RECORD NOS. 10-1891(L); 10-1921

In The

United States Court Of Appeals

For The Fourth Circuit

WISSAM ABDULLATEFF SA' AL-QURAISHI, *et al.*,
Plaintiffs – Appellees,

v.

L-3 SERVICES, INCORPORATED; ADEL NAKHLA,
Defendants – Appellants.

ON REHEARING *EN BANC* OF AN APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1891 Caption: Wissam Al-Quraishi, et al. v. L-3 Services, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Wissam Al-Quraishi, et al.
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction for the reasons set forth fully below in Argument, Section I.

The District Court properly exercised jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity); 28 U.S.C. § 1350 (Alien Tort Statute), and 28 U.S.C. § 1367 (supplemental jurisdiction).

L-3 and Adel Nakhla filed timely notices of appeal (JA–929, 931) from the opinion of the Honorable Judge Peter Messitte of the U.S. District Court for the District of Maryland on July 29, 2010, denying their motions to dismiss. (JA–831-941) (opinion reported at 728 F. Supp. 2d 702 (D. Md. 2010)). No final order was issued by the District Court.

A divided panel found that this Court has jurisdiction over the appeal pursuant to the collateral order doctrine. 657 F.3d 201 (4th Cir. Sept. 21, 2011), *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011).

Plaintiffs filed a timely petition for rehearing *en banc* pursuant to Rule 35 of Federal Rules of Appellate Procedure, and on November 8, 2011, this Court issued an Order granting Plaintiffs' petition.

This case has been consolidated for *en banc* argument with *Al Shimari v. CACI, Inc.*, 658 F.3d 413 (4th Cir. Sept. 21, 2011), *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011).

STATEMENT OF THE ISSUES

1. May a party manufacture appellate jurisdiction over interlocutory rulings under the narrow collateral order by labeling mere defenses to liability and to a court's jurisdiction as "immunities," where such defenses were not finally resolved by the district court and are otherwise plainly reviewable after final judgment?

2. Are corporate defendants entitled to categorical "law of war" immunity for their alleged torture and war crimes when such a proposed immunity runs counter to settled understandings of the law of war and centuries of Supreme Court precedent, and would give for-profit contractors more protection from suit than genuine members of the U.S. Armed Forces?

3. May these corporate defendants claim the mantle of sovereign immunity when their alleged torture and abuse constitute war crimes and were plainly not authorized by the United States?

4. May this Court expand the limited government contractor defense set forth in *Boyle v. United Technologies*, to give protection to contractors who are acting contrary to the government's wishes and whose torture and abuse of civilian detainees cannot be properly analogized to "combatant activities"?

STATEMENT OF THE CASE

Plaintiffs are 72 Iraqi civilians who were detained without charge at Abu Ghraib and other detention centers in Iraq and subjected to acts of torture and brutality at the hands of L-3. Plaintiffs' claims, which must be accepted as true at the pleading stage, correspond to U.S. Government reports that have found that "numerous acts of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib in 2003. *See* AR 15-6 Investigation of the 800th Military Police Brigade, Major General Antonio Taguba, Investigating Officer 16 (2004). *See also* JA–774.

Plaintiffs bring state tort law and federal law claims under the Alien Tort Statute for the war crimes, torture, cruel, inhuman or degrading treatment, sexual assault, and assault and batteries to which they were subjected by L-3, a private corporation the U.S. contracted with to provide interrogation services, and one of their employees, Adel Nakhla.

In a well-reasoned decision, the District Court denied Defendants' motions to dismiss, ruling that Plaintiffs' claims were entitled to proceed to discovery. The District Court explained that Defendants' claims of entitlement to law-of-war and derivative sovereign immunity could not prevail in light of the Plaintiffs' complaint alleging that L-3 failed to abide by the terms of its contract with the United States, flouted government orders and directives, and engaged in war

crimes. JA–864-869. It found that it was "too early" to dismiss the claims given the lack of any record evidence, although it left open the possibility that discovery could yield a different result. JA–867-869.

The District Court declined to adopt *Saleh*'s battlefield preemption theory, given that Congress expressly excluded government contractors such as Defendants from the scope of sovereign immunities defined by the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2679 (1988). It found that the *Boyle v. United Technologies,* 487 U.S. 500 (1988) decision cannot be read as permitting the courts to ignore the text of the FTCA and instead fashion immunities for contractors based on each of the FTCA exceptions to the United States' overall waiver of sovereign immunity and explained that the *Boyle* Court's rejection of an argument based on the *Feres* doctrine makes crystal clear that government discretion must serve as the limiting principle in the preemption analysis. JA–870-877.

The District Court also ruled against dismissal based on the political question doctrine, finding instead that courts are capable of insuring that civil litigation arising out of illicit brutality in prisons does not unduly burden the United States' ability to wage war. JA–858-864.

Finally, the District Court found that Plaintiffs stated cognizable claims of war crimes, torture and cruel, inhuman, and degrading treatment pursuant to the Alien Tort Statute, 28 U.S.C. § 1350.

Invoking the collateral order doctrine as a basis for interlocutory appeal, Defendants sought to overturn the District Court's denial of its motion to dismiss premised on: (1) law-of-war immunity, (2) derivative sovereign immunity, (3) the *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009) "battlefield preemption," and (4) the political question doctrine. Plaintiffs contested that this Court had jurisdiction over the appeal.

In a 2-1 decision, a majority of the panel (Niemeyer and Shedd, JJ.) concluded that this Court has jurisdiction over the appeal, finding that preemption of state law claims satisfied the requirements of the collateral order doctrine. Judge King dissented both from the finding that the Court had jurisdiction over the appeal and that Plaintiffs' state law claims could be preempted. Plaintiffs successfully sought *en banc* review. *See* Dkt. No. 59 in 10-1891, 10-1921.

STATEMENT OF FACTS

Defendant L-3 permitted its employees to participate in torturing the 72 Plaintiffs and other detainees in Iraq. JA–63-65, ¶¶425, 428-431, 435-436; JA–23-48. L-3 translators have admitted to participating in abusive incidents where detainees were beaten, choked, deprived of sleep, kept in stress positions until they collapsed, and exposed to extreme temperatures. JA–64, ¶427. These incidents occurred at Abu Ghraib and other detention facilities. JA–65, ¶436.

Defendant L-3 employees and agents participated in the torture and abuse of Plaintiffs, including Adel Nakhla (JA–62, ¶419), John Israel (JA–63, ¶426), Etaf Mheisen, and "Iraqi Mike". Defendants worked in concert with CACI interrogators to torture prisoners. *Id*. As an example, Defendant Nakhla, a Maryland resident acting in concert with others, sexually assaulted and humiliated prisoners; stripped them naked; exposed them to extreme heat and cold; threatened them with dogs; forced them into painful stress positions; physically assaulted them; and made unlawful threats of violence to them. JA–62, ¶419. Nakhla's criminal actions have been established by photographs, sworn testimony from his co-conspirators and former detainees, and Nakhla's own partial confession to military investigators. JA–62, ¶¶415-417.

Defendants' conduct – such as the instance when an L-3 translator attempted to pry out detainees' teeth with pliers – was not authorized by the United States. JA–64, ¶426. On occasion, a Special Forces soldier intervened to prevent an L-3 translator from beating a detainee to death. JA–64, ¶426. L-3 concealed its employees' misconduct. JA–64-66, ¶¶ 432-434, 445.

L-3 employed all the civilian translators used by the military in Iraq and was paid millions of dollars for its services. JA–22, ¶7-8. As of December 2003, L-3 had deployed managers at 28 sites in Iraq, and had deployed 3052 employees throughout the country. JA–65, ¶¶437-438. L-3 had both the contractual duty, and

the actual authority, to supervise its employees and prevent them from committing war crimes. JA–65-66, ¶¶439-443. It knew that controlling law forbade soldiers and contractors from torturing or otherwise abusing torturing and abusing prisoners. JA–67-69, ¶¶450-456.

Although L-3 claims the United States took no contractual action against L-3 (*see* L-3 Br. 5), L-3 in fact refunded money to the Army after the Abu Ghraib scandal. *See* Bruce V. Bigelow, *Titan to Repay Army $937,000 for Translators*, San Diego Union-Tribune, June 16, 2004.

SUMMARY OF ARGUMENT

L-3 strives to assume the status of the sovereign. It seeks to dismiss this case on the grounds that it might meddle with considerations constitutionally committed to our duly elected branches of government. Yet this case does not challenge Executive-branch policy making or any appropriately discretionary judgments undertaken by the military. Whatever limited exemptions may exist to protect *bona fide* members and policy makers of the U.S. Armed Forces, they are decidedly not available to for-profit contractors such as L-3 whose duty is not to represent the country or abide by a binding chain of command, but merely to maximize profits for its shareholders. Granting Defendants the broad immunity they seek for their significant role in "sadistic, blatant, and wanton criminal abuses" at Abu Ghraib and beyond, *CACI Premier Technology, Inc. v. Rhodes*, 536

F.3d 280, 285 -286 (4th Cir. 2008), will certainly enhance L-3's bottom line; but, it will just as surely undermine the sovereign's interest in assuring accountability for war crimes and upholding this country's commitment to the rule of law.

