No. 09-1335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Nazim Abdullah AL SHIMARI,
Taha Yaseen Arraq RASHID,
Sa'ad Hamza Hantoosh AL-ZUBA'E, and
Salah Hasan Nusaif Jasim AL-EJAILI,
Plaintiffs-Appellees,

v.

CACI INTERNATIONAL INC and
CACI PREMIER TECHNOLOGY, INC.,
Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:08-cv-00827
The Honorable Gerald Bruce Lee, United States District Judge

APPELLANTS' RESPONSE TO BRIEF OF UNITED STATES AS AMICUS CURIAE

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I. INTRODUCTION

To the extent that the United States addresses the merits of CACI's[1] defenses, the U.S. largely agrees with CACI. Principally, the Government asserts that because there are "significant federal interests at stake" that "must be protected" in this action, "federal preemption principles generally apply to the acts of civilian contractors assisting the military in detaining and interrogating enemy aliens in a U.S. military prison in Iraq during wartime." Brief for the United States as *Amicus Curiae* ("U.S. Brief") at 2, 13. The United States also agrees that *Dow v. Johnson*, 100 U.S. 158 (1879), and its progeny might bar Plaintiffs' claims. U.S. Brief at 11-12. Yet notwithstanding the complex and challenging legal issues that led this Court to grant *en banc* rehearing and invite the United States to participate, the Government does not address the merits of CACI's other defenses: Constitutional preemption, derivative absolute immunity, and the political question doctrine. In addition to its areas of agreement with CACI, the United States also advances two arguments that are contradicted by precedent and wholly inconsistent with the positions repeatedly taken by the Government in other cases.

First, the United States posits that appellate jurisdiction here presents a "close question" (U.S. Br. at 1), but ultimately concludes that jurisdiction is lacking. The United States' assessment of this "close question," however, is based on a reading of the law of war immunity cases that places form over substance and

[1] "CACI" refers to appellants CACI International Inc and CACI Premier Technology, Inc.

ignores the practical effect of these decisions. Moreover, with respect to derivative absolute immunity, the Government ignores this Court's holding in *Mangold* that a decision denying that immunity is an immediately appealable order. The United States' position is also newly minted; in prior cases the Government has consistently and vociferously taken the position that denial of immunity pending discovery is an immediately appealable order. The Government neither discloses that discrepancy, nor attempts to explain why the order in this action warrants different treatment.

Second, the United States advocates a narrow exception to combatant activities preemption so that claims for past incidents of torture would not be preempted (except, under the Government's approach, where torture is allegedly committed by a Government official). This proposed exception is unworkable, rests on no statutory basis, is based on a faulty premise concerning availability of remedies other than state tort actions, and is internally inconsistent. It mistakenly attempts to vindicate significant federal interests through the surrogate of state law, which is prohibited by the Constitution.

II. ANALYSIS

A. This Court Has Jurisdiction Over CACI's Appeal

The Government appears to acknowledge that this Court would have pendent jurisdiction over CACI's preemption defenses if jurisdiction exists with respect to CACI's immunity defenses. After arguing that preemption and political question decisions are never immediately appealable, leaving only CACI's

immunity defenses as a potential source of jurisdiction, the Government argues that if jurisdiction exists, the Court should address (and correct) the district court's preemption analysis. U.S. Brief at 13.

Ultimately, however, the Government opines that the district court's denial of CACI's derivative absolute immunity defense is not immediately appealable because the district court expressed a willingness to revisit the question after discovery. *Id.* at 12. With respect to CACI's law of war immunity defense, the United States does not dispute that the district court's denial of CACI's law of war immunity defense was conclusive. Notwithstanding that, the United States is "not prepared at this point" to conclude that the denial of that immunity is immediately appealable. *Id.* at 11-12. The United States also urges a demurrer on the political question doctrine, suggesting that the Court need not consider that subject matter jurisdiction issue *even if* the Court has jurisdiction to consider some of CACI's other defenses. *Id.* at 8-9. Each of these contentions is incompatible with existing precedent and completely at odds with the United States' repeatedly-stated positions on these issues.

