No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,
Defendant and Third-Party Plaintiff – Appellant

and

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

v.

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

and

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

and

UNITED STATES OF AMERICA; JOHN DOES 1-60
Third-Party Defendants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Case No. 1:08-cv-00827
The Honorable Leonie M. Brinkema, United States District Judge

PUBLIC REDACTED VERSION
BRIEF OF APPELLANT
CACI PREMIER TECHNOLOGY, INC.

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CORPORATE DISCLOSURE STATEMENT

Appellant CACI Premier Technology, Inc. is a privately-held company. CACI Premier Technology, Inc.'s parent company is CACI, Inc. – FEDERAL, a privately-held company, and its ultimate parent company is CACI International Inc, a publicly-traded company. No other publicly-traded company has either a 10% or greater ownership interest in CACI Premier Technology, Inc., or a direct financial interest in the outcome of this litigation. There are no similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

/s/ John F. O'Connor

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JURISDICTION

Defendant-Appellant CACI Premier Technology, Incorporated ("CACI") appeals the district court's order entered March 22, 2019 denying CACI's assertion of derivative immunity from suit. JA.2353. CACI's notice of appeal was timely filed March 26, 2019. JA.2354.

A. Appellate Jurisdiction

This Court has jurisdiction to review the district court's denial of CACI's immunity assertion under the collateral order doctrine. *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009).

Plaintiffs bring their claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The Court always must satisfy itself that this Court and the district court have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Accordingly, in addressing CACI's appeal, this Court has jurisdiction to review the district court's determinations that it was not deprived of subject matter jurisdiction by (1) the absence of evidence of domestic conduct involving Plaintiffs comprising a violation of international norms, (2) the political question doctrine, and (3) the "vigilant doorkeeping" required for ATS suits.

The Court has jurisdiction to review the district court's determination that Plaintiffs' claims are not preempted because that question is inextricably intertwined with and necessary to ensure meaningful review of both the immunity and political question issues. *Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). These issues all turn on the same inextricably intertwined determinations: whether warfighting is an area of unique federal concern, constitutionally committed to

Congress and the Executive; and whether, as a result, the Plaintiffs' claims are barred.

B. District Court Jurisdiction

The district court lacked subject matter jurisdiction over this case based on (1) CACI's immunity from suit, (2) the absence of evidence of domestic conduct involving Plaintiffs comprising a violation of international norms, (3) the political question doctrine, and (4) the "vigilant doorkeeping" required before exercising jurisdiction under the ATS.

ISSUES PRESENTED

1. Whether the district court erred in rejecting CACI's assertion of derivative immunity on the grounds that the United States lacks sovereign immunity for alleged violations of *jus cogens* norms.

2. Whether the district court erred in failing to apply intervening Supreme Court precedent requiring that for ATS jurisdiction there must be sufficient domestic conduct comprising the alleged violations of international norms, when such precedent would compel dismissal of Plaintiffs' claims.

3. Whether the district court erred by refusing to conduct the evidence-based justiciability analysis dictated by this Court's remand instructions and by refusing to dismiss Plaintiffs' claims as implicating political questions.

4. Whether the district court erred in exercising subject matter jurisdiction over Plaintiffs' claims despite their separation-of-powers and foreign-relations implications.

5. Whether the district court erred in failing to apply this Court's preemption standard and in denying CACI summary judgment on preemption grounds where the record shows that CACI personnel were integrated into the combatant activities of the U.S. military in a war zone.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs allege that they were mistreated while detained by the U.S. military at Abu Ghraib prison in Iraq. They sued CACI, which provided a few dozen civilian interrogators to the U.S. military in Iraq, but did not sue the United States. Since this Court's most recent remand, Plaintiffs have admitted that they "are not contending that the CACI interrogators laid a hand on the plaintiffs," (JA.1060), and the district court dismissed Plaintiffs' claims of direct abuse. JA.1171-72, 1189. Plaintiffs also dismissed their common-law claims. JA.0271. All that remains are claims under ATS seeking to hold CACI liable, on aiding and abetting and co-conspirator theories, for mistreatment allegedly inflicted on them by U.S. soldiers in a war-zone detention facility.

B. Proceedings Through this Court's Most Recent Remand

This Court has heard four appeals in this case. In 2011, this Court held that federal law preempted Plaintiffs' claims. *Al Shimari v. CACI Int'l, Inc*, 658 F.3d 413 (4th Cir. 2011) ("*Al Shimari I*"). On rehearing *en banc*, this Court vacated the panel's decision, holding that it lacked appellate jurisdiction. *Al Shimari v. CACI Int'l, Inc*, 679 F.3d 205 (4th Cir. 2012) ("*Al Shimari II*).

In 2013, discovery began, but two Plaintiffs were not allowed into the country for depositions and medical exams, and the United States refused to identify personnel interrogating Plaintiffs or to produce Plaintiffs' unredacted interrogation records. These issues were being litigated when the district court dismissed Plaintiffs' ATS claims as involving an extraterritorial application of

ATS and dismissed Plaintiffs' common-law claims on other grounds. This Court reversed, holding that Plaintiffs' claims sufficiently "touched and concerned" the territory of the United States to permit ATS jurisdiction, but directed the district court to address the political question doctrine "before proceeding further in the case." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 533-34 (4th Cir. 2014) ("*Al Shimari III*").

Following remand, the district court dismissed Plaintiffs' claims based on the political question doctrine. This Court remanded for further consideration of the political question doctrine, directing the district court to conduct a "discriminating analysis" that would "examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*").

C. Proceedings Since this Court's Remand in *Al Shimari IV*

On remand, Plaintiffs abandoned allegations that they were directly abused by CACI employees, and also dismissed their common-law claims. JA.0271, 1060. All that remains are conspiracy and aiding and abetting claims brought under ATS. JA.1189. CACI repeatedly asked to begin discovery from the United States to develop the record on justiciability; the district court repeatedly refused.[1] In June 2017, the district court directed CACI to file a Rule 12 motion, and

[1] JA.0242-43, 0250-52, 0278-79, 0307-09, 0318-19.

clarified that it should address the political question doctrine even though CACI had not yet been permitted the necessary discovery. JA.0338-40. The district court denied CACI's justiciability challenge (JA.1189, noting it was "premature to be talking about dismissing a political question case" in the absence of discovery because the district court had not "finished the job for the Fourth Circuit." JA.1054-56.

CACI filed a third-party complaint against the United States asserting indemnification, exoneration, contribution and breach of contract claims. JA.1129-31. The United States asserted sovereign immunity; the district court did not rule on its motion for over a year. In the meantime, CACI sought discovery from the United States as to the "specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160. The United States, through Secretary of Defense Mattis, invoked the state secrets privilege twice to withhold the identities of soldiers and civilians interrogating Plaintiffs, including CACI personnel, which the district court upheld. JA.1235-36, 1267, 1302-03. In lieu of normal depositions, the district court limited CACI to pseudonymous depositions by telephone, with the deponents barred from disclosing facts that would provide clues to their identities. *See, e.g.*, JA.2846-54, 4486-99. If this case proceeded to trial, these rulings would prevent CACI from presenting live or videotaped testimony from *any* participant in Plaintiffs' interrogations, including from the CACI employees who are the alleged source of CACI's liability.

Secretary Mattis invoked the state secrets privilege a third time to withhold documents detailing approved interrogation approaches for Plaintiffs' interrogations. JA.1420. For Al Shimari, who was interrogated only once (JA.1453-54), this included "the tailored interrogation plan actually used for a lengthy interrogation of Al Shimari," a plan that "provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation." JA.1438. The privilege assertion also included, for Al Shimari and Al-Zuba'e, interrogation reports "summariz[ing] the results of interrogations [that] were completed close in time to their conclusion." JA.1438-40. The district court upheld the state secrets assertion. JA.1304.

After CACI took the limited discovery allowed, the district court:

- Denied the United States' assertion of sovereign immunity for CACI's tort claims, ruling that the United States lacked sovereign immunity for alleged violations of *jus cogens* norms. JA.2341.[2]
- Denied CACI's assertion of derivative immunity on the grounds that the United States lacked sovereign immunity. JA.2345-46.
- Denied CACI's jurisdictional challenge based on the extraterritorial application of ATS, refusing to consider intervening Supreme Court precedent on the grounds that "I'm not reversing the Fourth Circuit in this case. They may want to reverse themselves." JA.2227-28.
- Rejected CACI's political question challenge after failing to implement this Court's remand directive, ruling that its prior motion to dismiss

[2] The district court dismissed CACI's breach of contract claim on sovereign immunity grounds, and granted the United States summary judgment on other grounds for CACI's tort claims, which precluded a United States appeal from the denial of sovereign immunity.

ruling was "law of the case," even though the district court required CACI to file that motion before reopening discovery from the United States. JA.2275-76.

