Appeal No. 15-1831

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN ARRAQ RASHID; SALAH HASAN NUSAIF AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellants,

and

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant-Appellee,

and

TIMOTHY DUGAN; CACI INTERNATIONAL, INC.; L-3 SERVICES, INC.,

Defendants.

On Appeal from the United States District Court for the Eastern District of Virginia (Alexandria Division), Judge Gerald Bruce Lee, Case No. 1:08-cv-00827-GBL-JFA

BRIEF OF PROFESSORS OF CONSTITUTIONAL LAW AND FEDERAL COURTS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of constitutional law and/or federal jurisdiction who teach and write about the law governing federal court justiciability rules, especially the political question doctrine. Although *amici* take no position on the merits of the Appellants' claims and the Appellees' other defenses, *amici* come together in this case out of a shared view that the district court's two grounds for relying upon the political question doctrine to dismiss this suit, *see Al Shimari v. CACI Premier Tech., Inc.* ("*Al Shimari IV*"), No. 08-827, 2015 WL 4740217 (E.D. Va. June 18, 2015), respectively reflect an inappropriate and alarming application of that doctrine; are in tension with both this Court's and the Supreme Court's political question jurisprudence; and would create serious mischief if affirmed on appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court relied upon the political question doctrine to dismiss Appellants' claims arising out of their torture and mistreatment while detained by the U.S. military at Abu Ghraib. *See Al Shimari v. CACI Premier Tech., Inc.* ("*Al*

[1] Pursuant to Fed. R. App. P. 29(a), *amici* stipulate the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Shimari IV"), No. 08-827, 2015 WL 4740217 (E.D. Va. June 18, 2015). In particular, the district court held that (1) resolution of Appellants' claims is foreclosed by this Court's decision in *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011), because Appellees were acting under the direct control of the U.S. military; and (2) in any event, Appellants' tort claims, which are based upon conduct allegedly in violation of an array of federal criminal statutes and well-established norms of customary international law, nevertheless lack judicially manageable standards.

As *amici* explain in the brief that follows, each of these conclusions reflects separate (but equally problematic) misunderstandings of the political question doctrine jurisprudence of both this Court and the Supreme Court. More than just misapplying the relevant precedents, though, the district court's analysis portends a dramatic expansion of the scope of the political question doctrine to cover virtually all suits implicating military operations—and thereby risks the very violence to the separation of powers that the doctrine is designed to avoid. Thus, while *amici* take no position on the merits of Appellants' claims, we emphatically urge this Court to reverse the district court and remand for further proceedings.

ARGUMENT

I. The Political Question Doctrine is a "Narrow Exception" to Federal Jurisdiction, Especially in Cases Implicating Military Affairs

In recent years, the Supreme Court has repeatedly emphasized the limited compass of the political question doctrine—as a "narrow exception" to a federal court's "responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky v. Clinton* ("*Zivotofsky I*"), 132 S. Ct. 1421, 1427 (2011); *see also El-Shifa Pharm. Indus. Co. v. United States* ("*El-Shifa II*"), 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) ("The political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed."). And the Supreme Court's decisions back up its rhetoric; in the half-century since the canonical decision in *Baker v. Carr*, 369 U.S. 186 (1962), only twice has a majority identified a case presenting a wholly non-justiciable political question—in *Nixon v. United States*, 506 U.S. 224 (1993), and in *Gilligan v. Morgan*, 413 U.S. 1 (1973).[2] Even in *Gilligan*, the Justices went out of their way to stress the uniquely non-justiciable nature of the

[2] In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a four-Justice plurality held that challenges to partisan gerrymandering are nonjusticiable insofar as they fail to present judicially manageable standards. As *amici* explain in Part III, *infra*, however, *Vieth* only underscores the narrowness of the political question doctrine—and, as such, the district court's errors in relying upon it to dismiss this case.

plaintiffs' claim seeking ongoing judicial supervision of the Ohio National Guard—and the extent to which judicial review *would* have been available had they only sought damages. *See id.* at 5; *accord Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014) (rejecting application of the political question doctrine to a damages suit brought by the father of an American citizen killed in a drone strike).

