trial evidence demonstrated that CACI independently maintained substantial responsibility and control over its employees. JA7322-7323, JA7464-7440. The contract also required CACI to comply with all "Department of Defense, US Civil Code, and International Regulations." JA8026-8027; JA7366-7367. CACI's brutal treatment of detainees outside the military chain of command, JA6276-6277, JA6782-6798, violated the law and the plain terms of its contract.

The evidence at trial also showed that interrogations were not within the battlefield, let alone integrated with combat activities. Rather, CACI interrogators

[8] U.S. Dep't of State, Press Release, Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies (Sept. 17, 2008).

directed the abuses within Tier 1 of the Abu Ghraib prison. JA8451; JA 5875-5876; JA5923; *See Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 152 (4th Cir. 2016) ("Al Shimari IV") ("[M]ost of these acts of abuse occurred during the nighttime shift at the prison ... [and] were possible because of a 'command vacuum' at Abu Ghraib, caused by the failure of military leaders to exercise effective oversight over CACI interrogators and military police.").

Military regulations reinforce the principle of distinction by making clear that contractors are not combatants and are responsible for the legality of their own conduct. *See* 48 C.F.R. § 252.225–7040(b)(4); 48 C.F.R. § 52.247-21(a). As this Court previously held, CACI must therefore answer civilly for its conduct unless its acts "(1) were committed under actual control of the military; and (2) were not unlawful." *Al Shimari IV*, 840 F.3d at 157. Neither basis for avoiding civil liability exists here. Accordingly, Plaintiffs' claims were properly adjudicated at trial. Just as military officers and subordinates have been held accountable in the military justice system, so too must civilian contractors like CACI be subject to civil liability for its employees' misconduct at Abu Ghraib.

II. The Prohibitions Against Torture and Cruel, Inhuman, or Degrading Treatment Reflect Fundamental International Norms Ratified and Incorporated by Congress That Apply to Civilian Contractors.

Congress has consistently enacted well-established and unambiguous prohibitions against torture and CIDT, including the specific abusive techniques that

characterized CACI's interrogations. Yet CACI continues to contend that Plaintiffs' claims lack jurisdiction under the ATS and are, alternatively, nonjusticiable, preempted under the FTCA, and that it should enjoy immunity because the Government directed its abusive interrogations "under validly-conferred authority." CACI Br. 34. CACI's arguments are erroneous as a matter of fact and law. As noted, the evidence at trial established that these abusive interrogations occurred outside any control of the military. But more fundamentally, CACI's acts were plainly unlawful: they constituted violations of long-established norms that are binding under international and U.S. law. These proscriptions entail clear and manageable standards that do not involve sensitive military judgments or conflict with foreign policy decisions. For these reasons, the district court correctly held that the claims were cognizable under the ATS, justiciable, and did not merit preemption under the FTCA or derivative immunity.

A. Plaintiffs' Torture and Cruel, Inhuman or Degrading Treatment Claims Assert Violations of Universally Accepted Norms Under International Law That Are Enforceable in U.S. Federal Courts.

Although the jury found CACI liable for conspiracy to commit torture and CIDT, JA6399, CACI finds "it difficult to conceive of another ATS claim that would meet the Supreme Court's exacting standard for judge-made claims." Br. for CACI, No. 25-1043 (4th Cir. 2025), Dkt. 19 at 30. But the Supreme Court has articulated a more generous conception of the ATS, dictating that the statute was not "to be placed

on the shelf" and lie "fallow," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 (2004), without additional judicial recognition of causes of actions. *See id.* at 724 ("We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations[.]"). Plaintiffs' claims of torture and CIDT under the ATS raise violations of norms unrivaled in their specificity, universality, and obligatory nature. *Id.* at 732. Plaintiffs' claims therefore "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized by the Supreme Court that may be raised under the ATS. *Id.* at 725.