- Denied CACI's summary judgment motion on preemption without explanation. JA.2223.

- Denied CACI's motion to dismiss Plaintiffs' claims on the grounds that the state secrets privilege denied CACI a fair opportunity to defend itself. *Id.*

D. Statement of Facts

1. The U.S. Military Exercised Actual Operational Control Over CACI Interrogators at Abu Ghraib Prison

After a U.S.-led coalition invaded Iraq in March 2003, the U.S. military captured Abu Ghraib prison, a 280-acre compound near Baghdad. "Abu Ghraib prison was a military detention facility, located within an active war zone," that was "subject to enemy mortar fire, rocket-propelled grenades, and sniper fire." JA.1262.

Because it lacked sufficient military interrogators, the Government issued CACI two Delivery Orders ("DO 35" and "DO 71") to augment military interrogators in Iraq with civilians. JA.1485-90. DO 35 provided that CACI interrogators would conduct interrogations in accordance with "local SOP and higher authority regulations," would conduct other intelligence activities "as directed," and "will report findings of interrogation IAW with local reference documents, SOPs, and higher authority regulations as required/directed." JA.1342, 1345. DO 71 provided that CACI interrogators would perform under the direction and control of the Army's military intelligence chain of command or Brigade S2,

as determined by the supported command, and "will be managed by the Senior [Counter-Intelligence] Agent," a member of the U.S. military. JA.1390-91.

CACI interrogators at Abu Ghraib prison reported to the military chain of command for all operational matters. JA.3057-58, [redacted] The Army chain of command reviewed resumes and approved individual CACI employees for service on the contracts. JA.1410. "[I]n all respects, [CACI] interrogators were subject to the operational control of the U.S. military," "were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." JA.1264-65; *see* JA.3056, 3058-59, 3063, [redacted].

Colonel Pappas, who commanded the 205th Military Intelligence Brigade at Abu Ghraib prison, summarized the military's total control:

> The military decided where each detainee would be incarcerated within Abu Ghraib prison, which detainees would be interrogated, and who would conduct the interrogations of a given detainee. Both military and CACI interrogators were required to prepare an interrogation plan for a detainee, which was reviewed and approved by the U.S. military leadership in the [Interrogation Control Element]. At the conclusion of an interrogation, military and civilian interrogators were required to prepare an interrogation report and enter it into a classified military database. The military then decided what use to make of information obtained during interrogations.

JA.1265. Colonel Brady, who oversaw CACI's contract, [redacted] testified similarly, as did CACI

[redacted]

employees who served on the ground at Abu Ghraib prison. JA.1410-11, 1417-18, [redacted]

CACI Interrogators A and G, the only CACI interrogators assigned to interrogate a Plaintiff, confirmed, without contradiction, that the U.S. Army, and not CACI, controlled their dealings with detainees. This included dictating detainees' conditions of confinement; assigning detainees to interrogation teams; approving interrogation plans and techniques for each interrogation; establishing interrogation rules of engagement; and approving any interrogation techniques that required authorization from higher headquarters. JA.2881[redacted], 2895-99, 2901[redacted] 2949-50, 4539-4547. Army interrogators and translators employed by Titan Corporation testified that (1) they did not enter into nor were they aware of any conspiracies with CACI interrogators and (2) CACI personnel had no influence over interrogations of, or detention conditions for, detainees to whom they were not personally assigned. JA.1498-1501, 3107-09, 3173-76, 3185-86, 3193-95, 3308-09, 3503-06, [redacted]

The MPs who were prosecuted for abusing detainees testified that military and civilian interrogators sometimes gave MPs instructions concerning detainee treatment, but such instructions pertained only to an interrogator's assigned detainees. JA.2472-73, 2700-01, 2718-19. No witness testified that interrogators, military or civilian, influenced the treatment of detainees to whom they were not assigned. [redacted]

[redacted] JA.2910-12. CACI Interrogator G never instructed MPs regarding treatment of a detainee. JA.4508-09.

The Army also established the Interrogation Rules of Engagement ("IROEs"), [redacted] JA.2280-94, 3062, [redacted] Many of the interrogation techniques approved for use in Iraq had been approved at the highest levels of the Executive Branch for use at Guantanamo Bay, and then migrated through Army channels to Afghanistan and Iraq. JA.1552-57. With regard to the interrogation techniques initially approved for Guantanamo Bay, Vice President Cheney acknowledged, "We all approved it."[4]

2. Evidence Regarding Plaintiffs' Treatment

Plaintiffs have now conceded that they "are not contending that the CACI interrogators laid a hand on the plaintiffs," and seek to hold CACI liable for mistreatment allegedly inflicted by U.S. soldiers. JA.1060. Neither Plaintiffs nor the pseudonymous participants in Plaintiffs' interrogations testified that CACI personnel had any role in mistreating Plaintiffs.

a. Al Shimari

Al Shimari was in U.S. custody for more than four years, and was held at Abu Ghraib prison for nearly a year. JA.0192-93. He knows no facts tying CACI

[4] Paul Kane & Joby Warrick, "Cheney Led Briefings of Lawmakers To Defend Interrogation Techniques," *The Washington Post*, A1, A4 (June 3, 2009).

personnel to the abuse he alleges. JA.1646. CACI Interrogator A and Army Interrogator B conducted Al Shimari's only interrogation. JA.1644-45. [redacted] both testified that the abuses Al Shimari alleges did not occur in connection with any interrogation in which they participated. JA.2931-44, 3618-19, 3621-22. Army Interrogator B never saw any detainee abuse. JA.3648.

b. Al Zuba'e

Al-Zuba'e has no basis for concluding that CACI personnel were involved in the mistreatment he alleges. JA.0605-06, 0608, 0611, 0619-20, 0631-33, 0639-40, 0656, 1701. Al-Zuba'e summarized his knowledge: "I don't know anything about CACI or anything." JA.0605.

Al-Zuba'e was interrogated three times, twice by two sets of Army interrogators and once by CACI Interrogator G and Army Interrogator B. JA.1454. [redacted] They testified, however, that none of the abuses Al-Zuba'e alleges occurred in any interrogation in which they participated; they never saw such abuses; they did not enter into any agreement with CACI personnel to mistreat detainees; and they were not aided by CACI personnel in mistreating detainees. JA.3113[redacted], 3186-90, 3193, 3308-09, 3700-01, 3710-15, 3719-21. Army Interrogator F described the sole CACI

[5] The United States could not locate one of the soldiers participating in Al-Zuba'e's second interrogation.

employee with whom he worked as a "nice guy" whom he had never seen mistreat detainees. JA.[redacted], 3720-21.

CACI Interrogator G and Army Interrogator B do not remember Al-Zuba'e's third interrogation. JA.3627-29, 4516-17. They testified, however, that they had never participated in an interrogation in which a detainee was mistreated, nor had they ever seen any detainee subjected to the types of mistreatment alleged by Al-Zuba'e. JA.3632-34,[redacted], 4518-36, 4540-42.

c. Al-Ejaili

Al-Ejaili has no basis for concluding that CACI personnel were involved in his alleged mistreatment. JA.0353-54, 0410, 0417, 0538-40, 0560, 1672. When asked whether he had any information about CACI personnel giving instructions or recommendations regarding his treatment, Al-Ejaili admitted that he "[didn't] have any specific information." JA.0540. Instead, Al-Ejaili stated his view that if CACI had personnel at Abu Ghraib prison, "they have fault." JA.0538.

Al-Ejaili was never subjected to an intelligence interrogation, although he was assigned to Army interrogator Sergeant Joseph Beachner. JA.1465. Sergeant Beachner testified that a CACI interrogator questioned Al-Ejaili during an effort to locate weapons in the possession of detainees, but that "there was nothing violating the IROE in that particular Interrogation." JA.1465,[redacted].

d. The Evidence Refutes Plaintiffs' Theory That Mere Presence at Abu Ghraib Prison Connotes Participation in a Torture Conspiracy

Plaintiffs have urged that by their mere presence in the Abu Ghraib prison, CACI interrogators necessarily joined a conspiracy against Plaintiffs. The evidence refutes this contention. Major Holmes, the Officer in Charge for interrogations, never witnessed nor received a report that a CACI interrogator acted inappropriately with a detainee and was unaware of the detainee abuses that later surfaced. JA.3064-65, 3068-70. Multiple interrogation personnel testified that they lacked contemporaneous knowledge of abuses occurring at Abu Ghraib. *See, e.g.*, JA.1504-22, 3119, [redacted], 3410-11, [redacted], 3504-05, [redacted] 3648, 3739, 3750-52, 3758-70. Even the MPs implicated in detainee abuse testified that interrogators did not provide general instructions on detainee treatment; rather, they sometimes gave MPs instructions specific to their own assigned detainees. JA.2472-73, 2700-01, 2718-19.