Otherwise, in case after case in which parties or lower courts urged the Justices to rely upon the political question doctrine, the Court has refused. *See, e.g.*, *Zivotofsky I*, 132 S. Ct. 1421; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *INS v. Chadha*, 462 U.S. 919 (1983); *Elrod v. Burns*, 427 U.S. 347 (1976); *Powell v. McCormack*, 395 U.S. 486 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). More than just a scorecard, these cases illustrate the Supreme Court's reluctance to shirk the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

After all, although the political question doctrine is designed to protect the separation of powers by preventing the federal courts from intruding into the prerogatives of the other branches of government, the Supreme Court has long understood that it is just as important to the separation of powers to carefully circumscribe its scope, lest courts use the doctrine to abdicate their constitutional responsibility to serve as a countermajoritarian check on those same institutions. *See, e.g.*, *Zivotofsky I*, 132 S. Ct. at 1427.

The risk to the separation of powers from overbroad application of the political question doctrine is especially pronounced in suits challenging military conduct, where the Court has "long since made clear that a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). Thus, as Justice O'Connor explained in *Hamdi*: "Whatever power the United States Constitution envisions for the Executive in its exchanges . . . with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* (citations omitted); *see also, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that non-citizen enemy combatants held at Guantánamo Bay are constitutionally entitled to judicial review of their detentions); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that military commissions designed to try non-citizen enemy combatants for

alleged war crimes were unlawful); *Ex parte Quirin*, 317 U.S. 1 (1942) (reviewing the constitutionality of military commissions convened during World War II); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (reviewing the lawfulness of a naval blockade instituted at the outset of the Civil War); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (reviewing the lawfulness of a maritime capture by the U.S. Navy during the "Quasi War" with France). *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) ("[T]he Supreme Court's jurisprudence, stretching from early in our history through *Youngstown* to numerous contemporary war powers cases, is rife with instances of the Court's resolving questions of the Executive's war powers, just as it has adjudicated other separation of powers disputes between the political departments.").

Indeed, it was *this* Court's decision soon after September 11 in *Hamdi v. Rumsfeld* ("*Hamdi II*"), 296 F.3d 278 (4th Cir. 2002) that repudiated the government's alarming suggestion that courts "may not review at all its designation of an American citizen as an enemy combatant," emphasizing the threat to checks and balances that such a holding would have precipitated, *id.* at 283, and thereby setting the stage for the irrelevance of the political question doctrine to the habeas litigation that followed.

II. THE DISTRICT COURT'S APPLICATION OF *TAYLOR* WOULD DRAMATICALLY EXPAND THE POLITICAL QUESTION DOCTRINE

To its credit, the district court paid lip service to these principles, going out of its way to stress that, while "military judgments are often shielded from judicial review by the political question doctrine," that is not to say that "'all cases involving the military are automatically foreclosed by the political question doctrine.'" *Al Shimari IV*, 2015 WL 4740217, at *4 (quoting *Carmichael v. Kellogg, Brown & Root Servs.*, 572 F.3d 1271, 1281 (11th Cir. 2009)). Instead, in dismissing Appellants' claims, the district court purported to rely upon this Court's decision in *Taylor*, and its test for "whether litigation involving the actions of certain types of government contractors is justiciable under the political question doctrine." *Id.* at *5 (citing *Taylor*, 658 F.3d at 411).

As the district court read *Taylor*, a tort suit against a private military contractor will present a non-justiciable political question whenever (1) "the government contractor was under the 'plenary' or 'direct' control of the military;" or (2) "national defense interests were 'closely intertwined' with military decisions governing the contractor's conduct, such that a decision on the merits of the claim 'would require the judiciary to question actual, sensitive judgments made by the military.'" *Id.* (quoting *Taylor*, 658 F.3d at 411). But while the district court *quoted Taylor* correctly, it then proceeded to *apply* it in a manner deeply inconsistent with the narrowness and nuance upon which courts have insisted in

other political question doctrine cases. Instead, the district court read *Taylor* for all it's worth (and then some), and, in the process, ran roughshod over this Court's nuanced efforts to apply that decision in subsequent cases—and to properly circumscribe the political question doctrine more generally.