First, this Court is "unquestionably bereft of jurisdiction" over all aspects of this interlocutory appeal. *See Al-Quraishi v. L-3 Servs.*, 657 F.3d 201, 214 (4th Cir. 2011) (King, J., dissenting). Defendants transparently label their law-of-war, derivative sovereign immunity and preemption claims as "immunities," in order to manufacture a basis for this Court's jurisdiction under the collateral order doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). These issues, however, inconclusively considered by the District Court, are at best defenses to jurisdiction or to judgment; they do not protect a public interest of constitutional significance that would be irretrievably lost absent an immediate appeal, as is required under *Cohen*. Whatever defense to torture and abuse Defendants may think they have, those defenses can certainly be evaluated after discovery and final judgment, consistent with congressionally mandated rules. Because the remaining issues in this appeal are not "inextricably intertwined" with any properly appealable issue, this Court likewise certainly has no pendant appellate jurisdiction over remaining issues on appeal. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995).

Second, Defendants are not exempt from the jurisdiction of United States courts for war crimes and other wrongdoing committed abroad. *Rasul v. Bush*, 542 U.S. 466, 484 (2004), unambiguously affirms that even if these civilian detainees were considered "enemy" aliens, they would have the "privilege of litigation" in U.S. courts. Centuries of Supreme Court case law demonstrate that even U.S. soldiers can be held civilly liable for damages for actions undertaken in enemy territory if in violation of the laws of war. Congress has authorized criminal prosecution for U.S. soldiers who commit war crimes, and via the Military Commissions Act of 2006, has had to affirmatively strip U.S. courts of jurisdiction in order to deprive foreign nationals from their default entitlement to sue U.S. officials for damages in U.S. Courts. As such, the case on which Defendants' entire case teeters, *Dow v. Johnson*, 100 U.S. 158 (1880), stands for the limited, unremarkable and plainly inapplicable principle that U.S. soldiers cannot be haled into courts of the enemy jurisdiction to answer to that enemy's laws for its battlefield conduct.

Third, neither L-3 nor Nakhla are entitled to the benefits of the sovereign's immunity particularly at this stage of the proceedings, when there has been no discovery into L-3's contractual relationship with the government. The complaint alleges that Defendants torture and war crimes were outside of any lawful authority properly delegated by the U.S. military and, at this stage of the

proceedings, plainly take Defendants' actions far outside the narrow classes of cases recognizing a derivative sovereign or derivative official immunity for contractors' conduct.

Fourth, neither the FTCA's "combatant activities" exception to sovereign immunity, nor the unbounded "battlefield preemption" doctrine constructed by the *Saleh* majority may displace Plaintiffs' state tort claims (let alone their federal ATS claims not on appeal). Such a doctrine does not follow from *Boyle*, which only displaces state laws that actually interfere with a discretionary government function or undermine a substantial federal interest. *Boyle*'s limited government contractor defense does not protect Defendants from its unauthorized actions, particularly since those actions – torture and war crimes in Abu Ghraib and beyond – plainly contravenes the federal governments' interests; likewise it cannot extend to protect "combatant activities" in this case, as L-3 are not "combatants" and their "activities" occurred outside any legitimate battlefield context and contrary to the laws of war. As this Court stressed in upholding a criminal conviction for similar conduct, "No true 'battlefield interrogation' took place here" rather, [Defendants] administered a beating in a detention cell." *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009).

Finally, for the reasons set forth in the District Court's opinion, this case does not present any nonjusticiable political questions.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS NON-CERTIFIED INTERLOCUTORY APPEAL.

Defendants failed to seek appellate review of the District Court's decision under 28 U.S.C. § 1292(b), a process by which "Congress thus chose to confer on District Courts first line discretion to allow interlocutory appeals." *Swint*, 514 U.S. at 47. Instead, they seek a dramatic "expansion by court decision," *id*. at 48, by advancing a Rubik's Cube of jurisdictional theories that lack precedent or limiting principle and that underscore the wisdom of the Supreme Court's repeated admonitions to limit the scope of interlocutory appeals to the narrowest possible grounds. *Mohawk Indust. v. Carpenter*, 130 S. Ct. 599 (2009). Clear Supreme Court precedent forecloses each expansive permutation of Defendants' jurisdictional theories.

A. In Light of Congress' Prerogatives Over Federal Court Jurisdiction, the Collateral Order Doctrine Is Construed Very Strictly and Narrowly.

Congress, not the Courts, is empowered to set the jurisdictional parameters of the federal judiciary. U.S. Const. art III. In limiting conditions for appellate review to "final decisions of the District Courts," 28 U.S.C. § 1291, "Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by piecemeal appellate review of trial court decisions which do not terminate

the litigation." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1984) (internal quotations omitted). Though Congress also permits a court to certify interlocutory appeals over important "controlling questions of law" via 28 U.S.C. § 1292(b) – which provided sole basis for the D.C. Circuit's interlocutory jurisdiction in *Saleh* – L-3 ignored that process, instead seeking immediate interlocutory appeal via the judicially-created collateral order doctrine. That doctrine covers only a "small class" of rulings if, and only if, they satisfy each of three criteria set forth in *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 546 (1949): "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006).

The Supreme Court has described the collateral order doctrine as "narrow and selective," of "modest scope," *id*. at 350, and to be interpreted with "utmost strictness," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989), all in order to underscore the point that, "the narrow exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered. *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) (internal citations and quotations omitted). Accordingly, despite "numerous opportunities" in the many years since

Cohen, *Midland Asphalt*, 489 U.S. at 799, the Supreme Court has permitted collateral order review of only a handful of cases implicating a substantial public interest arising from constitutional immunity from suit. *See infra* Section I(C) (describing cases). Abiding by these stringent confines is necessary to preserve the congressionally-calibrated benefits of the final judgment rule, *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), and "has acquired special force in recent years with the enactment of legislation designating rulemaking, . . . as the preferred means" for "determining the scope of prejudgment jurisdiction." *Mohawk*, 130 S. Ct. at 609.

B. This Court Lacks *Cohen* Jurisdiction Over the Derivative Immunity and Preemption Claims Because They Were Not "Conclusively Determined."

Cohen proscribes interlocutory appellate review of an issue unless it has been "conclusively determined," a status which requires a "fully consummated decision," *Abney v. United States*, 431 U.S. 651, 639 (1977), and that the district court has given "the final word on the subject addressed," *Digital Equip. Corp.*, 511 U.S. at 868. There can be no appeal from "any decision which is tentative, informal or incomplete," or where the decision is "subject to revision." *Swint*, 514 U.S. at 42 (interlocutory appeal prohibited where district court remained open to reconsidering summary judgment denial prior to trial); *see also Jamison v. Wiley*, 14 F.3d 222, 230 (4th Cir. 1994) ("[A] tentative and preliminary ruling on a

disputed issue, which plainly holds open the prospect of reconsideration and alteration by the District Court itself, is not sufficiently 'final' to be appealable under the collateral order doctrine.").

It is beyond dispute that the District Court's ruling on derivative sovereign immunity was "tentative" and "incomplete," as it expressly stated that dismissal based on the pleadings was "clearly too early," and that "the issue must await further discovery before the Court is in a position to judge." JA–867-868; *see also* JA–869. ("Without more information as to Defendants' contract and their duties vis-à-vis the Government – information which discovery should reveal – it would be premature to dismiss based on that ground."). Similarly, as Judge King explained, the contractor defense cannot have been "conclusively determined" where, obviously *unlike* the proceedings in *Saleh*, there has been no discovery regarding the terms of the contract. *Al-Qurashi v. L-3 Servs.*, 657 F.3d 201,214 n. 10; *see also* JA–867 ("determining the scope of their contracts . . . is not possible" without discovery); *id.* at 741 n. 11 (possibility that defendants were not motivated by "federal wartime policy-making" such that "state law claims [would] not intrude upon the preempted field" would make preemption decision premature). Accordingly, Defendants' preemption defense cannot be reviewed. *See Martin v. Halliburton*, 618 F.3d 476, 487 (5th Cir. 2010) (emphasizing need for the kind of discovery that took place in *Saleh* to evaluate conclusively combatant immunities

preemption); *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259, 1266 (9th Cir. 2010) ("until requisite facts are determined," denial of summary judgment on government contract defense is not "conclusively determined"); *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398, 400-402 (3d Cir. 2010) (same).

Defendants' reliance on *McVey v. Stacy*, 157 F.3d 271, 275-76 (4th Cir. 1998), L-3 Br. 22, for the proposition that this Court can review an otherwise tentative ruling by focusing exclusively on the facts as pled, is deeply misguided. First, *McVey* involved a qualified immunity appeal – which, quite unlike the immunities asserted here, *see infra* Section I(C)(2) – has for decades fit within the *Cohen* criteria. *See Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985) (qualified immunity is "conclusively determined" under *Cohen* where pure legal questions can be resolved without considering "the correctness of the plaintiff's version of the facts"). Thus, qualified immunity should be resolved on the pleadings only *where possible*. *See McVey*, 157 F.3d at 276 (issues resolved by district court "do not raise factual questions"). However, as *McVey* itself expressly instructs, "when a trial court concludes that it has insufficient facts before it on which to make a ruling," as here, such conclusion would not be directly appealable. *Id*. at 275-76.[1]

[1] Indeed, Defendants' reading of *McVey* is flatly inconsistent with the Supreme Court's analysis of *Cohen*'s first prong in *Swint*. *See* 514 U.S. at 42.