3. There Is No Evidence of Domestic Involvement by CACI in Any Violation of International Norms

CACI personnel in the United States had no involvement in operational matters or detainee treatment. The record confirms the wholesale absence of domestic conduct by CACI personnel with respect to Plaintiffs' allegations of violation of international norms. Specifically:

- There is no evidence that any of the allegedly tortious conduct was planned in the United States.
- There is no evidence that any CACI employee in the United States conspired with anyone in Iraq to abuse detainees.

- There is no evidence that any CACI employee in the United States participated in the allegedly tortious conduct.
- There is no evidence that any CACI employee in the United States encouraged, directed or condoned the allegedly tortious conduct.
- There is no evidence that any CACI employee in the United States was even aware of the allegedly tortious conduct at the time it supposedly occurred.

JA.1419, 1473, 1478-80, 1489-90, 1493-95, [redacted] 4544-47.

SUMMARY OF ARGUMENT

Since this Court's remand, the district court consistently refused to apply and follow controlling precedents of the Supreme Court and this Court. This is exemplified by the district court's sovereign immunity ruling, which serves as the basis for its denial of derivative immunity to CACI and gives rise to this appeal. The Court's failure to apply binding precedent is equally apparent in the district court's decisions regarding extraterritoriality, political question, the separation-of-powers and foreign-relations concerns the preclude ATS jurisdiction, and preemption. The district court's stated position, after the 2016 remand and thereafter, was that if this case didn't settle, it was going to trial.[6] Binding precedent does not permit such a result.

[6] JA.0305 (suggesting that CACI consider settlement because this Court "may or may not be sending a certain amount of signal"); JA.2275-76 ("I think I told you-all when I first got this case, you know, given its tortured history, I said we're going to have lots of motions practice, but you should expect if you don't settle this case, it's going to go to trial.").

A government contractor is entitled to the same immunity as the United States if (1) the government authorized the contractor's actions, and (2) the government validly conferred that authorization. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 341-42 (4th Cir. 2014) ("*Burn Pit*") The district court erred in ruling that the United States lacks sovereign immunity for claims of the type brought by Plaintiffs, and CACI meets the other requirements for derivative immunity.

The district court also erred in concluding that the presumption against extraterritoriality does not bar Plaintiffs' claims. Since this Court ruled on extraterritoriality in *Al Shimari III*, the Supreme Court explicitly held that extraterritoriality must be assessed by considering the locus of the conduct that is the "focus" of the statute. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016). There is no evidence of domestic involvement by CACI in violations of international norms involving Plaintiffs. Thus, the district court erred in failing to give effect to the intervening Supreme Court decision in *RJR Nabisco*.

In addition, the district court erred in refusing to conduct the evidence-based political question inquiry this Court directed in *Al Shimari IV*, 840 F.3d at 160. That evidence-based inquiry shows that Plaintiffs' claims implicate nonjusticiable political questions.

ATS claims arising out of U.S. military operations in a war are inappropriate. They infringe on the political branches' role in creating private rights of action and their Constitutional role in matters of war, and do not serve the

foreign-relations objective of ATS. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1394, 1406 (2018). The district court erred in concluding otherwise.

Finally, the district court erred in denying, without explanation, CACI's motion for summary judgment on preemption. CACI personnel were integrated into the U.S. military's combatant activities in a war. Accordingly, the federal interests embodied in the U.S. Constitution and the combatant activities exception to the FTCA preempt Plaintiffs' claims.

ARGUMENT

A. Standard of Review

All of CACI's challenges other than preemption implicate the district court's subject matter jurisdiction, and are reviewed *de novo*. *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997). Plaintiffs bear the burden of showing the district court has jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). For CACI's subject matter jurisdiction challenges, Plaintiffs' allegations are not accepted as true and the Court may consider matters outside the complaint. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

CACI's appeal of the district court's denial of summary judgment on preemption grounds presents a question of law that is reviewed *de novo*. *AES Sparrow Point LNG v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008).

B. The District Court Erred in Declining to Dismiss Plaintiffs' Claims on Derivative Immunity Grounds

The district court rejected CACI's assertion of derivative immunity based on its conclusion that the United States lacks sovereign immunity for alleged violations of *jus cogens* norms. JA.2345-46. In holding that *jus cogens* allegations render sovereign immunity a nullity, the district court cast aside two hundred years of Supreme Court precedent. The district court's ruling is as erroneous as it is unrivaled, rejecting innumerable decisions of the Supreme Court and this Court holding that, absent an express and unequivocal waiver, the United States is entitled to sovereign immunity. Those decisions admit of no exception for *jus cogens.*

The lower court characterized its sovereign immunity ruling as addressing a "question . . . of first impression, not just in this district or circuit but nationally." JA.2302. That is not correct. The Fifth Circuit has held that neither allegations of *jus cogens* violations nor the ATS abrogates sovereign immunity. *Hernandez v. United States*, 757 F.3d 249, 258-59 (5th Cir. 2014). On rehearing, the full Fifth Circuit reinstated the panel's ruling upholding sovereign immunity for the plaintiff's ATS claim. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (*en banc*)[7]; *see also Perez v. United States*, 2014 WL 4385473, at *4-6 (S.D. Cal. 2014) (dismissing ATS claim because an "alleged *jus cogens* violation . . .

[7] The Supreme Court vacated the Fifth Circuit's *en banc* decision on the availability of a *Bivens* remedy, but did not address ATS or the *en banc* court's reinstatement of the panel's ATS decision. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2016).

does not result in a waiver of, or exception to, sovereign immunity"). These decisions are based on the well-established principle that any waiver of sovereign immunity must be express, it must be unequivocal, and it must come from Congress.

It is not hyperbolic to characterize the district court's decision as opening a veritable Pandora's Box of threats to the interests of the United States that sovereign immunity was designed to protect. While *jus cogens* norms are defined as super-norms that are hierarchically superior to all other laws, Article VI of the Constitution makes the Constitution and the laws of the United States the supreme law of the land. The district court erred in disregarding that and superseding federal law with *jus cogens* norms.

Since the district court made CACI's derivative immunity a function of sovereign immunity, we address sovereign immunity first. We then demonstrate that CACI satisfies the standards for derivative immunity.

1. The District Court Erred in Concluding That the United States Lacks Sovereign Immunity for *Jus Cogens* Claims

The United States' sovereign immunity is firmly enshrined in our constitutional framework. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits."). In *Nichols v. United States*, the Court explained the intuitive rationale for sovereign immunity:

> Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created.

74 U.S. 122, 126 (1868).

Over the past two hundred years, the Supreme Court has issued a string of unbroken decisions affirming the principle of sovereign immunity. So, too, has this Court. Those decisions emphatically hold that any waiver of sovereign immunity must be statutory, express and unequivocal. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019); *Pornomo v. United States*, 814 F.3d 681, 687 (4th Cir. 2016).

ATS "has been interpreted as a jurisdictional statute only – it has not been held to imply any waiver of sovereign immunity." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). Other Circuits have reached the same conclusion. *See Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).[8] Moreover, the combatant activities exception to the Federal Tort Claims Act ("FTCA") specifically excludes from the United States' waiver of sovereign immunity "[a]ny

[8] The Supreme Court has rejected the notion that ATS impliedly waived FSIA immunity. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437-38 (1989).

claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j); *see Burn Pit*, 744 F.3d at 351. Accordingly, there is no statutory basis reflecting a waiver of sovereign immunity for *jus cogens* claims.

In *Yousuf v. Samantar,* 699 F.3d 763 (4th Cir. 2012), this Court held that common-law head of state immunity applied even to allegations of *jus cogens* violations. *Id.* at 776-77. That holding, standing alone, defeats the district court's conclusion that allegations of *jus cogens* violations trump all immunities. With respect to foreign official immunity, the Court noted that Congress had created a substantive cause of action under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, encompassing torture committed under color of foreign law, indicating an understanding that foreign official immunity bar such claims. *Yousuf*, 699 F.3d at 776-77. Thus, this Court rejected foreign official immunity because "under international *and domestic* law," foreign officials are not immune from suit for alleged violations of *jus cogens* norms. *Id.* (emphasis added). The express, statutory statement of congressional intent applicable to claims against *foreign* officials is notably absent with respect to claims against the United States and U.S. officials.