For example, Judge Lee treated the first prong of *Taylor* as going solely to the chain of command—and whether Appellees were simply carrying out the directions of their military superiors. *See, e.g.*, *Al Shimari IV*, 2015 WL 4740217, at *7. But this Court has since properly clarified that Taylor's first prong is far more specific—that it goes not to whether "the military 'exercised some level of oversight' over a contractor's activities," *id.* at *6 (quoting *In re KBR, Inc., Burn Pit Litig.* ("*Burn Pit*"), 744 F.3d 326, 339 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1153 (2015)), but whether the lawsuit would effectively require courts to second-guess the lawful conduct of the military *itself*, as opposed to any discretion retained by the contractors. *See id.*; *see also Al Shimari v. CACI Premier Tech., Inc.* ("*Al Shimari III*"), 758 F.3d 516, 534–35 (4th Cir. 2014). Properly understood, the first prong of *Taylor* is meant to bar efforts to sue the military through the back door when those same claims could not proceed through the front door.

What Judge Lee's cursory analysis of *Taylor* thereby missed is the fundamental distinction between Appellants' claims in this case and the claims at issue in *Taylor*—the complete absence of discretion on the part of the military or

Appellees with regard to the underlying conduct here, *i.e.*, the alleged abuse of the detainees. In particular, Appellants' allegations go to conduct that, if proven, would violate the federal anti-torture statute, 18 U.S.C. § 2340A; the War Crimes Act, 18 U.S.C. § 2441; and *jus cogens* norms of customary international law that the Supreme Court has held to be enforceable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

It is axiomatic that neither government officials nor government contractors will ever possess legal discretion to break the law. *See, e.g.*, *Dalehite v. United States*, 346 U.S. 15 (1953). As a result, the relationship between the military and Appellees in this case should have been irrelevant under *Taylor*. *See also, e.g.*, *Gilligan*, 413 U.S. at 11–12 ("[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for *violations of law* for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.") (emphasis added; footnote omitted).

Similar problems pervade Judge Lee's application of *Taylor*'s second prong, *i.e.*, whether reaching Appellants' claims would require the court to question "actual, sensitive judgments made by the military." *Taylor*, 658 F.3d at 411. In applying this aspect of *Taylor*, Judge Lee baldly asserted that "the Court is simply unequipped to second-guess the military judgments in the application or use of

extreme interrogation measures in the theatre of war." *Al Shimari IV*, 2015 WL 4740217, at *12. But properly understood, *Taylor*'s second prong does not ask whether judicial review would require courts to second-guess any and all judgments made by the military. Otherwise, there would be *no* judicial review of any "sensitive" military judgment, like whether a particular individual is an "enemy combatant." *But see, e.g.*, *Hamdi*, 542 U.S. 507.[3]

Instead, *Taylor*'s second prong is better understood as going far more specifically to whether judicial review of claims against a military contractor would require courts to second-guess *discretionary* judgments made by the military—claims over which the federal government would retain sovereign

[3] Nor is it any response that habeas cases such as *Hamdi* are inapposite because judicial review in such instances is required by the Suspension Clause, U.S. CONST., art. I, § 9, cl. 2. Where its application is otherwise appropriate, the political question doctrine can—and often does—pretermit judicial resolution even of constitutional claims, as cases like *Nixon*, 506 U.S. 224, *Gilligan*, 413 U.S. 1, and a wide range of others underscore. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.3, at 15 (5th ed. 2007) ("Under current law, the political question doctrine consigns certain allegations of *constitutional violations* to the other branches of government for adjudication and decision, even if all other jurisdictional and justiciability requirements are met.") (emphasis added).