More fundamentally, the appeal of a decision which the District Court might itself revise does not facilitate "review," it produces "improper 'intervention,' if not outright 'intrusion.'" *Harris*, 618 F.3d at 402 (quoting *Cohen*, 337 U.S. at 546); *see also Al-Qurashi*, 657 F.3d at 214 n.10 (King, J., dissenting) ("Fundamentally, a court is entitled to have before it a proper record, sufficiently developed through discovery proceedings, to accurately assess an immunity claim."). Appellate consideration of a question that might "evaporate" in the lower court is not only improper, *United States v. Cisneros*, 169 F.3d 763, 768 (D.C. Cir. 1999), it presents "no clearer example of the very redundancy, delay and waste of judicial resources that the final decision rule is intended to prevent." *Harris*, 618 F.3d at 403.

C. This Court Lacks *Cohen* Jurisdiction Because Defendants' Defenses Are Not Genuine Immunities from Suit, and Are Effectively Reviewable After Final Judgment.

The collateral order doctrine's third requirement is that the ruling in question be "effectively unreviewable on appeal from final judgment." *Will*, 546 U.S. at 349. Defendants conclusorily assert that a "party asserting an immunity defense" has a categorical right to collateral order review, L-3 Br. 22, and that their "preemption defense" affords it a "right not to be tried," *id*. at 39. By unilaterally classifying these affirmative defenses as "immunities," Defendants seek to improperly manufacture a basis for otherwise unavailable appellate jurisdiction. The Supreme Court has specifically warned against such transparent

gamesmanship, as it risks opening up broad new categories of interlocutory appeals and upends the final judgment rule. The defenses are wholly insufficient to meet the stringent *Cohen* criteria.

1. *Cohen* Requires That an Asserted Right To Avoid Trial Have a Constitutional or Statutory Basis.

Because "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (U.S. 1988), the Supreme Court has admonished appellate courts to "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 873; *see also Midland Asphalt*, 489 U.S. at 801 ("[o]ne must be careful not to play word games with the concept of a right not to be tried."). There is a "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Midland Asphalt*, 489 U.S. at 801. That a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final District Court judgment …has never sufficed" to demonstrate a judgment is unreviewable upon final judgment. *Mohawk*, 130 S. Ct. at 605.

Accordingly, the third *Cohen* prong is satisfied only where the ruling at issue involves "an asserted right the legal and practical value of which would be destroyed," *Midland Asphalt*, 489 U.S. at 799, if it were not vindicated before trial, *Van Cauwenberghe*, 486 U.S. at 524. The Court instructs that the only values to be

protected from being "irretrievably lost" are ones that implicate a "substantial public interest." *See Will*, 546 U.S. at 352-53 (doctrine requires existence of "some particular value of a high order"); *Compare Digital Equipment*, 511 U.S. at 879 ("Where statutory and constitutional rights are concerned, 'irretrievabl[e] los[s]' can hardly be trivial") (alterations in original).

Thus, an adverse ruling on a claim of double jeopardy is directly appealable because the Fifth Amendment considers it "intolerable" for the State "to make repeated attempts to convict an individual," thereby "compelling him to live in a continuing state of anxiety and insecurity"; these "deeply ingrained" public values would be "irretrievably lost" by waiting until the conclusion of a second trial. *Abney v. United States*, 431 U.S. 651, 661-62 (1977); *see also Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (under Constitution's Speech and Debate Clause, if a congressperson "is to avoid *exposure* to [being questioned for acts done in either House] his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.") (emphasis and alterations in original). Similarly, recognizing the "President occupies a unique position in our constitutional scheme," the Court held the President was entitled to immediately appeal his absolute immunity claim, because "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Nixon v. Fitzgerald*, 457 U.S. 749, 751-52 (1982); *see also P.R. Aqueduct and Sewer Authority v. Metcalf &*

Eddy, Inc., 506 U.S. 139, 146 (1993) (collateral appeal of State claim to sovereign immunity justified because the "very object and purpose of the 11th Amendment w[as] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."). A government official's qualified immunity claim is immediately appealable because of the public interest that is undermined by awaiting final judgment. *Mitchell*, 472 U.S. at 526. Those interests include the "threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established'." *Will*, 546 U.S. at 352 (quoting *Mitchell*, 472 U.S. at 526).

In sum, based on this "small class" of cases, the Court has interpreted the right "not to be tried" relevant to *Cohen*'s exception as one that "rests upon an *explicit statutory or constitutional guarantee* that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added).[2] The Court requires an "explicit constitutional guarantee," because "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equipment*, 511 U.S. at 879, 880. Defendants' defenses do not meet this high threshold.

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[2] Despite its arguably implicit character, qualified immunity falls within the collateral order doctrine because it possesses a "good pedigree in public law." *Digital Equipment*, 511 U.S. at 875.

2. Defendants Cannot Show That a Trial on Their Law-of-War or Derivative Immunity Defenses Will Destroy a Substantial Public Interest.

Defendants do not – and cannot – attempt to locate their asserted immunity defenses in a statutorily or constitutionally grounded right to avoid trial. Nor is there any sufficiently important public value that would be "irretrievably lost" were Defendants to await final judgment.[3] If Defendants – an individual and a for-profit corporation engaged in one of the most notorious episodes in American history – have any conceivable entitlement to avoid moral accountability and financial responsibility for its illegal conduct, there is certainly no reason such entitlement cannot be evaluated after final judgment.

To be sure, "there is value . . . in triumphing before trial, rather than after it, regardless of the substance of the winning claim," *Van Cauwenberghe*, 486 U.S. at 524. Yet in limiting the availability of interlocutory appeals, Congress has already accepted that parties who lose pre-trial motions would suffer burden, expense and litigation disadvantage. *See Richardson-Merrell*, 472 U.S. at 436. Accordingly, the Court has rejected scores of attempts to invoke

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[3] Defendants' allusion to "separation of powers" – and citation to *Will* in support – as an interest sufficient to trigger collateral order review is seriously incomplete. When *Will* mentioned separation of powers as a value relevant to the collateral order doctrine, "it *only* did so while discussing cases involving immunity," such as *Nixon v. Fitzgerald*. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007) (emphasis added). Separation of powers standing alone, is insufficient to support interlocutory review. *Id*.

collateral review where, as here, a party claims an "immunity" or right to avoid an assertedly significant and irreparable financial or strategic burden stemming from trial. *See Mohawk*, 130 S. Ct. at 606-07 (order requiring disclosure of attorney-client materials not immediately appealable, even if benefits of privilege would be irretrievably lost while awaiting final judgment); *Will*, 546 U.S. at 353-354 (no review of order denying immunity under FTCA judgment bar despite analogy to qualified immunity); *Midland Asphalt*, 489 U.S. at 801-02 (no immediate appeal of motion to dismiss grand jury indictment even though dismissal would avert burdens of criminal trial altogether); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (order disqualifying criminal counsel not immediately appealable despite arguably irreversible Sixth Amendment interests at stake).

Indeed, despite its best efforts to clothe its defense exclusively as a broad immunity, Defendants slip enough times to reveal that the proposed law-of-war "immunity" is actually a defense to judgment. *See* L-3 Br. 24 (contending that *Freeland v. Williams* "reaffirmed" *Dow*'s holding that "parties are protected 'from civil *liability*'…") (quoting *Freeland*, 131 U.S. 405, 417 (1889) (emphasis added)); L-3 Br. 27 (suggesting that *Dow* bars "a cause of action" regardless of venue) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004)). Indeed, as fully described below, *see infra* Section II(B), *Dow* at most offers a defense to a foreign

tribunal's jurisdiction. *See Dow*, 100 U.S. at 165 ("the tribunals of the enemy must be *without jurisdiction* to sit in judgment upon the military conduct of the officers and soldiers of the invading army.") (emphasis added).[4] As such, this appeal is foreclosed by a line of Supreme Court cases that rejected immediate appeal to review an asserted "immunity" from a court's jurisdiction. *See Van Cauwenberghe*, 486 U.S. at 525 (no collateral review of decision denying treaty-based immunity from civil process); *Digital Equipment*, 511 U.S. at 880-82 (claim that District Court lacks power to try case in light of settlement agreement not appealable, even if appealing after trial would render benefits of enforceable settlement agreement irretrievable).