The United States incorporated into its laws the universal prohibition against torture and CIDT through the ratification of the Geneva Conventions of 1949,[9] the International Covenant on Civil and Political Rights of 1966,[10] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ("CAT").[11] These legal instruments recognize that the right to freedom from

[9] GC I, GC II; GC III; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV").
[10] ICCPR, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.
[11] CAT, G.A. Res. 39/46, Annex. 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

torture and CIDT is non-derogable and that it protects people in U.S. custody during armed conflict.

Among its recognized fundamental norms of international law, the Geneva Conventions provide a "minimum" set of protections to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by … detention." *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-30 (2006) (quoting GC III, 6 U.S.T. at 3318). Common Article 3 provides that detainees "shall in all circumstances be treated humanely," and "prohibit[s] at any time and in any place whatsoever" various acts, including "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particularly humiliating and degrading treatment." GC IV, art. 3, 6 U.S.T. 3516.

The Geneva Conventions further define as "grave breaches" treatment of persons that amounts to "torture or inhuman treatment . . . [and] willfully causing great suffering or serious injury to body or health." GC IV, art. 147, 6 U.S.T. 3516. The United States and all other state parties to the Geneva Conventions are obligated to enact legislation to criminalize any "grave breaches." GC IV, art. 146, 6 U.S.T. 3516. State parties are further required to exercise universal jurisdiction over those alleged to have committed grave breaches. *Id.*

The United States Congress enacted these binding international obligations into U.S. law through the War Crimes Act of 1996. 18 U.S.C. § 2441. That act defines war crimes to include grave breaches of the Geneva Conventions and Common Article 3 violations. *Id.* at § 2441(c). The Act also reinforces the notion of dual accountability for military and civilian wrongdoers, clarifying that the U.S. may exercise criminal jurisdiction over war crimes whether the offender is "a national of the United States" ***or*** "a member of the Armed Forces of the United States." *Id.* at § 2441(b).

The United States has further committed itself and its military and contracted civilian interrogators to the international prohibition on torture through its ratification of the CAT. The CAT's prohibition of torture applies in all situations, including armed conflict: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT art. 2(2). Moreover, the CAT prohibits invoking a government or superior's order to justify torture. *Id*. at art. 2(3). [12]

[12] CAT art. 10(1) further emphasizes the obligation to educate both military and civil personnel on the prohibition against torture: "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, ***civil or military***, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment." (Emphasis added.)

Congress further domestically incorporated CAT's obligations by passing the federal anti-torture statute, which defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). *See* Br. for the United States, No. 25-1043 (4th Cir. 2025), Dkt. 43 at 30 [native page 20] (the United States "implemented the Convention [against Torture] in domestic law" and citing Pub. L. No. 105-277, div. G, 112 Stat. 2681, 2681-761 (1998)). The anti-torture statute further establishes extraterritorial criminal jurisdiction over acts of torture, 18 U.S.C. § 2340A(a), criminalizes conspiracy to commit torture outside the United States. 18 U.S.C. § 2340A(c). It provides, in part, for jurisdiction over any offender who is a national of the United States, regardless of military service member status. 18 U.S.C. § 2340A(b)(1).

Congress's enactment of the ATS in 1789 reflected its intent for courts to recognize private federal claims for violations of "specific, universal, and obligatory" international law norms. *Sosa*, 542 U.S. at 732 (citation omitted). The Supreme Court noted that "with the evolving recognition . . . that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international

human-rights protections that are clear and unambiguous." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 255 (2018).

In *Filártiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), the Second Circuit recognized as customary international law the prohibition against torture and held that Paraguayan citizens might bring a claim of torture against a Paraguayan official under the ATS. Recognizing the fundamental norm status of the prohibition on torture, the *Filartiga* court stated that, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Id.* at 890; *see also Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 131 (2013) (Breyer, J., concurring) ("Certainly today's pirates include torturers and perpetrators of genocide.").