1. Appellate Jurisdiction Exists to Review the District Court's Denial of Derivative Absolute Official Immunity

With respect to CACI's derivative absolute immunity defense, the United States argues that this Court lacks jurisdiction because of the district court's view that "defendants' entitlement to immunity would depend on further discovery." U.S. Brief at 12. This, so the theory goes, renders the district court's denial of immunity "not conclusive," and CACI's appeal "premature." *Id.* The Government

fails to cite *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1453-54 (4th Cir. 1996), where this Court held that denials of derivative absolute immunity are immediately appealable. The Government also fails to address *McVey v. Stacy*, 157 F.3d 271, 276 (4th Cir. 1998), which holds that a district court's claimed need for discovery does not preclude an immediate appeal of the denial of immunity.

A collateral order determination is categorical and focuses on "the entire category to which a claim belongs" and is not an "individualized jurisdictional inquiry." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605-06 (2009) (citations omitted). The Justice Department has been very clear that denials of absolute immunity are immediately appealable. *See* Brief of United States at 13 in *Wuterich v. Murtha*, No. 07-5379 (D.C. Cir. Aug. 6, 2008) ("Because the District Court's decision denies Congressman Murtha absolute immunity from suit, it is immediately appealable.").[2]

Indeed, the Government consistently sings a different tune in other cases, arguing that a district court's claimed need for discovery does not deprive an appellate court of jurisdiction over an appeal from an order denying immunity. As the United States asserted in *Wuterich*:

[2] The only caveat to immediate appealability is that the district court's decision must turn on a question of law, but as the United States has explained, this is always satisfied on a Rule 12(b)(6) motion, which is decided based on "the undisputed facts, or plaintiff's version of the facts to the extent they are disputed." Brief of United States at 10 in *Howards v. Reichle*, No. 09-1201 (10th Cir. July 2, 2009).

> ***For purposes of appealability and absolute immunity, the discrepancy between an outright denial of immunity and a denial of immunity pending discovery is a distinction without a difference.*** As the Supreme Court and this Court have explained, the whole point of an individual's entitlement to qualified or absolute immunity is to shield the person from the burdens and distraction of the litigation itself, and not just from the possibility of an eventual adverse judgment. . . .

Id. at 15-16 (emphasis added). The Government recently reaffirmed its position in *Wuterich*. Brief of United States at 9 in *Sandoval v. Martinez-Barnish*, No. 10-1518 (10th Cir. Jan. 2011) (citing with approval the D.C. Circuit's holding in *Wuterich* that "because district court's denial of certification pending discovery denied Congressman the absolute immunity guaranteed him by the Westfall Act, the denial was immediately appealable"). Nothing about this appeal warrants a different result than that which the Government sought and obtained in other cases.

2. The District Court's Rejection of Law of War Immunity Is Immediately Appealable

With respect to CACI's assertion of law of war immunity, the United States recognizes that the precedent on which CACI relies "may well inform the ultimate disposition of [Plaintiffs'] claims." U.S. Brief at 11. Nevertheless, the United States indicates that it is "not prepared *at this point* to conclude that the contractor defendants have demonstrated a right to immediate review of their contentions." *Id.* at 11-12 (emphasis added). The Government reaches this curious conclusion based solely on its observation that the Supreme Court, in its 1879 decision in *Dow*, 100 U.S. at 166-67, did not use the term "immunity." From that premise, the Government speculates that the doctrine might be a mere defense to liability and

not an immunity from suit. *Id.* at 11. This hypothesis, however, ignores key language from *Dow*. Moreover, the heavy reliance on the word choices in *Dow* runs counter to the United States' position that determining whether an order qualifies for collateral order jurisdiction involves a "practical rather than a technical construction." Brief of United States at 12 in *United States v. Mitchell*, No. 09-4718 (3d Cir. Feb. 5, 2010).