Thus, as Justice Scalia explained in *Lauro Lines*, the benefits to a company's asserted immunity from suit in a U.S. jurisdiction would actually be "positively *destroyed* . . . by permitting trial to occur and reversing its outcome." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502-503 (U.S. 1989) (Scalia, J., concurring) (emphasis added). Nevertheless, just like Defendants' asserted rights in this case, "that is vindication enough because the right is not sufficiently

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[4] *See also Coleman v. Tennessee*, 97 U.S. 509 (1878) ("It is well settled that a foreign army permitted to march through a friendly country . . . is exempt from the civil and criminal *jurisdiction* of the place.") (emphasis added); *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) ("The U.S. military, entering Berlin as conquerors, were immune from the *jurisdiction* of the courts of the conquered country. . .") (emphasis added).

important to overcome the policies militating against interlocutory appeals." *Id*. at 503.[5]

Defendants' alternative reliance on derivative immunity fares no better, even assuming *arguendo*, this defense was not "tentative," or "subject to revision." *See supra* Section I(B). Contrary to L-3's claim, this Court's fact-bound decision in *Mangold v. Analytic Servs.*, 77 F.3d 1442 (4th Cir. 1996), does not support the expansion of *Cohen*'s limited "unreviewability" prong. In *Mangold*, the court accepted a contractor's interlocutory appeal asserting immunity from a private lawsuit for actions arising out of its cooperation with a federal criminal investigation. *Id*. at 1447-48. Immediate appeal was appropriate not because of any balancing of costs versus benefits of appeal, as Defendants suggest. Rather, the "full justification" for the collateral appeal of this particularly-constructed immunity turned on the "long-standing" and "well established" "common law privilege to testify with absolute immunity in courts of law, before grand juries and

[5] Indeed, to justify its theory of appellate jurisdiction, Defendants bear the "unenviable task of explaining why other rights that might fairly be said to include an (implicit) 'right to avoid trial' are in less need of protection by immediate review." *Digital Equipment*, 511 U.S. at 875. For example, nothing distinguishes L-3's claim from an entitlement to immediately appeal a denial of dismissal for lack of personal jurisdiction or for expiration of the statute of limitations, as these issues strongly implicate due process, public policy and fundamental fairness that would arguably be lost by awaiting an otherwise improper trial. *Compare Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (U.S. 2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case" as "[s]imple jurisdictional rules also promote greater predictability.")

before government investigators." *Id*. at 1448; *see also Mitchell*, 472 U.S. at 521 ("The [absolute] immunity for judges, prosecutors and witnesses established by [Supreme Court] cases have firm roots in the common law."). The court stressed these substantial, public benefits of witness immunity – absent here – which would be irretrievably lost while awaiting appeal from final judgment. *Mangold*, 77 F.3d at 1449. ("[Witnesses might be reluctant to come forward to testify. . . . And once a witness is on the stand his testimony might be distorted by the fear of subsequent liability.") (quoting *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983)).

3. Defendants' Asserted Preemption Defense Is A Defense to Liability, Not An Immunity from Suit.

This Court is "unquestionably bereft of jurisdiction . . . to reach the preemption question." *Al-Quraishi*, 657 F.3d at 214 (King, J., dissenting). First, far from statutory or constitutional grounding to support such a proposed immunity, Congress has expressly *excluded* contractors from the definition of a "federal agency" entitled to sovereign immunity under the FTCA. 28 U.S.C. § 2671. Even in *Boyle* – the judicial genesis of the Defendants' proposed derivative FTCA preemption defense – the Court recognized "the absence of legislation specifically immunizing Government contractors from liability," 487 U.S. at 504, and held that the preemption claimed was merely a defense to judgment, not an immunity from the burdens of trial. *Id.* at 505 n.1 (rejecting claim that contractors may be eligible for official immunity); *id*. at 514 ("whether the facts establish the

conditions of a *defense* is a question for the jury") (emphasis added).[6] *Boyle* was concerned that the government would face increasing costs and be unable to exercise its discretion if contractors were subjected to large money *judgments* when they strictly adhered to government contract specifications, *Boyle*, 487 U.S. at 506. *Boyle* says nothing about any harm to federal interests stemming from mere occurrence of trial against a contractor.

Thus, there is simply no support for an immediate appeal of a government contractor defense. *See Rodriguez*, 627 F.3d at 1265-66 (because defense "does not confer sovereign immunity," but "is only a corollary financial benefit flowing from the government's sovereign immunity," it can await review upon final judgment); *Martin*, 618 F.3d at 486-87 (defense "is not subject to a *sui generis* exemption from the ordinary jurisdictional requirements for denials of preemption claims"); *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1366 (11th Cir. 2007) (declining to accept pendant appellate jurisdiction over defense, without even contemplating that it might be subject to collateral order review).[7]

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[6] Indeed, even the panel majority characterized *Boyle* preemption as precluding "state law *liability* where such protection was necessary to safeguard uniquely federal interests." *Al Shimari*, 658 F.3d at 417 (emphasis added).

[7] Preemption has always been considered a defense to suit, not an immunity. *See, e.g., Jordan v. AVCO Financial Services of Georgia, Inc.*, 117 F.3d 1254, 1258 (11th Cir. 1997) (because statute is one of preemption rather than immunity, relevant order not immediately appealable); *In re Joy Global, Inc.*, 257 F. App'x 539, 541 (3d Cir. 2007) (preemption defense can be appealed after final judgment).

Even in *Saleh* the court did not view the broad preemption defense it constructed as a full immunity from the burdens of trial; to the contrary, it considered it possible that facts in another case could demonstrate contractor work was distinctive from "combat activities" and thus outside the field of preemption. *Saleh*, 580 F.3d at 9; *see also Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 17-18 (D.D.C. 2005) (explaining need for discovery to develop contractor defense).

The mere possibility that discovery might burden military operations or the executive branch's separation-of-powers interests, *see Al-Quraishi*, 657 F.3d at 206, cannot transform the preemption defense into an immunity from suit for appellate review purposes. First, such concerns appear highly overstated. Discovery into the alleged rape, torture and abuse at issue here would not implicate military strategy or secrets, as the conduct occurred outside the battlefield, and involved private corporate employees. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 535 (2004) (distinguishing between questioning "core strategic matters of warmaking" and inquiring into "appropriateness of continuing to detain an individual," which "meddles little, if at all, in the strategy or conduct of war."); *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009) ("No true 'battlefield interrogation' took place here; rather, Passaro administered a beating in a detention cell. . . Passaro was a civilian contractor with instructions to interrogate, not to beat.").

The court's primary inquiry will focus not on military decisionmaking, but on the contract's scope and whether Defendants complied with it. Thus, in *Saleh*, the district court permitted discovery "regarding the military's supervision of the contract employees' as well as the degree to which such employees were integrated into the military chain of command." *Saleh*, 580 F.3d at 4. Yet, "none of the ill effects foretold" by the *Al-Quraishi* majority opinion emerged. *Al-Quraishi*, 657 F.3d at 213 (King, J., dissenting).

Speculation about burdens imposed on the military are particularly misplaced insofar as the United States has not intervened in these cases. *Cf. Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (U.S. intervened in suit against private contractor to assert state secret defense). The Defense Department, as evidenced in rulemaking governing private military contractors engaged with U.S. forces abroad, fully anticipated that "inappropriate use of force could subject a contractor . . . to prosecution or civil liability," without concern over collateral burdens on U.S. military. *See* Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008). The Solicitor General, while questioning *Saleh*'s reasoning, urged the Supreme Court to decline *certiorari* in large part because it recognized the need for "further explication of those issues in concrete *factual* settings." Br. of U.S. as *Amicus Curiae* at 18, *Saleh v. Titan Corp*., No. 9-1313 (U.S. May 2011) (emphasis

added). Finally, as of December 31, 2011, the United States will no longer have combat troops in Iraq; accordingly, there will be no burden to active military abroad from this suit.

Even if classified information were somehow implicated in this case (which it is not), the district court maintains an arsenal of tools to limit potential disruption to the military on as-needed basis. *See Al-Qurashi*, 657 F.3d at 213 (King, J., dissenting) (courts can limit depositions, limit discovery to the contours of the preemption defense, and resolve defense first); *Martin*, 618 F.3d at 488 (identifying ways court can show "respect for the interests of the Government in military matters" without resort to interlocutory review); *see also* U.S. Army Regulation 27-10, Litigation, §§ 7-8, 7-9, 7-11 (authorizing soldiers to testify only if it will not "interfere seriously with the accomplishment of a military mission").

D. This Court Lacks Pendant Appellate Jurisdiction Over Defendants' Preemption and Political Question Defenses.

Consistent with its scattershot approach to appellate jurisdiction, Defendants suggest that the Court could independently review the District Court's preliminary rulings on Defendants' preemption and political question arguments because those issues are also pendant to the immunity defenses. L-3 Br. 40-41; 52-53. Specifically, Defendants contend that the preemption issue is "closely intertwined" and bears a "close relationship" to the immunity issue, *id.* at

41, and the same policy considerations "underlie" the immunity and political question doctrines, *id*. at 53. This is decidedly not the standard for pendant appellate jurisdiction.