Following the influential *Filartiga* opinion, Congress enacted the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note § 2(a), 106 Stat. 73 (1992), to "establish an unambiguous and modern basis for a cause of action that has been successfully maintained under [the ATS]." H.R. Rep. No. 102-367, pt. 1, at 3 (1991). Congress intended that the ATS "should not be replaced" by the TVPA; rather, Congress enacted the TVPA to "be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing." *Id.; see also* S. Rep. No. 102–249, p. 4 (1991) (ATS "should not be replaced" by TVPA); *Sosa*, 542 U.S. at 730-31

(describing TVPA as "enacting legislation supplementing the judicial determination" "to recognize enforceable international norms").[13]

Resolving Plaintiffs' claims of torture and CIDT under the ATS falls within a consistent line of cases addressing such treatment that Congress has repeatedly deemed to be in the country's foreign policy interests through its enactment of prohibitions. *See*, *e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184, 187 (D. Mass. 1995).

This Court too has repeatedly recognized that Plaintiffs' cause of action for torture and CIDT is well-supported by "specific, universal, and obligatory" norms. *Sosa*, 542 U.S. at 732; *see also Al Shimari IV*, 840 F.3d at 161 ("With regard to the present case, the terms 'torture' and 'war crimes' are defined at length in the United States Code and in international agreements to which the United States government has obligated itself."). More specifically, as this Court determined previously, the President condemned CACI's acts, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) (citation omitted), and Congress expressly concluded that the misconduct was plainly unlawful, in violation of "policies, orders, and laws of

[13] Congress further underscored its condemnation of torture through the Torture Victims Relief Act of 1998. Pub. L. No. 105–320, 112 Stat. 3016 (1998). Congress stated that "there is a need for a comprehensive strategy to protect and support torture victims and their treatment providers, together with overall efforts to eliminate torture." *Id.* § 2(1), (7), 112 Stat. at 3016. The congressional support for global rehabilitation programs for torture survivors evinces the Legislature's foreign policy decision that aligns perfectly with affording a civil remedy for Plaintiffs' claims.

the United States and the United States military." *Id.* (quoting H.R. Res. 627, 108th Cong. (2004)). Accordingly, the district court properly upheld jurisdiction over Plaintiffs' torture and CIDT cause of action.

B. Resolving Plaintiffs' Claims of Torture and CIDT Do Not Entail Unmanageable Standards or Implicate Sensitive Military Judgments.

CACI again raises arguments that it may escape liability because, alternatively, the political question doctrine, FTCA preemption, or derivative sovereign immunity apply. These arguments have been either rejected or waived at earlier stages of this litigation. Nevertheless, *amici* emphasize that none of these arguments should disturb the lower court's ruling or the jury's verdict that CACI conspired to commit acts of torture and CIDT, a ruling and finding that furthers systemic accountability and military order.

First, the political question doctrine does not immunize CACI's unlawful conduct from liability even if the military had ordered CACI to commit acts of torture and CIDT. No military order can render lawful that which is unlawful. *See Al Shimari IV*, 840 F.3d at 157 ("[T]he military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine."); *id.* at 158 ("[W]hen a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale

underlying the political question doctrine does not shield the contractor's actions from judicial review.") (citing *Baker v. Carr*, 369 U.S.186, 217 (1962)); *id.* at 159; CAT art. 2(3). But this Court already rejected CACI's political question argument, concluding that it did not "lack manageable standards…[to] adjudicat[e]" Plaintiffs' torture and CIDT claims. *Al Shimari IV*, 840 F. 3d at 161.

Second, as set forth above, CACI does not find safe harbor under the FTCA's "combatant activities" exception. 28 U.S.C. § 2680(j). As this Court has previously stressed, "[t]he commission of unlawful acts is not based on 'military expertise and judgment.'" *Al Shimari IV*, 840 F.3d at 158. Tellingly, the Unites States stated in this case that "federal preemption . . . should not apply to conduct by civilian contractors that constitutes torture as defined in federal criminal law." JA6444. Indeed, the national security and military interests in prohibiting and remedying torture and CIDT far exceed any interest in a theoretical, sweeping exemption of military contractors from civil liability. And CACI did not put any preemption defense before the jury at trial.