In the FSIA context, courts have consistently rejected the concept that allegations of *jus cogens* violations impliedly waive immunity. "If violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so." *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992); *see also Belhas v. Ya'alon,* 515 F.3d 1279, 1287 (D.C. Cir.

2008); *Sampson v. Fed. Rep. of Germany,* 250 F.3d 1145, 1150-51 (7th Cir. 2001); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 242-45 (2d Cir. 1997); *Princz v. Fed. Rep. of Germany,* 26 F.3d 1166, 1174 (D.C. Cir. 1994).

The district court's opinion acknowledged that it is "well established that the United States enjoys the benefit of sovereign immunity and cannot be sued absent a waiver of this immunity." JA.2314. In a footnote, the district court allowed that "the Fourth Circuit and the Supreme Court have used language suggesting that any sovereign immunity waiver must be explicit and statutory." JA.2314 (citing *Lane* and *Robinson*). Those decisions, however, do not merely "suggest" that a waiver should be explicit and statutory; they command it.

Nevertheless, the lower court relied on cases addressing issues such as equitable tolling and state and foreign immunity to conclude that "history and caselaw confirm that the government may also waive its immunity through its conduct." JA.2315. Having unshackled itself from binding precedent, the district court ruled that the United States had, in a number of ways, impliedly waived its sovereign immunity for alleged violations of *jus cogens* norms. For example, the district court ruled that "by joining the community of nations and accepting the law of nations, the federal government has impliedly waived any right to claim sovereign immunity with respect to *jus cogens* violations when sued for such violations in an American court." JA.2326-27. The logic of that conclusion is neither apparent nor explained in the decision.

Similarly, the district court concluded that *jus cogens* norms sit "at the top of the hierarchy of international law norms and . . . invalidate any contradictory state

acts." JA.2332. From there, however, the district court conflated lawfulness with immunity and ruled that because a state may not authorize *jus cogens* violations, "so too is a government unable to immunize itself from civil liability for such violations." JA.2335.

The district court stated that it was "mindful of the binding nature of the determinations by the Supreme Court and the Fourth Circuit that the federal government may not be sued in tort without its consent." JA.2319. Mindfulness, however, is not the standard. Few legal precepts are as firmly established as the doctrine that decisions of the Supreme Court and this Court are controlling, on the district court, as to matters within their compass. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Disagreement provides no basis for refusing to follow controlling precedent of the Supreme Court and this Court.

Here, the district court failed to follow controlling precedent. The district court concluded that the government may "waive its immunity impliedly through conduct," even after quoting the Supreme Court's holding in *Lane* that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . ." JA.2315 (omission in original) (quoting *Lane*, 518 U.S. at 192). The district court's use of ellipses is telling. When the omitted language from *Lane* is restored, it tells a different story:

> A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, ***and will not be implied***.

Lane, 518 U.S. at 192 (emphasis added) (citations omitted). This Court follows *Lane*. *Robinson*, 917 F.3d at 801-02. Clearly, the Supreme Court and this Court have rejected the entire premise of implied waiver on which the district court's decision rests.

It does not appear that the district court considered the full consequences of its holding. Under the decision, *jus cogens* allegations can vanquish Acts of Congress, Executive Orders, and Supreme Court decisions. A federal judge could christen a new *jus cogens* norm and use that super-norm to invalidate any law, judicial doctrine, or state action in derogation of that norm. That is what the district court did in denying sovereign immunity.

Were the district court's ruling to become the law of the land, the floodgates would open to suits against the United States and its officials. The district court's reasoning would allow *jus cogens* allegations to defeat, at least at the motion to dismiss stage, assertions of sovereign immunity, foreign sovereign immunity, diplomatic immunity, Eleventh Amendment immunity, Speech and Debate Clause immunity, prosecutorial immunity, and judicial immunity. Well-established defenses to actions alleging *jus cogens* violations would give way to the sway of international imperatives.

The district court's decision was legal legerdemain, which should not stand. As this Court recognized years ago, it is infinitely preferable "not [to] open the lid to Pandora's Box into a virtual *terra incognito* where we cannot stand on something more like *terra firma*." *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal*, 35 F.3d 275, 287 (4th Cir. 1998).

2. CACI Meets the Requirements for Derivative Immunity

Derivative sovereign immunity protects private parties from suit when they carry out the sovereign's will. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018); *Burn Pit*, 744 F.3d at 341-42. A government contractor is entitled to the same immunity as the United States if "(1) the government authorized the contractor's actions, and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *Burn Pit*, 744 F.3d at 342; *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) ("[T]here is no liability on the part of the contractor who simply performed as the Government directed"); *Cunningham*, 888 F.3d at 643. Both conditions are satisfied on the record here.

Derivative immunity derives from "the government's unquestioned need to delegate governmental functions," and is a recognition that "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1447-48 (4th Cir. 1996). "The purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, and thus, it cannot be that an alleged violation of law *per se* precludes *Yearsley* immunity." *Cunningham*, 888 F.3d at 648.

Denying immunity to contractors while awarding it to government employees disserves the public interest: "Because government employees will

often be protected from suit by some form of immunity, those working alongside them could be left holding the bag – facing liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky v. Delia*, 566 U.S. 377, 391 (2012). This principle has particular resonance in this case, as Plaintiffs have abandoned allegations that CACI personnel abused them, and are seeking to hold CACI liable for abuses allegedly inflicted by soldiers.

a. CACI Performed Under a Contract Validly Awarded by the United States

For purposes of derivative immunity, authorization is "validly conferred" on a contractor if Congress authorized the government agency to perform a task and empowered the agency to delegate that task to the contractor, provided it was within the power of Congress to grant the authorization. *See Yearsley*, 309 U.S. at 20; *Burn Pit*, 744 F.3d at 342, 344 n.7. This standard is easily satisfied here.

Congress vested the President with authority "to use the Armed Forces of the United States as he determines to be necessary and appropriate" to "defend the national security of the United States against the continuing threat posed by Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498. The U.S. military, in turn, had authority pursuant to 10 U.S.C. §§ 2301, *et seq.*, and 50 U.S.C. § 1431 to enter into contracts for contractor support. CACI provided interrogators under two Delivery Orders issued by the United States. Statement of the Case, § D.1. CACI therefore performed pursuant to a validly-awarded contract.

b. CACI Performed the Contract in Accordance with its Terms

The second requirement for derivative sovereign immunity is that the contractor adhered to the terms of its contract. *Burn Pit*, 744 F.3d at 345. "When a contractor violates both federal law and the Government's explicit instructions, . . . no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation." *Cunningham,* 888 F.3d at 647. Plaintiffs have the burden of proving unauthorized conduct because derivative immunity implicates subject matter jurisdiction[9] and the burden for establishing jurisdiction rests with the plaintiff. *Demetres v. E.W. Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015). Plaintiffs cannot sustain that burden.

There is no evidence that CACI personnel acted in an unauthorized way *with respect to these Plaintiffs*, which is what Plaintiffs must show. *See Cunningham*, 888 F.3d at 643-44 (alleged unauthorized conduct injured the plaintiff); *Burn Pit*, 744 F.3d at 331 (same); *see also Univ. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013) ("When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged."). Plaintiffs have no facts showing unauthorized conduct by CACI personnel directed at them, nor do any other witnesses or government records. Statement of the Case, § D.2.

CACI acted precisely as required by its contract – it located, hired, and sent interrogators to Iraq, where they were turned over to the U.S. military chain of

[9] *Cunningham*, 888 F.3d at 649; *Burn Pit*, 744 F.3d at 342-44.

command for operational utilization, direction and supervision. Statement of the Case, § D.1. Derivative immunity exists so that a company such as CACI is not left holding the bag, subjected to a suit alleging injuries inflicted by soldiers on the theory that those soldiers were encouraged by CACI employees, who themselves were under the U.S. military's exclusive direction and control. *Filarsky*, 566 U.S. at 391; *Cunningham*, 888 F.3d at 643.