But even if habeas petitions are unique for these purposes, courts have historically reviewed determinations of "enemy" status in an array of different contexts, including under the Alien Enemy Act of 1798, 50 U.S.C. §§ 21–24, the Trading With the Enemy Act, 50 U.S.C. app. §§ 1–44, and congressional use-of-force authorizations, among others. *See generally* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 967–86 (2007).

immunity under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *See Wu Tien Li-Shou v. United States*, 777 F.3d 175, 183 (4th Cir. 2015) ("[T]he political question doctrine and the discretionary function exception to waivers of sovereign immunity overlap here in important respects.").

This point is subtle, but crucial: the line between challenges to military operations that courts have previously found to be justiciable and those barred by the political question doctrine has everything to do with whether the underlying government conduct was within the legal discretion of the relevant government officer—even if such discretion may have been exercised in a tortious manner. Thus, as Judge Griffith has explained for the *en banc* D.C. Circuit:

> We have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was "wise"—"a 'policy choice[] and value determination [] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'"—and claims "[p]resenting purely legal issues" such as whether the government had legal authority to act.

El-Shifa II, 607 F.3d at 842.

Taylor adds the wrinkle of claims against military contractors, as opposed to directly against the military—but it is only a wrinkle. As the facts of cases like *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015); *Taylor*, 658 F.3d 402; *Carmichael*, 572 F.3d 1271;

Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); and *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), underscore, the underlying principle remains the same: where judicial review of a claim against a military contractor would require courts to second-guess the means in which the military *itself* exercised legal discretion, such review has consistently been precluded. As Judge Wilkinson underscored in *Li-Shou*, "selecting the proper rules of military engagement is decidedly not our job." 777 F.3d at 181; *cf. Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (holding that state-law tort claims against a military contractor are preempted by federal common law insofar as they would require courts to review exercises of discretion by the federal government).[4]

In contrast, where the military has no such discretion—and is therefore incapable of conferring discretion upon its contractors—civil suits have not been precluded. Insofar as Appellants' allegations go to conduct that, if proven, could not possibly have been within the lawful discretion of the military, *Taylor* is, and should have been, inapposite. The district court's contrary reading of *Taylor*

[4] A separate question arises whether *Boyle* can—and should—be extended to claims against military contractors that would be barred by the FTCA's "combatant activities" exception, 28 U.S.C. § 2680(j), if brought directly against the military. *See, e.g.*, *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). Critically, for present purposes, though, such an argument would provide a federal common law defense on the merits—and not a basis for invoking the political question doctrine. *See, e.g.*, *Al Shimari v. CACI Int'l., Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc) ("*Al Shimari II*").

places that decision in entirely avoidable tension with the myriad cases cited above (and dozens of others) in which courts, including this one, have unflinchingly reviewed the legality, as opposed to the reasonableness, of a wide array of military actions.

III. THIS CASE UNQUESTIONABLY PRESENTS JUDICIALLY MANAGEABLE STANDARDS

Although the district court's first ground for relying upon the political question doctrine merely involved a mistakenly overbroad application of *Taylor*'s nuanced precedent, its alternative ground for dismissal—that Appellants' claims fail to present judicially manageable standards—would, if affirmed, turn the political question doctrine on its head.

With respect to Appellants' torture claim, for example, the district court asserted that "the lack of clarity as to the definition of torture during the relevant time period creates enough of cloud of ambiguity to conclude that the court lacks judicially manageable standards to adjudicate the merits of Plaintiffs' ATS torture claim." *Al Shimari IV*, 2015 WL 4740217, at *14; *see also id.* at *15–16 (making similar assertions with respect to Appellants' cruel, inhuman, or degrading treatment ("CIDT") and war crimes claims).[5] Simply put, and despite its earlier

[5] With regard to Appellants' war crimes claims, the district court stated that "[a] determination as to whether Plaintiffs were insurgents, innocent civilians, or even innocent insurgents would compel the Court to step into the shoes of the military and question its decisions." *Al Shimari IV*, 2015 WL 4740217, at *15.

conclusion entirely to the contrary, *see Al Shimari v. CACI Premier Tech., Inc.* ("*Al Shimari I*"), 657 F. Supp. 2d 700, 711–12 (E.D. Va. 2009), the district court treated the lucidity of the Appellants' claims as dispositive of their justiciability.