Finally, CACI does not enjoy derivative sovereign immunity for the torture and CIDT committed by its employees at Abu Ghraib, even assuming that the United States has sovereign immunity. As set forth above, CACI's unlawful acts of torture and CIDT, coupled with the violations of its contract with the government, deprive it of any claim to the protection of derivative sovereign immunity. *Campbell-Ewald*

Co. v. Gomez, 577 U.S. 153, 166, 167 (2016); *Al Shimari v. CCI Premier Tech, Inc.*, 368 F. Supp. 935, 970 (E.D. Va. 2019).

Accordingly, neither the district court nor the jury were called upon to question military orders or the chain of command's judgments or second-guess the political branches. Rather, the court's legal rulings entailed assessing standards that are set forth in the international conventions and U.S. statutes and military regulations that incorporate these obligations. This is the business of courts. *See Sosa*, 542 U.S. at 730 ("It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."); *Hamdi*, 542 U.S. at 535-36 (rejecting "assertion that separation of powers principles mandate a heavily circumscribed role for the courts . . . when individual liberties are at stake"). The district court therefore appropriately applied the applicable laws and regulations that unambiguously bar the inhumane abuses that CACI inflicted. *See Al Shimari IV*, 840 F. 3d at 160 ("[S]ome of the alleged acts plainly were unlawful at the time they were committed and will not require extensive consideration by the district court.").

In sum, upholding Plaintiffs' claims under the ATS offends no foreign policy interest nor interferes with military or national security concerns. On the contrary, recognizing Plaintiffs' cause of action and accepting the jury's verdict, ensures

accountability for long-recognized violations of customary international law and U.S. law.

CONCLUSION

The horrors of Abu Ghraib tainted this country's reputation and undermined its security. The U.S. military provided a modicum of justice by prosecuting many of its servicemembers for breaking the law. But affording impunity to private contractors who also bore responsibility for the abuses would be unjust and undermine the standards for detainees' treatment as set forth in international conventions, U.S. statutes, and military regulations. Upholding these laws is vital to the reputation and order of the U.S. military. There is no basis for this Court to disturb the district court's rulings and jury's verdict. And doing so would extend the negative shadow cast by the Abu Ghraib abuses with ongoing costs for our military and the rule of law.

Respectfully submitted,

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APPENDIX

LIST OF *AMICI CURIAE*

Rear Admiral Jamie Barnett, USN (Ret.), served in the U.S. Navy and Navy Reserve for 32 years, ending his career as Deputy Commander, Navy Expeditionary Combat Command during the height of the wars in Iraq and Afghanistan. His first flag assignment was Director of Naval Education and Training in the Pentagon. He served on the ground in Saudi Arabia and Kuwait during Operation Desert Shield/Desert Storm. Among other personal awards, Admiral Barnett received four Legion of Merit medals. After retiring from the Navy, Admiral Barnett served as the Chief of the Public Safety and Homeland Security Bureau of the Federal Communications Commission (FCC).

Major General Charles F. Bolden Jr, USMC (Ret.), charted a pioneering career in the U.S. Marine Corps and the National Aeronautics and Space Administration (NASA). He flew over 100 combat missions in Vietnam, Laos, and Cambodia, and orbited the Earth on four separate occasions as a NASA Space Shuttle pilot and commander. In 2009, President Barack Obama asked Bolden to serve as the 12th Administrator of NASA. He was the first African American confirmed by the U.S. Senate to take on the role, a precedent that Bolden insists is only important if he is one day followed by women or persons of color.

Rear Admiral Don Guter, JAGC, USN (Ret.), served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter served as President and Dean of the South Texas College of Law in Houston, Texas from 2009 to 2019.

Brigadier General Leif H. Hendrickson, USMC (Ret.), served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine Corps University and as Commanding General, Education Command. General Hendrickson amassed over 5,000 flight hours. His personal decorations include the Distinguished Service Medal, Defense Superior Service Medal, Defense Meritorious Service Medal, Meritorious Service Medal with two gold stars, Air Medal and the Joint Staff Badge.