In addition, to the extent there is any evidentiary gap, it is because CACI has been denied, on state secrets grounds, the only records showing what the Army authorized for the only two intelligence interrogations of Plaintiffs in which CACI interrogators participated. Statement of the Case, § C. If this Court does not direct dismissal because Plaintiffs have failed to meet their evidentiary burden for defeating derivative immunity, dismissal still would be required because CACI has been denied, on state secrets grounds, a fair opportunity to develop the record on derivative immunity. *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007) (dismissal based on the state secrets privilege is required if "the defendants could not properly defend themselves without using privileged evidence").[10]

C. This Action Is An Impermissible Extraterritorial Application of the ATS.

Subject matter jurisdiction is lacking for this action because the evidentiary record shows no ***domestic conduct*** comprising the alleged violations of

[10] CACI sought dismissal based on the denial of crucial evidence by virtue of the state secrets privilege, and the district court denied CACI's motion. JA.2223.

international norms involving Plaintiffs. That is the standard for jurisdiction enunciated in *RJR Nabisco*, 136 S. Ct. at 2101, which supersedes the standard used by this Court in *Al Shimari III*. In *Al Shimari III*, this Court held that under a test derived from *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the claims in this action sufficiently "touched and concerned" United States territory to provide jurisdiction. *RJR Nabisco*, however, mandates a different approach.

In *RJR Nabisco*, the Supreme Court held that in determining extraterritorial jurisdiction, a court does not review claims, but examines only a statute's focus – the conduct the statute seeks to regulate. 136 S. Ct. at 2101. If there is insufficient *domestic* conduct comprising the statutory violation, a federal court has no jurisdiction. *Id.* That is the case here.

CACI asked the district court to apply the *RJR Nabisco* test pursuant to *United States v. Robinson*, 390 F.3d 833, 837 (4th Cir. 2004) (district courts must apply intervening Supreme Court precedent that alters controlling principles). The district court demurred. While opining that *RJR Nabisco* set a "possibly new standard," the district court held that *Al Shimari III* was the law of the case and that it was "not reversing the Fourth Circuit," although "[t]hey may want to reverse themselves." JA.2227-28.

RJR Nabisco, which this Court must now follow, does not permit *Al Shimari III*'s touch and concern approach, and requires the Court to determine whether sufficient conduct violating international law occurred in the United States. There is ***no*** evidence of domestic conduct involving these Plaintiffs that violated international norms. As a result, there is no jurisdiction.

1. The ATS, *Kiobel*, and *Al Shimari III*

The ATS provides that the "district courts shall have original jurisdiction of 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. In *Kiobel*, the Court held that the statute does not apply extraterritorially and therefore courts lack jurisdiction over claims for violations of the law of nations occurring outside the United States. *Id.* at 124 (citing *Morrison v. Nat'l Austrl. Bank, Ltd.*, 561 U.S. 247, 264 (2010)).

At the end of the decision, the Court observed that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 124-25 (citing *Morrison*).[11] In *Morrison,* the Court held that in considering whether conduct violates a statute without extraterritorial application, courts should determine whether the conduct that is the "focus of congressional concern" occurred in the United States. 561 U.S. at 266.

Kiobel's citation to *Morrison* led some lower courts to conclude that they should apply *Morrison*'s focus test in ATS cases to determine whether the relevant conduct occurred in the United States. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014). The Ninth Circuit, on the other hand, concluded that

[11] The Supreme Court also noted that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Kiobel*, 569 U.S. at 125.

Kiobel did not adopt *Morrison*'s focus test because it "chose to use the phrase touch and concern." *Doe v. Nestle*, 766 F.3d 1013, 1028 (9th Cir. 2014) (*Doe I*).

While neither adopting nor rejecting *Morrison*'s focus test, this Court in *Al Shimari III* considered whether Plaintiffs' *claims* sufficiently touched and concerned United States territory to provide jurisdiction. 758 F.3d at 528. The Court concluded that a "claim[] covered all the facts relevant to the lawsuit, including the parties' identities and their relationship to the causes of action," not just the acts that may have violated international law. *Id.* at 527. In other words, this Court distinguished *matters* relevant to a *plaintiff's claim* from *conduct* relevant to a *statute's focus* and adopted a test for ATS jurisdiction centered on the former.

On a limited record, this Court attached significance to numerous factors: (1) CACI was a U.S. corporation; (2) CACI hired U.S. citizens with U.S. security clearances to provide intelligence support services, and who allegedly perpetrated torture in Iraq; (3) CACI received payments in the U.S. based on contracts issued by the U.S. government; (4) Congress intended to provide access to the U.S. federal courts by adopting statutes such as the TVPA; (5) important American foreign policy interests were implicated Plaintiffs' allegations; and (6) Plaintiffs had alleged that CACI's managers in the United States approved acts of torture, encouraged misconduct, and attempted to cover up misconduct when it was discovered. *Id.* at 530-31. The Court characterized these facts and allegations, cumulatively, as "extensive 'relevant conduct' in United States territory" sufficient to establish jurisdiction. *Id.* at 528. This Court conspicuously did not confine its

analysis to the conduct that the ATS seeks to regulate – torts committed in violation of international law. *RJR Nabisco* requires that the Court do so now.

a. Intervening Supreme Court Precedent Has Rejected the Analytical Approach Used in *Al Shimari III*

RJR Nabisco made clear that courts must use a two-step framework for applying the presumption against extraterritoriality, a framework that does not allow consideration of the mélange of factors on which *Al Shimari III* relied. Under *RJR Nabisco*, a court first "ask[s] whether the presumption against extraterritoriality has been rebutted – that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." 136 S. Ct. at 2101. If there is no such indication, the court proceeds to the second step, which "determine[s] whether the case involves a *domestic* application of the statute." *Id.* (emphasis added). To do so, it "look[s] to the statute's 'focus'" and determines if there is sufficient conduct relevant to that focus that occurred in United States territory:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but ***if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory***.

Id. (emphasis added). The Supreme Court confirmed the application of the focus test for jurisdiction in *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018).

The Fifth Circuit recognized *RJR Nabisco* as controlling precedent in *Adhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, 199-200 (5th Cir. 2017),

holding that, in light of *RJR Nabisco*, the extraterritoriality analysis in *Al Shimari III* is "not the test" because *Morrison* and *RJR Nabisco* "require[] analysis of the conduct relevant to the statute's 'focus.'" *Id.* Similarly, the Ninth Circuit discarded the touch and concern standard adopted in *Doe I* and held that *RJR Nabisco* requires use of the focus test. *Doe v. Nestle*, 906 F.3d 1120, 1125 (9th Cir. 2018) (*Doe II*).

This Court's use of touch and concern as the test in *Al Shimari III*, and the resulting analysis, is in irreconcilable conflict with the focus test required by *RJR Nabisco*. This Court acknowledged as much in *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019). Citing *RJR Nabisco* and not *Al Shimari III* as controlling, this Court held that in determining jurisdiction, a court looks to whether the conduct relevant to the statute's focus occurred in the United States. *Id.* at 240.

Curiously, *Roe* continued with a footnote that asserted some ambiguity regarding the standard:

> In delineating the two-step framework in *RJR Nabisco,* the Supreme Court drew on two of its key precedents addressing extraterritoriality: *Morrison* and *Kiobel.* The second step in *RJR Nabisco,* however, appears to privilege consideration of a statute's focus – the approach set out in *Morrison* – over the inquiry articulated in *Kiobel*, which asked whether the claims at issue "touch and concern the territory of the United States." On the other hand, *RJR Nabisco* did not overturn *Kiobel* and – in step two – retains a similar emphasis on the relevant claim's connection to U.S. territory. We need not resolve the effect of *RJR Nabisco* on *Kiobel* because, as explained herein, we do not reach the second step of the *RJR Nabisco* framework.

Id. at 240 n.6 (citations omitted).

This *dicta*, in perceiving tension between *Morrison* and *Kiobel* from *RJR Nabisco*, overlooks that *RJR Nabisco* explicitly holds that *Morrison* and *Kiobel* require *the same standard* for analyzing extraterritoriality issues. *RJR Nabisco,* 136 S. Ct. at 2101. Rather than creating friction between *Morrison* and *Kiobel*, *RJR Nabisco* cemented the focus test as the standard for extraterritorial jurisdiction.