The category of judicially created pendent appellate jurisdiction is exceedingly narrow and limited to the circumstances set out in *Swint*, 514 U.S. at 47-48. The issues must be "(1) so intertwined that we *must* decide the pendent issue in order to review the claims properly raised on interlocutory appeal or (2) resolution of the issue properly raised on interlocutory appeal *necessarily resolves* the pendent issue." *Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir. 2006) (emphases added). Such jurisdiction is "disfavored," *Cutts v. Peed*, 17 Fed. Appx. 132, 137, 2001 WL 963728 at *133 (4th Cir. Aug. 24, 2001) and exercised "rare[ly]," *Jackson v. Long*, 102 F.3d 722, 731 (4th Cir. 1996). Pendant issues must be necessarily and logically interdependent; it is not enough that "two legal issues arise from the same set of facts." *Pena v. Porter*, 316 Fed. Appx. 303, 309 (4th Cir. 2009); *see also Renn by & Through Renn v. Garrison*, 100 F.3d 344, 352 (4th Cir. 1996).

This Court certainly need not resolve all of the issues raised by the assertedly pendant preemption defense (*i.e.*, the scope of Congressional intent embodied in the FTCA and the federal interest in foreclosing state tort law liability) or by the political question doctrine (*i.e.*, whether the questions presented are subject to judicially manageable standards), in order to resolve the questions raised by

Defendants' asserted immunity defenses (*i.e.*, the status the parties under the laws of war or the scope of L-3's duties under the contract). *See Al-Quraishi*, 657 F.3d at 215 (King, J., dissenting). The preemption and political question issues are thus not "inextricably intertwined," with any properly appealable issue. *See Bellotte v. Edwards*, 629 F.3d 415, 427 (4th Cir. 2011) (pendant appellate jurisdiction unavailable if two issues "shar[e] certain wholesale commonalities of fact . . . and law" but "nevertheless present quite distinct factual and legal issues at the retail level").

In sum, Defendants' proposal to expand this Court's appellate review is the perfect example of what the Supreme Court considers an improper attempt "to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets," *Swint*, 514 U.S. at 49-50.

II. THE LAW OF WAR DOES NOT IMMUNIZE DEFENDANTS FROM SUIT FOR PLAINLY UNLAWFUL ACTIONS.

In claiming absolute immunity under the law of war, Defendants seek to equate themselves with the United States Armed Forces. Whatever limited immunities the law of war may provide for actual combatants, however, they derive from international law principles governing a state's armed forces; they decidedly do not protect Defendants and other for-profit contractors outside the chain of command from responsibility for the torture, rape and serious abuse of defenseless, incarcerated civilians.

First, the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466, 484 (2004) that those detained during ongoing wars have the privilege of litigation in United States courts. Congress had to affirmatively pass legislation, via the Military Commissions Act of 2006, to strip courts of jurisdiction to hear otherwise cognizable damages claims by detainees.

Second, there is no precedent to support Defendants' novel attempt to exempt themselves from civil litigation for their egregious misconduct in the very federal districts in which they reside. Defendants' near exclusive reliance on *Dow v. Johnson*, 100 U.S. 158 (1879), is unavailing as it held only that, consistent with the laws of war, a state's armed forces are freed from jurisdiction in the courts of the country where they are engaged in war or occupation. The *Dow* decision, particularly when read in light of subsequent Supreme Court rulings, decidedly does not support the categorical proposition that individuals or corporations are immune from civil liability in their home jurisdiction.

Finally, nothing supports Defendants self-serving and exaggerated claims that this lawsuit will hinder genuine combatant activities, L-3 Br. 22. Adjudication of this suit between private parties has no bearing on the political branches, the waging of war or U.S. interrogation practices. This lawsuit seeks review of unlawful and unauthorized acts of Defendants who, with access to incarcerated civilian prisoners, tortured and abused them in a manner indisputably contrary to U.S. law and policy.

A. The Supreme Court Has Made Clear That Plaintiffs and Other Iraqis Enjoy the "Privilege of Litigation" in U.S. Courts.

L-3 attempts to devise a categorical bar to the federal courts to hear claims brought by Iraqis for events that occurred during the Iraq war. *See* L-3 Br. 22-30 (contending that "occupying forces" cannot be sued by "enemy aliens" for "claims arising during war or occupation").[8] Yet L-3 ignores the Supreme Court's contrary ruling in *Rasul v. Bush*, which squarely held that "enemy combatants" detained at Guantánamo Bay – could invoke the federal court's federal question jurisdiction even to assert claims under the Alien Tort Statute. 542 U.S. 466, 484 (2004) ("nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U.S. courts.") (internal citation omitted). Indeed, it took an affirmative congressional act – obviously absent here – to strip such "enemy combatants" detainees from this pre-existing right to sue in U.S. courts for damages. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 7, 28 U.S.C. § 2241(e)(2) (stripping courts of jurisdiction over damages cases brought by alien detainees against U.S. officials arising out "any aspect of the detention, transfer, treatment, trial, or conditions of confinement").

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[8] Defendants' characterization of the plaintiff in *Dow* as an "enemy alien" is incorrect; he was in fact a "loyal citizen of New York" who owned property near New Orleans, 100 U.S. at 179, which underscores that *Dow* concerned the power of foreign courts, not the status of a Plaintiff.

B. The Law-of-War Immunity Afforded to Combatants Is Narrow and Limited to Freedom from Foreign Court Jurisdiction.

Even setting aside the Supreme Court's clear ruling in *Rasul*, Defendants grossly distort the limited jurisdictional ruling in *Dow*. *Dow* does not provide the military – let alone private contractors – immunity from any civil suit in any court of law. Rather, it explicitly held that military members of "loyal States" were "subject only to their own government, and only by its laws, administered by its authority, could they be called to account." *Dow*, 100 U.S. at 165. The Court had earlier arrived at a similar conclusion in *Coleman v. Tennessee*, when addressing the question of whether Tennessee state law could be applied to a member of the Union army during the Civil War. 97 U.S. 509, 515 (1878) (Union soldiers during Civil War "were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished."). *Dow*, like *Coleman*, stands for no broader principle than a foreign army is exempt from *jurisdiction* in the country it is stationed. 100 U.S. at 165.[9] Other cases cited by L-3 (*Dostal, In re Lo Dolce, Best, and Hamilton)* are to the same effect; none expand the principle beyond *Dow*'s scope.

[9] The Court observed that situations where "free passage" to march through the territory of a friendly state is granted to foreign armies provide for a complete release from the friendly state's jurisdiction, as that grant of *free* passage "implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require." *Coleman*, 97 U.S. at 515-16, quoting *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 139 (1812). The principle set forth in *Dow* is also reflected in "Status of Forces" agreements that the U.S. enters into with countries where it anticipates having a long-term presence of troops.

The rationale underlying *Dow*'s holding is critical to appreciating its limited scope. *Dow*'s premise is that armed forces are governed by an independent and adequate system of law and regulation – *i.e.* military discipline and court martial – that permits the military prosecuting soldiers for crimes committed in foreign jurisdictions. *See Dow*, 100 U.S. at 170. At the same time, *Dow's* prohibition against subjecting soldiers to foreign jurisdiction reflects the federal interest in protecting soldiers from trials lacking important procedural protections. *See* John Egan, *The Future of Criminal Jurisdiction over the Deployed American Soldier*, 20 Emory Int'l L. Rev. 291 (2006).

Thus, fundamentally contrary to L-3's argument (L-3 Br. 27), *Dow* does not afford immunity, but instead controls jurisdiction alone, that is, it governs the choice between locating an action in local courts of the occupied versus the home country. *Dow*, 100 U.S. at 165 ("the tribunals of the enemy must be *without jurisdiction* to sit in judgment upon the military conduct of the officers and soldiers of the invading army.") (emphasis added); *see also id.* at 169 (describing its holding as reflecting the "doctrine of non-liability to the tribunals of the invaded country for acts of warfare"). While this narrow principle may insulate a U.S. serviceperson from answering to "enemy" courts for violating "enemy" laws, it does not provide immunity for a U.S. serviceperson – let alone a publicly-traded American corporation – from the jurisdiction of American courts and the reach of American law.

Congress has ensured that U.S. courts may hear charges against military personnel for violations of the law of war committed abroad – a regime that would be incompatible with Defendants' exaggerated understanding of *Dow*. *See* 18 U.S.C. § 2340A (Anti-Torture statute), 18 U.S.C. § 2441 (War Crimes Act); 18 U.S.C. §§ 3261-65 (Military Extraterritorial Jurisdiction Act). In addition, by enacting the Alien Tort Statute, 28 U.S.C. § 1350, Congress has unambiguously authorized suits in U.S. courts for violations of the laws of nations. *Dow* itself makes clear that military "remain subject to the laws of war, and are responsible for their conduct only to their *own* government, and the *tribunals* by which those laws are administered." *Dow*, 100 U.S. at 166 (emphases added); *id*., at 169 ("the military should always be kept in subjection to the laws of the country to which it belongs").

Indeed, American courts have the power to review claims against military service members, even outside the military justice system. *Coleman*, 97 U.S. at 514-15 (jurisdiction of military tribunals over soldiers is not exclusive)*; Kennedy v. Sanford*, 166 F.2d 568, 569 (5th Cir. 1948) (per curiam) ("That a soldier in time of war is under military law and answerable to a court martial does not absolve him from prosecution for crimes against federal or State laws committed where such laws are of force."). Accordingly, throughout our history, U.S. courts have adjudicated suits for damages against military personnel in American courts based

on misconduct arising out of war. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a unanimous Supreme Court held that a U.S. Navy Captain was liable for illegally seizing a ship during wartime even though the Captain had acted on a Presidential order. The Court held that the President's orders authorizing seizure of the ship went beyond his statutory authority, and therefore did not immunize the captain from a lawsuit for civil damages. *Id.* at 179. In *Mitchell v. Harmony,* 54 U.S. (12 How) 115 (1851), the Court held a soldier could be sued for trespass for wrongfully seizing a Mexican citizen's goods in Mexico during the Mexican War.