Rear Admiral Leendert "Len" Hering Sr., USN (Ret.), served in the U.S. Navy for 32 years, retiring in 2009. His Flag Officer assignments include Commander, Naval Surface Group Pacific Northwest; Commander, Navy Region Northwest; and Commander, Navy Region Southwest. His personal decorations include the Navy

Distinguished Service Medal, Legion of Merit, Defense Meritorious Service Medal, Meritorious Service Medals, Navy Commendation Medals, and Navy Achievement Medals.

Rear Admiral John D. Hutson, JAGC, USN (Ret.), served in the U.S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson was Dean University of New Hampshire School of Law in Concord, New Hampshire from 2000 to 2011.

Brigadier General David R. Irvine, USA (Ret.), enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for eighteen years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th Regional Readiness Command. General Irvine is an attorney, and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

Major General Randy Manner, USA (Ret.), served as the Deputy Commanding General of the United States 3rdArmy in Kuwait, as the Acting Vice Chief of the National Guard Bureau, and as the Acting and Deputy Director of the Defense Threat Reduction Agency. He facilitated the withdrawal of U.S. forces from Iraq in 2010, helped neutralize chemical weapons in Russia, oversaw investments in biological prophylactic research on deadly pathogens, to include Ebola, and helped coordinate military emergency response support to States during natural disasters. He also was responsible for red-teaming critical DoD systems and facilities against cyber and physical attacks.

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2006. The John F. Kennedy Library Foundation awarded him the Profile in Courage Award in 2006 for his opposition, while serving as Navy General Counsel, to the U.S. use of torture as a weapon of war in the post-9/11 period. More recently, Mora served as the American Bar Association's Associate Executive Director for Global Affairs and Director of the ABA Rule of Law Initiative.

Lieutenant General Charles Otstott, USA (Ret.), served 32 years in the Army. As an Infantryman, he commanded at every echelon including command of the 25th Infantry Division (Light) from 1988-1990. His service included two combat tours in

Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990-1992.

Ambassador Charles Ray (Ret.) spent 20 years in the U.S. Army, retiring with the rank of Major. During his army career, he did two tours in Vietnam, served in Military Intelligence, Special Operations and Public Affairs, with assignments in Germany, Korea, Vietnam, and Panama, as well as several posts in the United States. Ray retired from the US Foreign Service in 2012 after a 30-year career, which included serving as Deputy Chief of Mission in Sierra Leone, Consul General in Ho Chi Minh City, Vietnam, and as ambassador to Cambodia and Zimbabwe. He was Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs and Director of the Defense POW/Missing Personnel Office from 2006 to 2009.

Brigadier General Murray G. Sagsveen, USA (Ret.), entered the U.S. Army in 1968, with initial service in the Republic of Korea. He later joined the North Dakota Army National Guard, where his assignments included Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, and Army National Guard Special Assistant to the Judge Advocate General of the Army (the senior judge advocate position in the Army National Guard). General Sagsveen currently serves on the North Dakota Ethics Commission in Bismarck, North Dakota.

Brigadier General Paul "Greg" Smith, USA (Ret.), served for 35 years in the U.S. Army and the National Guard. He commanded at all levels from company to state. Smith's final assignment was Assistant Adjutant General - Army of the Massachusetts National Guard in which he served as the military Joint Task Force Commander during the 2013 Boston Marathon Bombings response. He has led many disaster response missions and oversaw the State Partnership Program with the Republic of Paraguay for which he received that nation's Medalla del Honor del CECOPAZ. Smith served as a visiting instructor at the US Army War College and continues to teach Counterterrorism Strategy at Nichols College.

STATEMENT OF AUTHORITY TO FILE

Plaintiffs-Appellees and Defendant/Third-Party Plaintiff-Appellant have consented to filing this brief.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS

Counsel for *amici curiae* states pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) that (1) no counsel for a party authored this brief in whole or in part; (2) that no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and; (3) no person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6,497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ Jennifer B. Condon
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May 8, 2025

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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