Though *Dow* used the term "exemption" from suit rather than its synonym "immunity", the only fair reading of that decision is that it recognizes an immunity from suit. The entire justification in *Dow* is not the need to spare the defendant the financial hardship of a monetary judgment, but the need to prevent the negative impact on military affairs that tort suits would entail. *See Dow*, 100 U.S. at 160, 165. Accordingly, the Court characterized its holding as an "exemption from . . . civil proceedings." *Id.* at 165. The Court held that those covered by its holding are subject to criminal prosecution by their own country, but "are amenable to no other tribunal." *Id.* at 166. To summarize its holding, the Court stated that occupying forces were not governed by "the civil law of the invaded country" or "the civil law of the conquering country." *Id.* at 170. To question whether *Dow* involves an immunity is to turn a blind eye to the entire basis for the Court's decision.

3. This Court Has Jurisdiction to Review the District Court's Rejection of CACI's Political Question Defense

CACI's argument for jurisdiction over the issue of political question is a limited one: if this Court has jurisdiction to consider immunity, the Court necessarily has jurisdiction to consider CACI's political question defense because

that defense implicates the Court's subject-matter jurisdiction. CACI's position has a good pedigree. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *Interstate Petroleum Corp. v. Morgan*, 249 F.3d 215, 219 (4th Cir. 2011) (*en banc*) ("The Supreme Court has stated that it is the 'special obligation' of appellate courts to evaluate not only their own subject matter jurisdiction but also [the jurisdiction] of the lower courts in a case under review, even though the parties are prepared to concede it. In fact, we must consider questions regarding jurisdiction whenever they are raised, and even *sua sponte*." (internal quotations and citations omitted)).

The Government, however, would have this Court disregard that "special obligation" *even if* the Court concludes that CACI's immunity defenses are subject to immediate appeal. U.S. Brief at 8. The Government supports this proposition by arguing that this Court declined to consider "standing" in an "analogous" context in *Rux v. Sudan*, 461 F.3d 461, 476 (4th Cir. 2006). But *Rux* is not at all analogous on this point. In *Rux*, the Court declined to exercise pendent jurisdiction over a *statutory* standing issue (that the district court had not decided) under the Death on the High Seas Act. Unlike the political question doctrine here, the statutory standing issue in *Rux* simply did not implicate the subject-matter jurisdiction of this Court.

B. Federal Preemption

The Government does not address CACI's assertion that the Constitution's exclusive commitment of the prosecution of war to the federal government,

including the resolution of claims, preempts state tort regulation of wartime conduct. *See* CACI Br. at 36-38. With respect to CACI's assertion of a combatant activities preemption defense, the United States' position is generally consistent with the approach advocated by CACI, except that the proposed "torture exception" to preemption lacks any principled foundation in the law.

1. The U.S. Brief Is Largely Consistent With CACI's Position on Combatant Activities Preemption

The U.S. does not defend, in any way, shape or form, the district court's combatant activities preemption analysis. Indeed, the Government is quite clear that the district court's preemption analysis should not stand. If this Court has jurisdiction, the United States submits that this Court should reject the district court's preemption analysis in favor of one that gives far greater heed to the primacy of the federal interests at stake. U.S. Brief at 13. If this Court concludes that it lacks appellate jurisdiction, the U.S. submits that the district court should reconsider its preemption analysis (*id.* at 2, 3), and that interlocutory appellate review under 28 U.S.C. § 1292(b) or by writ of mandamus may be appropriate if the district court declines to sufficiently revise its preemption framework. U.S. Brief at 6.

While Plaintiffs contend that the preemption framework in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), has no application here (Pl. Br. at 39), the United States agrees that "*Boyle* is the proper starting point for the preemption analysis in these cases." U.S. Brief at 14. Contrary to Plaintiffs' position and the district court's analysis, the United States recognizes the "significant federal

interests at stake" in "protecting the conduct of the military's combat operations from interference by litigation based on state tort law" (U.S. Brief at 2), and the "relatively minimal state interests" implicated by such activities. *Id.* at 13.