This is a frighteningly dangerous approach to the political question doctrine, as it would allow courts to avoid deciding cases simply because they appear to present hard questions. Although the Supreme Court has reaffirmed the vitality of the second *Baker* factor, *see, e.g., Vieth*, 541 U.S. 267 (plurality opinion), it has been equally clear that few cases will *actually* present a lack of judicially manageable standards, *see, e.g., Zivotofsky I*, 132 S. Ct. at 1435 (Sotomayor, J., concurring in part and concurring in the judgment) (framing the question as whether there is "a basis to adjudicate meaningfully the issue with which [the court] is presented").

The narrowness of this prong of the political question doctrine stems from the nuance in the question the second *Baker* factor asks, as the *Vieth* plurality recognized, which is not whether courts are faced with *difficult* legal issues (without which there would be no need for human judges in the first place); rather, the question is whether there are sufficiently clear legal principles to allow courts

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But even if the detainees' status were relevant to the question of whether their mistreatment constituted a war crime (most war crimes do not turn on the status of the putative victim), federal courts have routinely engaged in such status determinations in the context of post-September 11 habeas litigation—and, ever since this Court's decision in *Hamdi II*, 296 F.3d 278, without any suggestion that they lack judicially manageable standards to do so. *See also ante* at 10 n.3.

to draw the line between permissible and impermissible conduct, *see Vieth*, 541 U.S. at 301 (plurality opinion); *id.* at 307–08 (Kennedy, J., concurring in the judgment), even if it will not always be clear on which side of such a line a specific case falls.[6]

The notion that Appellants' claims "turn on standards that defy judicial application," *Baker*, 369 U.S. at 211, is belied by the Supreme Court's settled approach to suits brought under the Alien Tort Statute, which bestows jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As this Court noted in *Al Shimari III*, "[t]he Supreme Court . . . has suggested that the prohibition against torture exemplifies a norm that is 'specific, universal, and obligatory.'" 758 F.3d at 525 (quoting *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013)). The *Al Shimari III* Court continued and cited *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), for the holding that "federal courts may exercise jurisdiction under the ATS concerning such international violations" as

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[6] This distinction underscores the inappropriateness of applying the political question doctrine to cases turning on the interpretation of Acts of Congress—a task that is "emphatically the province and duty of the judicial department," *Marbury v. Madison*, 5 U.S. (1 Cranch) 133, 177 (1803), even—if not especially—when it is difficult. *See Zivotofsky I*, 132 S. Ct. at 1427–28; *see also El-Shifa II*, 607 F.3d at 856 (Kavanaugh, J., concurring in the judgment) ("The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never.").

official torture. 758 F.3d at 525. Inasmuch as torture, CIDT, and war crimes are cognizable claims under the Alien Tort Statute, it necessarily follows that they do *not* "turn on standards that defy judicial application."

Finally, even if, the amorphousness of customary international law *could* ever implicate the second *Baker* factor, the specific human rights norms at issue in this case are backstopped by overlapping express and explicit prohibitions in U.S. criminal law—the anti-torture statute, 18 U.S.C. § 2340A, and the War Crimes Act, 18 U.S.C. § 2441—the interpretation of which is unquestionably within the proper exercise of federal judicial power. *See, e.g.*, *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (interpreting § 2340A in rejecting a defendant's appeal of his conviction under that statute).

This is not to say that reasonable people cannot disagree as to whether particular episodes qualify as torture, CIDT, or war crimes. But there is a constitutionally significant difference between standards that may be difficult to apply to a particular case and "standards that defy application" *in general*. By conflating these two concepts in refusing to adjudicate claims that are well-defined under both domestic and international law, the district court's application of the political question doctrine risks opening the floodgates by turning all cases involving difficult questions of law into non-justiciable ones—and thereby turning the political question doctrine's "narrow exception" into the rule.

CONCLUSION

For the foregoing reasons, *amici* urge this court to reverse the district court's decision and remand for further proceedings.

Dated: September 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,155 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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