Second, *RJR Nabisco* did not "retain a similar emphasis on the relevant claim's connection to U.S. territory." Instead, *RJR Nabisco* holds that the only relevant aspects of a claim are the conduct comprising the statutory violations and where *that* conduct occurred.

b. The *RJR Nabisco* Analysis Requires a Determination Whether There is Sufficient Domestic Conduct Comprising the Alleged International Law Violations

Because ATS does not apply extraterritorially, this Court need only assess whether sufficient conduct relevant to the ATS's focus occurred in the United States. The focus of a statute is the object of its solicitude, which includes the conduct it seeks to regulate and the parties it seeks to protect. *WesternGeco*, 138 S. Ct. at 2137-38; *Morrison*, 561 U.S. at 266-67.

The Supreme Court has always identified a statute's "focus" as something explicitly mentioned in the statute's text. *WesternGeco*, 138 S. Ct. at 2137-38; *RJR Nabisco*, 136 S. Ct. at 2106, 2111; *Morrison*, 561 U.S. at 266-67; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *see also U.S. ex rel. Wilson v. Graham Cty. Soil & Water Cons. Dist.*, 777 F.3d 691, 698 n.4 (4th Cir. 2015).

The ATS's focus is unquestionably the tort committed in violation of the law of nations or a treaty of the United States. *Doe II*, 906 F.3d at 1125; *Adhikari*, 845 F.3d at 197; *Mastafa*, 770 F.3d at 185. Torts committed in violation of universally-accepted and specific international norms are what the ATS regulates. The *only* relevant conduct for purposes of ATS jurisdiction is the conduct comprising the alleged international law violations. As *Kiobel* made clear, the full "focus" of the ATS is on *conduct* that transgresses international norms. 569 U.S. at 112-18.

The other factors on which this Court relied in *Al Shimari III* are simply not considered in assessing jurisdiction under ATS. CACI's citizenship and that of its employees, its U.S. contracts, other federal statutes, and U.S. interests are all immaterial because they do not reflect conduct regarding Plaintiffs that violates international law. Here, all conduct regarding Plaintiffs and the alleged violations of international law – conspiracy and aiding and abetting – occurred, if at all, outside the United States. No conduct relevant to ATS's focus occurred in the United States.

c. The Record Contains No Evidence of Domestic Conduct Comprising the Alleged International Law Violations

Adducing evidence sufficient to establish jurisdiction is Plaintiffs' burden; CACI has no obligation to prove the absence of jurisdictional facts. *Demetres*, 776 F.3d at 272. To demonstrate jurisdiction, Plaintiffs must provide evidence of

sufficient conduct relating to them and comprising international law violations *that occurred in the United States*. This they cannot do.

Plaintiffs do not contend that the primary tortious conduct occurred anywhere other than Iraq. Plaintiffs' only allegations of actionable conduct in the United States were that "CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it." *Al Shimari III*, 758 F.3d at 531. Plaintiffs were given unfettered opportunity to pursue their allegations in discovery; there is nothing to substantiate them. The record refutes the contention that any CACI employee in the U.S. planned, encouraged, participated in, or condoned any allegedly tortious conduct in Iraq. JA.1419, 1473, 1478-80, 1489-90, 1493-95, [redacted], 4544-47.

Where discovery reveals insufficient domestic conduct involving the alleged international law violations, dismissal is required for lack of jurisdiction. *See, e.g.*, *Sexual Minorities Uganda v. Lively*, 254 F. Supp. 3d 262, 270 (D. Mass. 2017) (dismissing ATS action after discovery revealed that the only activity the defendant had engaged in within the U.S. was to send sporadic emails offering encouragement, guidance and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country), *aff'd in part, dismissed in part*, 899 F.3d 24, 30 (1st Cir. 2018).

Plaintiffs' inability to marshal facts showing domestic conduct by CACI in violation of international law makes this case an impermissible extraterritorial application of the ATS and requires dismissal.

D. The District Court Erred in Refusing to Dismiss Plaintiffs' Claims on Political Question Grounds

"Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see also In re KBR, Inc. Burn Pit Litig.*, 893 F.3d 241, 259 (4th Cir. 2018) (political questions must be resolved within "'the halls of Congress or the confines of the Executive Branch,' not on the steps of a federal courthouse"). No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

This strict prohibition extends to acts by government contractors "if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments." *Al Shimari IV*, 840 F.3d at 151; *Taylor v. Kellogg Brown & Root Servs.*, 658 F.3d 402, 411 (4th Cir. 2011). To make this determination, this Court directed the district court to "examine the *evidence* regarding the *specific conduct* to which *the plaintiffs* were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160 (emphasis added). To execute that mandate, discovery was needed

from the United States, which had sole possession of interrogation plans, reports, and assignments of interrogators to specific detainees.

On remand, the district court refused CACI's multiple requests to commence discovery from the Government.[12] The district court required CACI to file a justiciability challenge before pursuing such discovery, which the district court predictably denied as premature. After CACI was permitted *some* of the necessary discovery, while being denied crucial discovery on state secrets grounds, the district court refused to consider CACI's post-discovery political question challenge, casting its motion to dismiss decision as "law of the case." JA.2275-76. Thus, the district court refused to conduct the evidence-based jurisdictional inquiry this Court directed and to which all litigants are entitled. *See Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414 (4th Cir. 2005) ("the lower court may not deviate from that mandate but is required to give full effect to its execution"); *see also Burn Pit*, 744 F.3d at 333 (defendant can challenge justiciability on a factual basis).

Because CACI was denied, on state secrets grounds, crucial evidence bearing on justiciability, CACI was prevented from fairly defending itself. That alone requires dismissal. Alternatively, if the district court elected not to dismiss on state secrets grounds, it should have dismissed on political question grounds because Plaintiffs are unable to present facts showing a justiciable dispute.

[12] JA.0242-43, 0250-52, 0278-79, 0307-09, 0318-19.

1. The District Court Should Have Dismissed on State Secrets Grounds Because CACI Is Unfairly Handicapped in Challenging Justiciability

Dismissal on political question grounds is required when a court lacks judicially manageable standards for resolving the case. *Taylor*, 658, F.3d at 408-09. Dismissal on state secrets grounds is required if "the defendants could not properly defend themselves without using privileged evidence." *El-Masri*, 479 F.3d at 309. The United States' assertion of the state secrets privilege – three times – denied CACI access to the critical evidence on these subjects.

Al Shimari was interrogated once, and Al-Zuba'e three times. [redacted] The United States withheld on state secrets grounds "the tailored interrogation plan actually used for a lengthy interrogation of Al Shimari," a plan that "provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation." JA.1438. For Al Shimari and Al-Zuba'e, the United States withheld interrogation reports "summariz[ing] the results of interrogations [that] were completed close in time to their conclusion." JA.1438-39. CACI cannot fairly litigate justiciability when the only "evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place," *Al Shimari IV*, 840 F.3d at 160, is shielded from disclosure by the state secrets privilege.

Moreover, the identities of participants in Plaintiffs' interrogations are classified, prohibited from disclosure by Secretary Mattis's first two state secrets assertions. Their testimony was available only with severe restrictions that resulted in an unidentified, disembodied voice testifying on a speakerphone from

an unknown location. As one example, Plaintiffs allege that their injuries occurred because CACI interrogators had inadequate training and experience (JA.0190), but the state secrets privilege prevented the CACI employees who interrogated Plaintiffs from disclosing their training and experience, preventing CACI from rebutting Plaintiffs' narrative. JA.2850-51, 4490-91. If this case proceeded to trial, not a single participant in Plaintiffs' interrogations would be permitted to testify live or by videotape. This case is the paradigm of a case in which national security interests deprive the district court of judicially-manageable standards for determining justiciability and the merits and deprive CACI of a proper opportunity to defend itself. Accordingly, had the district court not refused to conduct the evidence-based political question inquiry this Court mandated, dismissal on state secrets grounds would have been required.

2. Plaintiffs Cannot Present Facts Showing a Justiciable Dispute

The available evidence, while incomplete because of the state secrets privilege, is one-sided on justiciability. Plaintiffs cannot produce evidence of unlawful conduct by CACI personnel directed at them. Moreover, the United States exercised actual control over CACI interrogators and Plaintiffs' claims involve challenges to sensitive military judgments.

a. There Is No Evidence CACI Interrogators Committed, Assisted, or Conspired to Commit Unlawful Acts Against Plaintiffs

Plaintiffs concede that CACI interrogators never "laid a hand on them." JA.1060. No documents or witnesses implicate CACI personnel in mistreatment of Plaintiffs. Participants in Plaintiffs' interrogations testified, without contradiction, that (1) they did not enter into nor were they aware of any conspiracies with CACI interrogators, and (2) CACI personnel had no influence over interrogations of, or detention conditions for, detainees to whom they were not personally assigned. *See* Statement of the Case, § D.1.