The U.S. notes and embraces the D.C. Circuit's preemption decision in *Saleh v. Titan Corp.*, 580 F.3d 1, 5-11 (D.C. Cir. 2009), stating that the D.C. Circuit's "approach is generally consistent with the Supreme Court's decision in *Boyle*." U.S. Brief at 15. The Government's minor quarrel with *Saleh* is that, in the United States' view, *Saleh* focused on whether the challenged activities themselves were combatant activities rather than on whether the challenged activities *arise out of* the military's combatant activities. *Id.* at 17. As the United States notes, the "arising out of" language in the combatant activities exception is "purposefully broad" (U.S. Brief at 19), and this quibble with *Saleh* only strengthens CACI's preemption argument.[3]

In light of the federal interests involved, the Government proposes a modification of the *Saleh* preemption test:

> For the purpose of these cases, the Court should hold that claims against a contractor are generally preempted to the extent that a similar claim against the United States would be within the combatant activities exception of the FTCA, and the contractor was

[3] Notably, the U.S. also adopts the broad definition of "combatant activities" applied in *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948), and *Koohi v. United States*, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992), and notes that "district court decisions are generally consistent with the Ninth Circuit's standard in *Johnson* and *Koohi*. U.S. Brief at 18-19. Thus, the U.S. rejects the analysis of the district court (JA.0445) and Plaintiffs (Pl. Br. at 10-11, 45-46) that would limit combatant activities to the act of firing of a weapon at an enemy.

> acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose, particularly in situations where the contractor was integrated with military personnel in the performance of the military's combat-related activities.

U.S. Brief at 17-18. The Government acknowledges that the practical effect of this test will be to preempt state law claims like those present here. In fact, the Government allows that the "acting within the scope of its contractual relationship" concept it proposes is a broad one and, contrary to Plaintiff's position (Pl. Br. at 40), applies even where the contractor was *violating* the terms of its government contract. U.S. Br. at 20; *see also Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (government officials enjoy qualified immunity from, and court declines to recognize *Bivens* action for, claims of torture, abuse, sexual assault, assault, deprivation of medical care, death threats, and others arising from detention and interrogation in Iraq).

Here, there is no dispute concerning the scope of CACI's contractual duties. The military brigades assigned to Abu Ghraib prison "suffered from a severe shortage of military personnel," and the United States subsequently contracted with CACI to supply contractors to support the military's intelligence-gathering effort at Abu Ghraib prison. JA.0408. Plaintiffs allege that they suffered injury while detained by the U.S. military at Abu Ghraib prison (JA.0016), and allege that CACI employees were acting within the scope of their employment. JA.0022 ("The acts of CACI employees constitute acts of CACI."). Plaintiffs specifically allege a nexus between the conduct of CACI employees and CACI's support of the war effort: "Defendants' acts took place during a period of armed conflict, in

connection with war." JA.0032. Thus, the record on CACI's motion to dismiss is sufficient to satisfy the "scope of the contractual relationship" test proposed by the United States, in the event the Court adopted such a test.

Moreover, as the United States noted in recommending denial of *certiorari* in *Saleh*, if Plaintiffs alleged conduct by CACI employees that was disconnected from their contractual obligations, CACI would not be liable. *See* Brief of United States as *Amicus Curiae* at 16-17 in *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 2011) ("Whatever force that argument [that preemption fails because the tortfeasors acted outside the scope of their employment] might have in the abstract, or in other contexts, here the only defendants are civilian contractors (not the individual contractor employees). The employees' actions must, by definition, fall within the scope of their employment for petitioners to prevail under the theory of *respondeat superior*."). Thus, Plaintiffs' claims against CACI fail either because they are preempted or because *respondeat superior* liability cannot attach.