The Supreme Court expanded this long-standing principle subsequent to *Dow* in *The Paquete Habana*, 175 U.S. 677 (1900). Specifically, the Court awarded damages for the seizure of enemy nationals' fishing boats, finding that "an established rule of international law" exempted unarmed, civilian fishing vessels from capture as war prizes and ordered restitution to the foreign claimant. *Id*. at 708. There is no precedent that bars the same tribunals from holding contractors civilly liable for torturing civilians.

Defendants' attempts to propose narrow factual distinctions do nothing to diminish the controlling weight of this precedent. Indeed, the other cases L-3 cites actually affirm the view that there must be accountability for acts which violate the laws of war. In *Freeland v. Williams*, 131 U.S. 405, 416 (1889), the Supreme Court permitted immunity from civil suits only for "an act done in accordance with

the usages of civilized warfare under and by military authority." *See also Ford v. Surget*, 97 U.S. 594, 606-607 (1878) (Mississippi citizen not liable for destroying another citizen's cotton during the Civil War because defendant had acted on military orders that did not violate the laws of war and the usages of civilized warfare); *City of New Orleans v. Steamship Co*., 87 U.S. 387, 394 (1874) ("There is no limit to the powers that may be exerted" in cases of military occupation "save those which are found in the laws and usages of war").

Thus, even assuming L-3 employees could be properly classified as an "occupying force," or deemed tantamount to real soldiers, which they cannot,[10] L-3's torture of civilians was a war crime not prohibited by the military, thereby subjecting L-3 to responsibility for its *ultra vires* acts. As the District Court found,

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[10] The law of war does not equate contractors doing business in a war zone with actual combatants or the "occupying force." In fact, Defendants are neither. Under international law that is relevant to the Court's analysis, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006), Defendants (who are not subject to military training, discipline or punishment) have the status of "civilian", and are recognized as "contractors accompanying the force." *See* Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 4.A(4), Aug. 12, 1949, 6 U.S.T. 3316. *See also* Br. U.S., *Saleh, supra,* at 15, (citing DoD regulations and explaining contractors are expressly prohibited from engagement in combat).

At its core, *Dow* reflects the international law principles that grant a privilege of belligerency (*i.e.*, immunity to kill other enemy belligerents) to members of a state's armed forces. As the Court found, "there could be no doubt of the right of the army to appropriate any property there…which was necessary ... *This was a belligerent right* […]." *Dow*, 100 U.S. at 167 (emphasis added). *See also id* at 169. (describing the "hostile seizure" of property as made "in the exercise of a belligerent right"). The same is not the case for unauthorized and illegal acts of torture carried out by corporate actors who fall outside the military chain of command.

"A defendant can only claim immunity under the laws of war if its actions comport with the laws of war." JA–846. *See also* W. Winthrop, Military Law and Precedents 885, 889 (rev.2d ed.1920) ("The existence, however, of war will not...justify… injuries not sanctioned by the laws or usages of war, nor will it justify wrongs done by irresponsible unauthorized parties. For such acts the offending officer or soldier may be made liable in damages.")[11]

The facts of *Dow* themselves underscore the crucial distinction between authorized and unauthorized wartime acts. The defendant in *Dow* argued that his troops' seizure of enemy property was based on a direct order by President Lincoln requiring the taking of property which might be "necessary or convenient" for military purposes. *Dow*, 100 U.S. at 161. In contrast, President Bush expressly ordered that civilians in Iraq be protected by the Fourth Geneva Convention, and consistently affirmed that the acts of torture at issue in this case violated U.S. law and policy, as well as the United States' international obligations.[12] *See* JA–189; Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian

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[11] The Supreme Court considers Winthrop "the Blackstone of military law." *Hamdan v. Rumsfeld*, 548 U.S. at 597.

[12] After the Abu Ghraib scandal was made public, the United States specifically confirmed that the Geneva Conventions applied to the Abu Ghraib detainees, either through the protections for POWs under the Third Geneva Convention or otherwise under the Fourth Geneva Convention and under Common Article 3. *See* Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004. JA–189.

Internees and Other Detainees, §1-5; U.S. Army Field Manual 34-52 at 1-8; Fourth Geneva Convention, art. 3, 27, 31, 32, 37, 100, 147; 10 U.S.C. §§ 881, 892, 893, 928. *See also* FM 100-21, § 1-39 (contractor employees are required to comply with "with all applicable US and/or international laws"). And while plaintiff's interest in *Dow* to recover the value of "25 hogsheads of sugar" was no doubt important to him, such lost-property actions are incomparable with the commission of acts that violate the prohibition against torture and other acts of cruelty against protected persons set forth in both U.S. and international law.

C. There is No Legal or Factual Support for the Claim That Holding Corporate Actors Accountable for Torturing Defenseless Prisoners Will Hinder the United States in Waging War.

Finally, L-3 warns that law of war immunity is "essential" to avoid hampering military efforts and hindering combatant activities. L-3 Br. 22. This claim lacks any basis in law or fact. First, the cases L-3 relies upon – *Perrin v. United States*, 4 Ct. Cl. 543 (1868) and *United States v. Caltex*, 344 U.S. 149, 155-56 (1952), L-3 Br. 29 – involved suits by private individuals against the government, and challenged the legality and wisdom of the government's wartime policy decisions. As explained by the District Court, actions brought against the government challenging the wisdom of military judgments cannot be equated to claims against private parties regarding conduct unrelated to policymaking. JA–841-846.

Second, there is no factual support for Defendants' self-serving and self-aggrandizing claim that Plaintiffs' suit will threaten United States capacity to wage war effectively.[13] Plaintiffs do not ask this Court to second-guess the Commander-in-Chief's means and methods of warfare or make policy determinations about detention and interrogation practices. JA–67-68 (Amended Compl. ¶¶ 451-55) (alleging Defendants acted contrary to U.S. law and policies, including those governing interrogations). The government always has the power to hire a different company to provide translators, a company that does not permit its employees to rape, beat, and otherwise harm prisoners. As much as Defendants wish to shift the blame to another entity, Defendants' unlawful actions were not the result of "mistakes" or negligence by the military; they were volitional acts by Defendants.

One of Defendants' Abu Ghraib co-conspirators, Charles Graner, unsuccessfully made the same type of blame-shifting argument attempted here by the corporate defendants, but the Court of Appeals for the Armed Forces held his acts "were not in furtherance of an official interrogation." *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010). This Court has resoundingly affirmed this important principle. In *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), this Court rejected a CIA contractor's characterization of his assault on a prisoner as a "battlefield interrogation" justified by the exigencies of war:

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[13] Indeed, the United States has withdrawn from Iraq effective December 31, 2011.

> No true "battlefield interrogation" took place here; rather, Passaro administered a beating in a detention cell. Nor was this brutal assault "conducted by the CIA" – rather, Passaro was a civilian contractor with instructions to interrogate, not to beat. . . . To accept this argument would equate a violent and unauthorized "interrogation" of a bound and guarded man with permissible battlefield conduct.

Id. at 218.

Indeed, to immunize Defendants outrageous conduct from any liability on the grounds that it was somehow sanctioned by the United States "would ignore the high standards to which this country holds its military personnel." *Id*.

III. DEFENDANTS' RAPE AND TORTURE OF PRISONERS DID NOT SERVE ANY MILITARY FUNCTION MERITING DERIVATIVE SOVEREIGN IMMUNITY.

Defendants contracted with the U.S. government to provide translation services in U.S. military prisons in Iraq, in order to reap considerable profits. JA–22 (Amended Compl. ¶ 8). In violation of these contracts and international law, they engaged in rape, torture and other abuses against defenseless civilian prisoners. JA–23-61. For this, Defendants seek to stand in the shoes of the U.S. military and obtain precisely the same benefits that attend actual sovereignty. They are not entitled to do so.

Contractors (and other common law agents) of the United States are entitled to derivative immunity only where their authority to act is "validly conferred" by the government, and their actions are within and consistent with that conferred authority. *See Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940)

("It is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for exercising its will."). A contractor is not entitled to immunity where, as in this case, its actions causing injury to another exceed its authority or that authority was not validly conferred. *Id.* Sovereign immunity exists because it is in the public interest to protect the exercise of certain government functions.

This public interest remains intact when the government delegates that function down the chain of command" to its "private agents." *Butters v. Vance*, 225 F.3d 462, 466 (4th Cir. 2000). However, the government may not delegate functions which are prohibited by law or otherwise forbidden, and "actions beyond those limitations are considered individual and not sovereign actions [because the actor] is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949); *see also Butz v. Economu*, 438 U.S. 478, 489 (1978) ("federal official may not with impunity ignore the limitations which the controlling law has placed on his powers"). Likewise, where there is no chain of command – *i.e*., where a contractor is acting pursuant to government officials' orders or specifications – a contractor cannot obtain the benefits of sovereign immunity.