The two CACI interrogators assigned to interrogate a Plaintiff denied any involvement in mistreating them. JA.2949-50, [redacted] 4535-36. Their testimony in uncontroverted. CACI Interrogator A, who interrogated Al Shimari once, [redacted] JA.2910-12. CACI Interrogator G, who interrogated Al-Zuba'e once, never instructed MPs regarding detainee treatment. JA.4508-09.

Plaintiffs have argued that CACI interrogators, by their mere presence at Abu Ghraib prison, necessarily joined a conspiracy against detainees, including Plaintiffs. The evidence refutes Plaintiffs' premise. Multiple witnesses testified, without contradiction, that detainee abuse at Abu Ghraib was not common knowledge as it was occurring. Statement of the Case, § D.2.d. Thus, the record is devoid of evidence that CACI personnel directly or indirectly engaged in any unlawful conduct directed at these Plaintiffs.

b. CACI Personnel Operated Under the Military's Actual Control

The U.S. military had exclusive operational control over CACI interrogation personnel. In *Al Shimari IV*, the court faulted the district court for focusing on formal control as opposed to actual control. 840 F.3d at 157. On remand, CACI took pseudonymous depositions of the participants in Plaintiffs' interrogations, and they confirmed the U.S. military's actual control over the utilization, direction, and supervision of military and CACI interrogators.

CACI's contracts called for the U.S. military to exercise operational control over CACI interrogators. Statement of the Case, § D.1. These contractual requirements were scrupulously followed on the ground. "CACI interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." JA.1264-65. The U.S. Army reviewed resumes and approved individual CACI employees for service on the contracts. JA.1408. Military and civilian personnel reported to the military intelligence chain of command for all operational matters. JA.3057-58, [redacted]. The military chain of command controlled all aspects of the interrogation mission and treated CACI interrogators the same as Army interrogators. JA.1265, 1410-11, 3056, 3058-59, 3063.

The military controlled conditions of confinement, interrogation priorities, interrogation assignments, interrogation plans and techniques, and interrogation rules of engagement. JA.1265, 1417-18, 2896[redacted] 4539-47. The participants in Plaintiffs' interrogations confirmed that the Army

chain of command dictated and controlled all of these aspects of the intelligence-gathering mission for every interrogation. JA.2881[redacted], 2895-99, 2901[redacted], 2926-28, [redacted], 3700-01, 3710, [redacted], 4539-47. Moreover, the military monitored interrogation booths on an *ad hoc* and unscheduled basis. JA.3062-63. Thus, it is clear even from the degraded evidence made available to CACI that the military exercised actual control over CACI contractors.

c. CACI Personnel's Conduct Involved Sensitive Military Judgments

The events at Abu Ghraib occurred during the Iraq War, in the midst of a war zone and under regular attack. JA.1527. The military interrogated detainees to extract actionable intelligence to protect coalition forces. CACI interrogators were integrated into the military intelligence operation and supervised by military officers. CACI interrogators used the same interrogation techniques and followed the same rules as their military counterparts. The military approved interrogation techniques and decided the approval level required for each. JA.2280-87, [redacted]. Many of the interrogation techniques used at Abu Ghraib were developed and approved at the highest levels of the U.S. government. *See* Statement of the Case, § D.1.

In asserting the state secrets privilege, Secretary Mattis emphasized the sensitive, subjective military decisions involved in deciding which interrogation techniques to approve and use for particular interrogations. JA.1434-41. The military made sensitive judgments regarding the proper balance between respect for detainees and the trying to save U.S. lives being lost on a daily basis to

insurgent and terrorist activity. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-82 (11th Cir. 2009) (political question doctrine applies where the military must "calibrate the risks" and perform a "delicate balancing of considerations"). Plaintiffs' claims necessarily require a second-guessing of Executive Branch and military decision-making regarding battlefield intelligence tactics in the face of a war in which U.S. soldiers were dying from insurgent activity every day. These are precisely the types of sensitive military judgments to which the political question doctrine applies.

E. The "Vigilant Doorkeeping" Required in ATS Cases Precludes Jurisdiction for Claims Alleging Injuries Inflicted By U.S. Soldiers During War

Sosa v. Alvarez Machain held that any ATS claims must "rest on a norm of international character accepted by the civilized world and defined with specificity." 542 U.S. 692, 725 (2004). *Sosa* also held that "ATS litigation implicates serious separation-of-powers and foreign-relations concerns" and must be "subject to vigilant doorkeeping." *Id.* at 729. These concerns require "judicial caution when considering *the kinds of individual claims* that might implement the jurisdiction conferred" by ATS and include:

- that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases";
- "the potential implications for the foreign relations of the United States of recognizing [ATS] causes of action should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and

- the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations."

Id. at 725-28 (emphasis added).

After remand, the district court originally ruled that these separation-of-powers and foreign-relations concerns were "beside the point" if the proposed tort was widely recognized. JA.0327. In *Jesner*, however, the Court assumed *arguendo* that the petitioners' proposed tort was actionable under ATS, but required dismissal on separation-of-powers and foreign-relations anyway. 138 S. Ct. at 1394. Thus, when separation-of-powers and foreign-policy considerations counsel against allowing a plaintiff's claims to proceed, dismissal is required *even if those claims could be actionable under ATS in other contexts*.[13]

Even after *Jesner*, the district court expressed "serious doubts" that separation-of-powers and foreign-relations concerns could require dismissal of claims alleging well-recognized and specifically-defined torts. JA.1286-87. Nevertheless, the district court relied on pre-*Jesner* decisions addressing extraterritoriality and justiciability to conclude that "the Fourth Circuit has already recognized that allowing these claims to proceed does not impermissibly interfere with the political branches." JA.1288-91. The district court's conclusion fails to apply the ATS-specific analysis dictated by *Sosa* and *Jesner*.

[13] A claim brought under ATS also must overcome the presumption against extraterritoriality. *See* Argument, § C, *supra*.

1. Separation-of-Powers Concerns Require Dismissal

In *Jesner*, the separation-of-powers concern was a "general reluctance to extend judicially created private rights of action" because such a decision is "better left to legislative judgment in the great majority of cases." *Id.* at 1402. "[T]he separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of ATS" because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403. Accordingly, *Jesner* rejected ATS jurisdiction in a new context – suits against foreign corporations – because of separation-of-powers concerns. *Id.*[14] The general reluctance to extend judicially-created private rights of action applies here, but this case involves additional separation-of-powers concerns that are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy. *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)).

First, Congress has legislated repeatedly in this space and never created a private right of action encompassing Plaintiffs' claims. The TVPA, 28 U.S.C. § 1350 note, applies only to conduct under color of *foreign* law. The Anti-Torture Statute and War Crimes Act authorize *criminal prosecution only*, and the Anti-Torture Statute disclaims creating any right "enforceable by law by any party in any civil proceeding." 18 U.S.C. §§ 2340A, B; 18 U.S.C. § 2441. Congress created criminal jurisdiction only over certain civilians serving with the armed

[14] *Jesner* does not resolve whether ATS suits may be maintained against domestic corporations.

forces.[15] Claims "arising out of the combatant activities of the military or naval forces" are excluded from the FTCA's waiver of sovereign immunity. 28 U.S.C. § 2680(j). These statutes reflect the sensible conclusion that litigation of wartime conduct should be subject to "the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727.

Second, Plaintiffs' claims seek to hold CACI liable for abuse allegedly inflicted by soldiers. The Constitution commits foreign policy and war powers to Congress and the President. *See* Argument, § D, *supra*. In *Jesner*, the Court invoked its analysis in *Ziglar*, which rejected a *Bivens* action because "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches." *Ziglar*, 137 S. Ct. at 1861. Such concerns are heightened in a wartime context.

Third, Plaintiffs seek to use *respondeat superior* to hold CACI liable for the acts of its employees' alleged co-conspirators. In *Jesner*, the Court noted that the petitioners' claims would not be allowed in the *Bivens* context and saw no reason for a different rule for ATS. *Jesner*, 138 S. Ct. at 1403. *Respondeat superior* liability is not allowed in the *Bivens* context. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Morell v. N.Y. City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978).

[15] *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 *et seq.*; UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10).

2. ATS Claims Are Not Appropriate to Regulate Hostilities That Are Underway

"The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406. In *Jesner*, the Court held that dismissal was required because the petitioners' claims would not further this objective. *Id.* The same is true here. Allowing an ATS claim against CACI for alleged abuses by soldiers would not prevent war – war was already well underway – nor would it prevent foreign nations from concluding that abuses at Abu Ghraib prison were chargeable to the U.S. military.