2. There Is No Principled Basis for the "Torture Exception" Proposed in the U.S. Brief

While supporting broad preemption of claims arising out of interrogation at battlefield detention facilities, the United States proposes a "torture exception" to preemption that is riddled with counter-exceptions and caveats. Essentially, the U.S. endorses an *ad hoc* "torture exception" to preemption that: (1) does not apply if the plaintiff remains in foreign detention; (2) is strictly limited to claims falling within the definition of torture in the Anti-Torture Statute, 18 U.S.C. § 2340; (3) might not preclude preemption of current or future torture claims because of

"enhanced tools to hold contractors accountable"; and (4) does not permit tort suits against former, current, or future government employees for torture. U.S. Brief at 23.

In those areas not subject to an exception to the exception, which seems to be limited to the claims of torture against the government contractors here, this proposed exception would threaten to swallow the preemption rule the U.S. advocates. The Government's proposal suffers from numerous flaws.

First, plaintiffs will denominate their claims as "torture" to avoid preemption. As the Supreme Court correctly noted in *Dow*, "[n]or can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." 100 U.S. at 165.

Second, there is no state law tort for "torture." As a result, the United States would have a court graft a federal criminal law standard for torture, from a federal statute that provides no private right of action, onto state-law tort claims such as assault. But it is not the province of the federal judiciary to redefine the elements of a state law cause of action. *Childers v. Chesapeake and Potomac Tel. Co.*, 881 F.2d 1259, 1265 (4th Cir. 1989) ("Federal courts, however, are required under *Erie*, 304 U.S. at 64, to rely upon state law as it presently exists and not to invite state courts to redefine their own state tort remedies."); *see also id.* ("The Court recognized in [*Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988),] that the

responsibility for defining the elements and scope of a state cause of action rests with the state legislature and state courts.").

This proposed approach also would involve states, which have no relevant interest here, in the regulation of the United States' conduct of war despite a constitutional framework that prohibits such regulation. CACI Br. at 36-39. Moreover, because many of the alleged acts that Plaintiffs claim constituted torture were in fact interrogation techniques approved at the highest levels of the federal government (CACI Br. at 17-19, 51), the Government's approach would involve the judiciary, and the states, in deciding the nonjusticiable question whether government-approved interrogation techniques constituted torture. CACI Br. at 48-52.

Third, the Government cites the Anti-Torture Statute, 18 U.S.C. § 2340, as reflecting a federal policy against torture, and suggests that, at least for claims of past torture against contractors, the federal courts properly might use state tort law to fill any gap caused by a lack of a federal private right of action. This argument is unsupported and unsupportable. In enacting the Anti-Torture Statute—a criminal prohibition—Congress did not create a civil right of action. Congress did create a private right of action for claims of torture in the Torture Victims Protection Act, 28 U.S.C. § 1350 note, but it expressly limited that private right of action to acts taking place under color of *foreign law*.

The United States is well aware that the TVPA creates no private right of action here. In fact, the Government repeatedly (and recently) has taken the

position, in cases involving allegations of torture in military detention, that Congress's decision not to create a private right of action calls not for judicial gap-filling, but respect for Congress's decision to make the available remedy solely a criminal one:

> The D.C. Circuit has properly held that military detention presents a sensitive and unique context, pertaining directly to matters of national security and military affairs, and that if damage claims are to be afforded to persons formerly detained by the U.S. military, such a cause of action must be enacted by Congress, and not created by the judiciary.

United States Pet. for Reh'g at 1in *Vance v. Rumsfeld*, No. 10-1687 (7th Cir. Sept. 22, 2011); *id.* at 12 ("It speaks volumes that while creating this administrative mechanism for monetary redress, Congress did not enact a statutory cause of action for claims of mistreatment during military detention."); Brief of United States at 16 in *Ali v. Rumsfeld*, No. 07-5178 (D.C. Cir. Oct. 15, 2010) ("The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." (quoting *Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006))).

