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' REPLY BRIEF

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I. INTRODUCTION

This is the first case in the history of the Republic in which a federal court has allowed aliens, detained as enemies by the United States military in a foreign war zone, to pursue state law tort claims relating to their detention and thereby subject the United States' conduct of war to judicial review. Through their singular entry in this case, Plaintiffs seek to use state tort law to establish the standard of care for battlefield interrogations. The district court approved, reasoning that because the United States military chose to use civilian contractors to augment the force in the war in Iraq, the court and Plaintiffs should police the consequences of that choice using state tort law. That decision ignores the Constitution, which clearly, repeatedly and forcefully forbids the states from *any* role in the conduct of war, and just as unequivocally allocates review of military judgments and decisions to the political branches. Under the Constitution, making and resolving war is exclusively the province of the federal government, which is perfectly capable of calling to account those whose conduct violates the law. *See, e.g., United States v. Passaro,* 577 F.3d 207 (4th Cir. 2009).

Plaintiffs emphasize again and again that they were released from Abu Ghraib prison without charge, suggesting that this supports the inference that they were wrongly detained. Pl. Br. at 6-8. Just so. Despite the presence of federal criminal laws (Pl. Br. at 26) and the pervasive scrutiny of federal investigations, the United States has never charged any CACI employee with mistreatment of any detainee in Iraq. Indeed, Plaintiffs' Amended Complaint alleges no actual interaction between Plaintiffs and CACI employees, and relies on a co-conspirator

liability theory that merely restates the elements of that doctrine (JA.0022). Yet Plaintiffs' brief proceeds with the presumption that CACI is guilty of all manner of misconduct not even alleged in their complaint.

There are two basic threads running through Plaintiffs' brief. The first is Plaintiffs' mischaracterization of CACI's legal arguments. There is hardly an issue in this appeal in which Plaintiffs fairly characterize CACI's arguments. This Court is not helped by briefing that addresses caricatures.

The second is Plaintiffs' mischaracterization of the record. Other than with respect to its political question argument, CACI is bound to accept the *well-pleaded* factual allegations from the Amended Complaint, where Plaintiffs do not allege any contact between themselves and a CACI employee. But neither CACI nor this Court is bound by Plaintiffs' attempt to recast their allegations on appeal. While Plaintiffs told the district court that their case was based on a conspiracy theory reaching the highest levels of the Executive Branch (JA.0382), Plaintiffs now try to avoid the foreign policy implications of their allegations by telling this Court that the only government "co-conspirators" are low-level soldiers (Pl. Br. at 6). At every turn, Plaintiffs revel in calling CACI "torturers," though that epithet is not borne out by the factual allegations in the Amended Complaint. In any event, it makes no difference "with what denunciatory epithets the complaining party may characterize [the defendants'] conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Dow v. Johnson*, 100 U.S. 158, 165 (1879). When CACI's legal defenses are considered in light of the actual allegations of Plaintiffs' Amended Complaint, the inexorable conclusion is

that this Court should reverse the district court and direct that this action be dismissed with prejudice.

II. ARGUMENT

A. Plaintiffs' Brief Mischaracterizes the Allegations in the Amended Complaint

Plaintiffs say their Amended Complaint alleges that "CACI and its co-conspirators" abused each of the Plaintiffs. *See, e.g.*, Pl. Br. at 6-8. But the Amended Complaint *never* alleges that a CACI employee abused Plaintiffs, and instead states allegations of abuse in the passive voice to conceal their inability to allege any contact between Plaintiffs and any CACI employee.[1] Plaintiffs' connection of these claims to CACI is by the thinnest of allegations of conspiracy: "CACI conveyed its intent to join the conspiracy, and ratified its employees' participation in the conspiracy, by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." JA.0022.

Plaintiffs assert in their brief that their alleged torture conspiracy involved only low-level soldiers (JA.0006), but told the district court that the conspirators included "high-level Executive Branch and military officials" (JA.0382). It is no coincidence that Plaintiffs have revamped their conspiracy allegations a few weeks after this Court held that the political question doctrine barred claims that would

[1] *See, e.g.*, JA.0018 ("Mr. Al Shimari was beaten."); JA.0019 ("Mr. Rashid was stripped and kept naked."); JA.0020 ("Mr. Al-Zuba'e was repeatedly beaten."); JA.0021 ("Mr. Al-Ejaili was subjected to repeated beatings.").

require judicial review of "actual, sensitive judgments made by the military." *Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011).

B. This Court Has Jurisdiction Over CACI's Appeal

1. CACI's Request that the District Court Issue a 28 U.S.C. § 1292(b) Certification Does Not Undermine This Court's Jurisdiction

Plaintiffs argue that CACI's request that the district court issue a 28 U.S.C. § 1292(b) certification is somehow an "appreciate[ion of] the weakness of the jurisdictional basis for this appeal." Pl. Br. at 14. Plaintiffs' suggested inference could not be more wrong.