Defendants are not entitled to derivative sovereign immunity because, based on the allegations in the complaint, Defendants were outside the military chain of command; their conduct was not authorized by the military at any level; and their torture and wanton abuse of Plaintiffs violated U.S. law and military regulation and policy. *See* JA–23-61. Any immunity Defendants may enjoy flows from and is defined by the contractual terms with the government. *See Yearsely*, 309 U.S. at 20-21.[14]

Nor would any public interest be served by allowing Defendants to evade liability for their role in what this Court has described as "sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law" and "stunned the U.S. military, public officials in general, and the public at large." *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 285-86 (4th Cir. 2008). Indeed, wholly apart from the harm Defendants' actions caused Plaintiffs, the Abu Ghraib torture scandal was so devastating to the United States that the Senate Armed Services Committee recognized in its unanimous report on the treatment of detainees in U.S. custody that, "there are serving U.S. flag-rank officers who maintain that the

[14] Defendants also are not entitled to sovereign immunity simply because they conspired with military personnel. Graner and other military co-conspirators have not been granted immunity; they have been court-martialed and sentenced to prison for their involvement in the Abu Ghraib scandal. Regardless, the law is well-established that a conspirator does not enjoy his co-conspirators' immunities. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

first . . . identifiable cause[ ] of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat" is "the symbol[ ] of Abu Ghraib." JA–549.

The public interest in deterring such conduct by corporate contractors is obvious and paramount. L-3 is a for-profit corporation whose employees' malfeasance has caused serious and long-lasting negative repercussions for the military, the United States and Plaintiffs. Had L-3 fulfilled its contractual duties or acted pursuant to U.S. orders, defendant Nakhla, for example, may not have held down a fourteen-year old boy as his co-conspirator raped him. JA–11, ¶20. Had L-3 acted pursuant to its contractual duties, perhaps Nakhla would not have held Mr. Al-Quraishi down while a co-conspirator poured feces on him. JA–23, ¶¶ 16-18.[15] There should be no serious dispute that promoting accountability best serves the public interest.

Defendants argue that *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), immunizes military contractors even when they are alleged to have engaged in outrageous and illegal conduct. L-3 Br. 31-32. But that case is readily

[15] Further, there is a strong public interest in preventing torture, ensuring adherence to and respect for the rule of law (including the laws of war), and complying with the United States' international obligations requiring us to permit torture victims to seek redress in our court system. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

distinguishable in three ways. First, plaintiffs there sued government officials, including President Reagan, and private parties for acts that were performed under the actual authority, and with the approval, of the President. Second, plaintiffs in that case conceded the private parties were authorized agents of the State. *Sanchez-Espinoza*, 770 F.2d at 207 n.4. Third, the Court held that sovereign immunity barred the claims against the government officials and their agents because the challenged acts were "official actions of the United States"; the official conduct of the Reagan Administration's foreign policy in Nicaragua was "authorized by the sovereign"; and as such, the conduct was not "contrary to statutory or constitutional prescription." *Id.* at 207. The Court expressed concern that holding U.S. officials liable in their official capacity for "action authorized by the sovereign as opposed to private wrongdoing" would "necessarily 'interfere with the public administration'" and "restrain the government from acting, or . . . compel it to act." *Id.* (citations omitted).

The District Court properly rejected L-3's effort to rely on *Sanchez-Espinoza* at this juncture. As the District Court observed: "In light of the many prohibitions against torture, L-3 will have to show (and they would seem to face a challenge to do so) that their actions were nevertheless lawful for the Government, else they would be deemed 'individual and not sovereign actions' and not immunized." JA–868-69. The District Court's reasoning is amply supported. As

the Supreme Court explained in *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949), when a statute (such as the Anti-Torture Statue) prohibits certain conduct, "actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief."); *see also Butz v. Economu*, 438 U.S. 478, 489 (1978) ("a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.").

Defendants also mistakenly rely on this Court's decision in *Mangold v. Analytic Services, Inc*., 77 F.3d 1442 (4th Cir. 1996). In *Mangold*, this Court held the contractor was entitled to immunity for its participation in a criminal investigation because government investigations into fraud and abuse can only be effective if witnesses are willing to cooperate. *Id.* at 1448 ("full justification for such immunity also draws on principles of that immunity which protects witnesses in government-sponsored investigations and adjudications."). The Court cited to "two roots," one of which draws necessarily "on the common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators."[16] *Id.* at 1449. *See also Mitchell*, 472 U.S. at 521 (reiterating the historical, common-law basis for prosecutorial, judicial and witness immunity).

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[16] This language also suggests that *Mangold* should be limited to its facts.

Defendants' reliance on *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), is equally misplaced, as the illegal conduct there was specifically ordered by the Saudi government, who had hired a private security contractor for a royal family visit. Discovery revealed that the Saudi government directed the contractor to place a man as head of the security detail rather than the more qualified Butters. *Id.* at 467. On this basis, the court extended foreign sovereign immunity to the contractor, finding such immunity was necessary in order not to discourage American companies "from entering lawful agreements with foreign governments." *Id.* at 466. Analogous to *Boyle*'s "government contractor defense," the Court ruled that if the contractor had made the hiring decision on its own, it would not have been entitled to derivative immunity. *Id.* at 466-67. *Cf. Orem v. Rephann*, 523 F.3d 442, 449 (4th Cir. 2008) (police officer not immune for tazing handcuffed suspect); *Griggs v. WMATA*, 232 F.3d 917, 921 (D.C. Cir. 2000) (no immunity for conduct that "crossed the line from official duty into illicit brutality").

Significantly, the government has not intervened in this case and has not certified, pursuant to the Westfall Act, 28 U.S.C. § 2679, that misconduct by Nakhla and other L-3 actors fell within the scope of the government contract or was expressly directed by the military.[17]

[17] Indeed, the Westfall Act expressly excludes corporate contractors. In any event, as a matter of logic, if military personnel are not immune, contractors cannot obtain derivative immunity.

IV. THIS COURT SHOULD ADOPT THE DISSENT'S REASONING IN *SALEH* AND REJECT THE UNBOUNDED "BATTLEFIELD PREEMPTION" DEFENSE.

Defendants ask this Court to adopt the "battlefield preemption" set out in the majority opinion in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), so as to effectively immunize from lawsuits for-profit corporations when they accompany U.S. armed forces to overseas conflicts. Congress and the Executive Branch have not given contractors such broad immunity. Neither should this Court.

L-3 and the *Saleh* majority try to ground the broad "battlefield preemption" in the FTCA "combatant activities" exception, and the judicial doctrine adopted by the *Boyle* Court. As Judge King explained in his dissent in *Al Shimari* however, *Boyle* can only assist Defendants if it is given an "excessively robust elasticity." 658 F.3d at 429. It is the "gratuitous torture by an independent contractor" and not U.S. war or interrogation policies that are at issue in this case. *Id*. at 430. *Boyle* requires a conflict between federal and state law, and as Judge King found "no federal interest implicates the torture and abuse of detainees." *Id*.

A. Congress Has Never Immunized Government Contractors From Liability.

The FTCA "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres v. United States*, 340 U.S. 135, 139 (1950), making it rather ironic that L-3 looks to this statute for

immunity. The FTCA expressly excludes independent contractors from its scope. In the "Definitions" section governing the FTCA, Congress stated the scope "does not include any contractor with the United States." 28 U.S.C. § 2671. Congress has never thought to bestow its sovereign immunity on defense contractors supporting the military in Iraq or any other war zone. Properly understood, the immunity conferred by the FTCA only applies to the government and "does not shield members of the armed services or other government employees from tort suits." *Al Shimari*, 658 F.3d at 435 (King, J., dissenting); *see also Saleh*, 580 F.3d at 26 (Garland, J., dissenting).

For soldiers and government employees to enjoy congressionally-sanctioned immunity, they must invoke the protection of a separate statute, the Westfall Act. 28 U.S.C. § 2679. Under the Westfall Act, a government employee may invoke the sovereign immunity conferred on the government only if the Attorney General certifies that the employee acted within the scope of his employment. 28 U.S.C. § 2679(d)(1), (4). Like the FTCA, the Westfall Act excludes contractors from its scope, which may be why L-3 has not sought Westfall certification despite trying to stand in the shoes of the sovereign. *Compare In re: XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va.

2009).[18] L-3 seems undeterred by the irony – and unfairness – of its position. As much as it seeks to stand in the shoes of real U.S. soldiers, if it obtains the immunity it seeks under the FTCA, they would receive "unqualified protection that even our citizens in uniform do not enjoy." *Al Shimari*, 658 F.3d at 435 (King, J., dissenting).