Fourth, the U.S. seeks to limit its proposed "torture exception" to claims of *past* torture (U.S. Brief at 23), arguing that the preemption calculus has changed because the federal government now has enhanced tools for addressing contractor misconduct. This argument is based on a faulty premise. The United States does not specify what "tools" were purportedly lacking at the time of the conduct

complained of here, and the Government was not without tools to take action in response to Plaintiffs' allegations.

The U.S. references the current availability of criminal prosecution for acts of torture, but all CACI employees serving at Abu Ghraib prison were American citizens and the United States assuredly had criminal jurisdiction to prosecute any alleged acts of torture by American citizens. *See* Anti-Torture Statute, 18 U.S.C. §§ 2340, 2340A.[4] Yet as the D.C. Circuit noted in *Saleh:* "[T]he government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal or contract proceedings have been instituted against the defendants. This fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." 580 F.3d at 10. And as this Court is aware, the United States has a demonstrated capacity to prosecute such claims where appropriate. *See United States v. Passaro*, 577 F.3d 207, 214-15 (4th Cir. 2009).

The U.S. also references the availability of an administrative claims process for addressing bona fide claims of detainee abuse. *Id.* at 22. But as the United States acknowledges, that administrative claims process remains available for *these Plaintiffs*, if they have valid claims of detainee abuse. *Id.*, *see also Saleh*, 580 F.3d at 2-3. Thus, the availability of a monetary remedy and criminal prosecution are

[4] Congress expressly made its criminal prohibition on torture extraterritorial, and expressly provided that the statute's jurisdictional reach covered all U.S. nationals. 18 U.S.C. § 2340A(a), (b)(1). Thus, the 2005 extension of the Military Extraterritorial Jurisdiction Act invoked by the Government was unnecessary to make torture a prosecutable crime.

not "new tools" for addressing acts of torture. Plaintiffs simply have elected not to avail themselves of the administrative claims process, and the United States has not deemed it appropriate to pursue criminal prosecution.

Fifth, the U.S. argues that the exception to preemption for past incidents of torture should not apply to tort claims against government officials. U.S. Brief at 23 n.8. The United States reaffirms its position that acts of torture by government employees may fall within the scope of their employment, barring those claims. *Id.* Cognizant that its position would permit government officials to torture with no tort remedy for the torture victims, the U.S. seeks to justify its proposed disparate treatment of civilian contractors and government employees because of the "greater accountability of federal employees, who are subject to administrative discipline . . . as well as criminal penalties." *Id.* This position is not defensible.

The Government makes no attempt to explain how CACI's employees would somehow be invulnerable to criminal prosecution under the Anti-Torture Statute while government personnel would be subject to that statute. With respect to "administrative discipline," it is hardly likely that administrative remedies are a credible option for addressing an act of torture; thus the type of administrative discipline available provides scant basis for distinguishing between federal employees and contractors for preemption purposes. But to the extent administrative remedies are relevant, wartime contractors are not immune from discipline by military commanders. It has been true from the earliest days of the Republic that a commander has the power to dismiss misbehaving civilians from

employment and expel them from a military camp. Dig. Op. Judge Advocates General of the Army 151 (1912) ("*Held* that retainers to the camp, such as officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial by court-martial in our service, but they have generally been dismissed from employment for breaches of discipline by them.").

The Government's meandering "torture exception" to preemption is not a viable doctrine. It is based on federal interest embodied by a criminal statute in which Congress declined to create a private right of action. It is based on the fictitious premise that the federal government somehow lacked the tools for addressing the claims raised by Plaintiffs here. It is based on a constitutionally forbidden role for state law in the United States' conduct of war. And it proposes an exception to the exception for government employees that also is based on the incorrect premise that the federal government had greater tools available for addressing claims of torture by government employees than for claims involving civilian contractors.

Respectfully submitted,

/s/ John F. O'Connor

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January 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2012, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, which will send notice of such filing to all registered CM/ECF users.

/s/ John F. O'Connor

John F. O'Connor