It is no coincidence that "relatively modest set" of international law violations that were "probably on the minds of the men who drafted the ATS" – "violation of safe conducts, infringement of the rights of ambassadors, and piracy" – involve private conduct unrelated to military operations that, if left unchecked, risked creating an issue of war. *Jesner*, 138 S. Ct. at 1397 (quoting *Sosa*, 542 U.S. at 715). None of these paradigms involves claims arising out of the United States prosecution of a war that had already begun. The disconnect between Plaintiffs' claims and the foreign-relations interests served by ATS is an independent reason for dismissal.

F. Plaintiffs' ATS Claims Are Preempted By Federal Law

This action calls on the Court to determine whether a federal court may use international norms to regulate the conduct of war by the United States. The

commitment of responsibilities concerning the prosecution of war to the Executive and Legislative branches preempts such regulation of the United States' prosecution of war in the guise of recognizing causes of action under ATS.

This case arises out of the same operative facts as *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). Indeed, Plaintiffs were members of the putative class in *Saleh*. In *Saleh*, the court held that the federal interests embodied in the U.S. Constitution and the combatant activities exception to the FTCA preempted ATS and state-law claims against CACI. Such claims are preempted "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority." 580 F.3d at 9.

Saleh's result and reasoning have found acceptance in this Court. In 2011, this Court, relying on *Saleh,* held that Plaintiffs' claims were preempted by federal law. *Al Shimari I*, 658 F.3d at 413. That decision was vacated, however, by the Court *en banc*, which dismissed CACI's interlocutory appeal. *Al Shimari II*, 679 F.3d at 205. Then, in 2014, this Court expressly adopted the *Saleh* test for preemption. *Burn Pit*, 744 F.3d at 351.

Saleh, however, found no acceptance in the district court. The district court denied CACI's preemption argument at the motion to dismiss stage. JA.1179-84. In doing so, the district court misread *Saleh*, incorrectly concluding that *Saleh* preempted only state-law claims. On summary judgment, the district court held a hearing nominally to address CACI's dispositive motions, but took no argument on preemption and said nothing about preemption. Nevertheless, the district court's

Order denied the motion "[f]or the reasons stated in open court." JA.2223. The absence of analysis, however, does not preclude meaningful appellate review.

The discovery adduced in this case shows that CACI personnel were integrated into the U.S. military's combatant activities and were under the ultimate operational control of the U.S. Army. That is all that is required for preemption of Plaintiffs' claims.

1. The Constitution's Allocation of War Powers Preempts ATS Claims Arising Out of the Conduct of War

The Constitution expressly commits foreign policy and war powers to the Executive and Legislative branches. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. Nowhere does the Constitution contemplate judicial recognition of the law of foreign sovereigns to govern U.S. foreign policy or the United States' conduct of war.

"National-security policy is the prerogative of the Congress and the President." *Ziglar*, 137 S. Ct. at 1861. "Power over external affairs . . . is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). The federal interest in not having foreign sovereigns' law regulate U.S. military operations – through a federal judge's acceptance or rejection of "international norms" – is particularly acute:

> The judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches. As the *Sosa* Court explained: "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign

> policy consequences, they should be undertaken, if at all, with great caution."

Saleh, 580 F.3d at 16 (quoting *Sosa*, 542 U.S. at 727-28).

The D.C. Circuit's conclusion is compelling. In *Sosa,* the Supreme Court emphasized that "the potential implications for the foreign relations of the United States of recognizing causes" of action for violating international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. The Supreme Court repeated that admonition in *Kiobel*, stressing that courts should exercise great caution not only in recognizing any common law cause of action, but in determining their scope. 569 U.S. at 116-17. That warning was punctuated in *Jesner*, where the Court held that "ATS litigation implicates serious separation-of-powers and foreign relations concerns" and that, as a result, "ATS claims must be "subject to vigilant doorkeeping." 138 S. Ct. at 1398.

The district court's approach here, however, opens the door to wide encroachments through ATS on powers reserved to the Executive and Legislative branches. This danger is not hypothetical. It is evidenced, at its most extreme, by the district court's denial of sovereign immunity to the United States for ATS claims alleging *jus cogens* violations. JA.2341. It is difficult to imagine a result more incompatible with the Supreme Court's repeated admonition regarding ATS and its dangerous foreign-policy implications.

At the motion to dismiss stage, the district court rejected preemption on the grounds that "the ATS is itself a federal statute," and represents "the constitutional

exercise of Congress's inherent power to regulate the conduct of war." JA.1180. That view is unsupportable. ATS is a jurisdictional statute only and creates no substantive causes of action. *Sosa*, 542 U.S. at 713. The causes of action Congress had in mind when enacting ATS were offenses against ambassadors, violations of safe conduct, and piracy, *id.* at 720, none of which involves regulation of the United States' conduct of war against a foreign enemy in a foreign land. *See Kiobel*, 569 U.S. at 124. Ultimately, the Constitution's commitment of the prosecution of war to Congress and the Executive precludes judicial recognition of causes of action based on international law to hold CACI liable for tortious acts allegedly committed by soldiers.

2. The Combatant Activities Exception to the FTCA Preempts Plaintiffs' ATS Claims

Similarly, the FTCA's retention of immunity for claims arising from combatant activities evinces a congressional intent to preclude judicial review of military operations. In *Saleh*, the D.C. Circuit surveyed the "uniquely federal interests" implicated by tort suits brought by Abu Ghraib detainees. *Id.* at 7. The court held that the principle underlying the combatant activities exception was that combatant activities "by their very nature should be free from the hindrance of a possible damage suit." *Id.* (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). Any decision to the contrary would allow tort regulation of commanders' battlefield decisions by the very enemies they have been called on to suppress.

Accordingly, *Saleh* held that the federal interests underlying the combatant activities exception preempted tort claims against a contractor "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority." *Id.* at 9. Military control need not be exclusive for preemption to apply, so long as the military is ultimately in charge. *Id.* This Court adopted the *Saleh* preemption test in *Burn Pit*, 744 F.3d at 351. This Court also adopted the broad conception of "combatant activities" applied in *Saleh* and *Johnson*, holding that waste management operations in a war theater involved combatant activities because they were "both necessary to and in direct connection with actual hostilities." *Id.*

In denying CACI's motion to dismiss, the district court misread *Saleh*, stating that "[i]n *Saleh*, the court was concerned with the conflict between federal policy – as embodied in the FTCA – and state tort law; however, in the present civil action, plaintiffs' claims are exclusively brought pursuant to federal law." JA.1183. While *Saleh* addressed, and preempted, state-law claims, the court devoted an entirely separate section to explaining why the plaintiffs' ATS claims also were preempted. *Saleh*, 580 F.3d at 16-17. The D.C. Circuit held that the federal interest in precluding tort litigation of battlefield conduct required application of the same "ultimate military control" test that barred plaintiffs' state-law claims:

> Finally, appellants' ATS claim runs athwart of our preemption analysis which is, after all, drawn from congressional[ly] stated policy, the FTCA. If we are correct in concluding that state tort law is preempted on the battlefield because it runs counter to federal

> interests, ***the application of international law to support a tort action on the battlefield must be equally barred.*** To be sure, ATS would be drawing on federal common law that, in turn, depends on international law, so the normal state preemption terms do not apply. But federal executive action is sometimes treated as "preempted" by legislation.

Saleh, 580 F.3d at 16 (citation omitted) (emphasis added); *see also Am. Elec. Power Co. v. Massachusetts*, 564 U.S. 410, 423 (2011) (federal statutes can displace federal court power to recognize federal common law causes of action); *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (same).

Thus, Plaintiffs' ATS claims are subject to *Burn Pit*'s "ultimate military authority" test and are preempted if the claims involve conduct "during wartime," and the "private service contractor is integrated into combatant activities over which the military retains command authority." *Burn Pit*, 744 F.3d at 349. The evidence establishes that the U.S. military exercised operational control over CACI personnel. Statement of the Case, § D.1. Plaintiffs' claims are thus preempted.

CONCLUSION

The Court should remand this case with instructions to dismiss the Third Amended Complaint.

Respectfully submitted,

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April 23, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, John F. O'Connor, hereby certify that:

1. I am an attorney representing Appellant CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the cover page, table of contents, table of authorities, certificates of compliance and service, and signature block) contains 12,966 words.

/s/ John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2019, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of Appellant's Brief to be served by electronic mail and first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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