B. The Narrow Preemption Doctrine from *Boyle* Is Designed To Protect Only United States' Discretionary Acts.

Although Congress excluded government contractors from the scope of sovereign immunity, the Supreme Court developed a narrow federal common law doctrine that preempts lawsuits raising state law claims against weapons manufacturers. *Boyle*, 487 U.S. at 507. Specifically, *Boyle* created a narrow preemption doctrine designed to protect weapons manufacturers "executing [the] will" of the government from state product liability lawsuits. *Id*. at 506 (internal quotation marks omitted). The Court set forth a two-part test for determining

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[18] Notably, the United States opposed a request for Westfall certification in the case of Xe (formerly known as Blackwater) related to its actions in Iraq. First, it opposed certification for acts that are alleged to have been carried out outside the scope of the contract, notably in the context of a *service provider* contractor working pursuant to task orders. Like the tort claims at issue in this case, the acts alleged to have occurred, framed as common-law tort claims, fell outside the scope of the contractors contract and were alleged to violate federal, state and international law. In relation to the Westfall Act, the U.S. argued that private contractors and corporations are not and cannot be "employees of the government" as defined in the FTCA. *See* United States' Consol. Br. in Opp'n to Defs.' Mot. to Substitute United States in Place of All Defs Pursuant to the Westfall Act, *In re: XE Servs. Alien Tort Litig*, Nos. 1:09-cv-615 et al. (E.D. Va. Oct. 8, 2009 [*Dkt#* 102]),

whether a lawsuit asserting state or common law claims should be preempted: the suit must (1) involve a "uniquely federal interest[]" and (2) create a "significant conflict" with an "identifiable federal policy." *Id.* at 505-07. Under this test, state law claims are preempted only when three conditions were satisfied: the U.S. approved reasonable precise specifications; the equipment conformed to those specifications, and the supplier warned the U.S. about the dangers in the use of the equipment known to the supplier but not to the U.S. *Id.* at 512.

In *Boyle*, the government gave a weapons manufacturer precise specifications for building a helicopter. *Id.* After the manufacturer built the helicopter under those specifications, it was sued under state law for an accident arising out of an asserted design flaw. The Supreme Court concluded that a corporate contractor should not be liable under state law for acting at the government's behest if the United States itself would not be subject to suit under the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). The Court found a significant conflict between the federal interest in "the procurement of equipment by the United States" and the state suit because "the state-imposed duty of care that is the asserted basis of the contractor's liability … is precisely contrary to the duty imposed by the Government contract . . . ." *Id.* at 509. The Court stressed that, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption . . . . [b]ut conflict there must be." *Id.* at 507-08.

In other words, in *Boyle* it was impossible for the contractor to both comply with government directives and with state standards of care. As the Court noted, on the opposite end of the spectrum was a lawsuit that sought to enforce the same contractual duty imposed by the government contract. *Id.* at 508. The defense does not apply even in "an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." *Id.* at 509. Thus, as long as "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care," state law will not generally be preempted. *Id. See also In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990) ("Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'"); *Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203, 1207 (N.D. Cal. 1994) (the "requisite conflict exists only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract.").

Thus, given the Supreme Court's carefully calibrated test for invoking the government contractor defense, the *Boyle* doctrine does not insulate contractors who, in the course of their contract, act *against* governmental interests. As *Boyle* explains, U.S. interests are advanced when a contractor implements a government's discretionary decision. *Boyle*, 487 U.S. at 510 (rejecting the *Feres*-

doctrine because it was both too broad and too narrow for identifying the amount of discretion exercised by the Governmental); *see also Saleh*, 580 F.3d at 22, 23 n. 7 (Garland, J., dissenting) ("No party's pleadings contend that the government required or authorized the contractor personnel at Abu Ghraib to do what state law forbids" and the acts are in violation of "U.S. law"); *Al Shimari*, 658 F.3d at 431 (King, J., dissenting) ("[T]he government rather than the contractor must be in charge of the decisionmaking in order for the contractor to be shielded from liability").

By contrast, in *Jama v. INS*, 334 F. Supp. 2d 662 (D.N.J. 2004), the District Court found the government contractor defense inapplicable to a contractor who ran a detention facility for asylum applicants because the alleged tortious conduct violated contract terms and the duty to keep the detainees safe. The court held "[i]t would defy logic to suggest that the INS could have 'approved' practices that breached this larger duty." *Id*. at 689. *See also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (government contractor defense "may [be] assert[ed]" where government "directed a contractor to do the very thing that is the subject of the claim");

In this case, there is no conflict between applying state law holding Defendants accountable for torture and abuse and the federal interest in condemning torture, particularly that which occurred at Abu Ghraib. How could

federal interests be frustrated by punishing Defendants' misdeeds, such as dragging a man around a concrete floor by a rope tied around his penis? The President of the United States himself proclaimed "the practices that took place in that prison are abhorrent and they don't represent America."[19] Similarly, the Senate "condemn[ed], in the strongest possible terms, the despicable acts at Abu Ghraib prison."[20]

To be sure, federal law and policy prohibit L-3's alleged actions in this case. *See Saleh*, 580 F.3d at 23 n. 7 (Garland, J., dissenting) ("if the contractors' employees committed the acts alleged here, their conduct would violate U.S. law"). Prior to *Saleh*, *Boyle* "had never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy." *Al Shimari*, 658 F.3d at 431 (King, J., dissenting), quoting *Saleh*, 580 F.3d at 23 (Garland, J., dissenting). "Indeed, it is quite plausible that the government would view private tort actions against the perpetrators of such abuses as *advancing* the federal interest in effective military activities." *Al Shimari*, 658 F.3d at 430 (King, J., dissenting) (emphasis in original). Thus, not only was L-3's misconduct not directed by or at the behest of the government, holding L-3 responsible advances, rather than undermines, strong federal interests.

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[19] White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004).

[20] S. Res. 356, 108th Cong. (2004).

This Court should resist the temptation, succumbed to by the *Saleh* majority, to substitute its own views for that of Congress, which has constructed a specific, limited architecture of immunity for distinct categories of government actions and actors, (*see, e.g.*, the Westfall Act, 28 U.S.C. § 2679), and which had every opportunity, given the existence of numerous similar actions, to immunize private contractors working in war zones – but declined to do so. *Cf. Wyeth v. Levine,* 555 U.S. 555, 575 (2009) (Congressional "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness"); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989).

Saleh not only conflicts with congressional prerogatives and with *Boyle*, it also conflicts with Department of Defense regulations, which require that contractors be held accountable for negligent or willful actions which harm third parties. *See* Federal Acquisition Regulation, 73 Fed. Reg. 16,768. The Department expressly concluded that *service* contractors such as L-3 are not in the same posture as those who manufacture weapons to specific government standards, and advised, "to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on

the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties." *Id.*

Accordingly, the majority opinion grants the private contractors immunity from suit the military specifically deemed unnecessary and unwise. Courts should not second guess this considered expert judgment by the military.[21] *See Saleh*, 580 F.3d at 30 (Garland, J., dissenting) ("there is nothing in the pleadings or record to suggest that the abuse alleged here was part of any 'military policy.'")

C. This Court Should Reject the Unbounded Concept of "Battlefield Preemption"

L-3 urges this Court to adopt the novel *Saleh* "field preemption" theory by arguing that the federal power to wage war results in preemption of *any* and all state tort law. Even if it could preempt claims related to waging war, it would have little consequence to Plaintiffs' claims which arise outside the battlefield. Prior to *Saleh*, "[n]o precedent has employed a foreign policy analysis to preempt state law under such circumstances." *Saleh*, 580 F.3d 1, 25-26 (Garland, J., dissenting). For a full discussion of the limits of field preemption doctrine, Plaintiffs respectfully direct the Court to Plaintiffs' Opposition to the CACI Brief.

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[21] L-3 also errs in characterizing their conduct as "combatant activities." Plaintiffs respectfully refer the Court to Plaintiffs' Opposition to CACI for a full discussion of this issue.

In addition, even though Plaintiffs' ATS claims are not on appeal, Defendants seek to dismiss them by arguing that the common law invention of "battlefield preemption" could actually preempt *federal, statutory* claims. *See* L-3 Br. 49-51. Defendants cite no statutory basis for preempting Plaintiffs' ATS claims, nor do they offer any support for *Saleh*'s unsubstantiated conclusion that ATS claims can be displaced merely because they draw from international law. *See Saleh*, 580 F.3d at 16. *Boyle*'s limited defense for contractors is exclusively predicated on a conflict between federal and state law. There is no conflict with a *federal* interest when the basis for jurisdiction is a *federal* statute and the claim is grounded in *federal* common law. *See* Erwin Chemirinsky, Constitutional Law: Principles and Policies 395 (3d ed. 2006) ("preemption doctrines are about allocating governing authority between the federal and state governments"). Accordingly, Defendants' preemption arguments necessarily must be read to exclude Plaintiffs' ATS claims. *See Al-Quraishi*, 657 F.3d at 208, n.4 (King, J., dissenting) (finding the majority had not "disturbed that part of the district court's ruling" declining to dismiss ATS claims).

V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS.

L-3 argues that Plaintiffs' claims present non-justiciable political questions. L-3 Br. 53-55. In addition to relying on the District Court's analysis rejecting this argument, Plaintiffs respectfully refer this Court to Plaintiffs' Opposition to CACI for a full discussion of this issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' CACI Opposition Brief, the appeal should be dismissed for lack of jurisdiction, or the district court's judgment should be affirmed on the merits.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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