The initial panel decision *upheld* CACI's position that the collateral order doctrine applied. *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413, 415 (4th Cir. 2011). In dissent, Judge King expressed doubt as to the existence of appellate jurisdiction; in the companion case of *Al Quraishi* he observed that cases involving battlefield conduct were appropriate candidates for § 1292(b) certification. *Al Quraishi v. L-3 Svcs., Inc.*, 657 F.3d 201, 213 (4th Cir. 2011).

When this Court granted rehearing *en banc*, CACI followed Judge King's lead and asked the district court to certify its Order for interlocutory appeal so this Court would have the option, but not the obligation, to reach the merits without having to address jurisdictional issues. CACI identified four decisions in which courts had held that a district court retains jurisdiction to issue a post-appeal § 1292(b) certification. *Marrese v. Am. Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530,

532 (4th Cir. 1991); *Pelt v. Utah*, 539 F.3d 1271, 1274 (10th Cir. 2008); *In re Jartran*, 886 F.2d 859, 861-64 (7th Cir. 1989). There is no contrary authority. Plaintiffs disputed the district court's jurisdiction, and further argued that even if jurisdiction existed, the district court should decline certification on an estoppel theory. Dist. Ct. Dkt. [132] at 9-11. The district court held that it lacked jurisdiction, without any explication and without reference to the decisions cited by CACI. Dist. Ct. Dkt. [135] at 1. The only inference supported by these facts is that Plaintiffs, despite this appeal having been pending for over two-and-a-half years, wish to delay the day when the significant legal issues present here receive appellate scrutiny.

2. The District Court's Denial of CACI's Immunity Defenses Is An Immediately-Appealable Collateral Order

a. CACI's Law of War Immunity Defense and Derivative Absolute Official Immunity Defense Are Immunities For Which Collateral Order Appeal Is Available

Plaintiffs' contention that law of war immunity is really just a defense to liability cannot be reconciled with precedent. In *Dow*, 100 U.S. at 165, the Court recognized an "exemption" from civil proceedings. The Court explained that other than criminal prosecution, occupying personnel "are amenable to no other tribunal." *Id.* at 166; *see also See Moyer v. Peabody*, 212 U.S. 78, 85-86 (1909) (Colorado National Guard commander had an "immunity" and there was no "suit authorized by law"); *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981)

(government officials declining to appear in West Berlin court "were only exercising the historic immunities of military forces in friendly foreign countries").

The *Dow* Court justified its holding not on the need to prevent liability, but on the costs associated with the mere filing of suit. *Dow*, 100 U.S. at 165 (if civil suits were allowed, "the efficiency of the army as a hostile force would be utterly destroyed"); *id.* at 160 ("[T]here might spring up such a multitude of suits as to keep the officers of the army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks.").

Moreover, since the collateral order doctrine is applied on a categorical basis,[2] it would be common for tort suits arising out of occupation conduct, if not dismissed, to proceed while the war/occupation is in progress, disrupting the military mission as in-theater servicemembers and contractors have to deal with the litigation as parties or witnesses. *See Dow*, 100 U.S. at 165-66.

Plaintiffs next assert that derivative absolute official immunity is not a genuine immunity. Pl. Br. at 20. But this Court recognized this immunity as "absolute" and held that it falls within the collateral order doctrine. *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1453-54 (4th Cir. 1996).[3] Plaintiffs try to

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[2] *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996).

[3] *See also Murray v. Northrop Grumman Information Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (government contractor performing contracted-for government function); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998) (same); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998) (Medicare insurer); *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997); *TWI d/b/a Servco Solutions v. CACI Int'l Inc*, 2007 WL 3376661, at *1 (E.D. Va. 2007).

distinguish *Mangold* as "fact-bound" (Pl. Br. at 20), but collateral order analyses are "categorical" based on the category of order appealed, and not dependent on the facts of a particular case. *Behrens*, 516 U.S. at 312; *McVey v. Stacy*, 157 F.3d 271, 276 (4th Cir. 1998).[4]

b. The District Court's Denial of CACI's Immunity Defenses Was "Conclusive"

Plaintiffs concede that the district court's denial of law of war immunity is conclusive. With respect to derivative absolute official immunity, Plaintiffs argue that the district court's order is not conclusive because the district court stated some willingness to revisit its decision after discovery. Pl. Br. at 18-19. Tellingly, Plaintiffs do not cite *Behrens*, 516 U.S. at 308, in their discussion of conclusiveness. In *Behrens*, the Supreme Court held that immunity involves a right "to avoid the burdens of discovery," and "[w]hether or not a later summary judgment motion is granted, denial of a motion to dismiss is conclusive as to this right." *Id.*

This Court's decision in *McVey* reaches the same conclusion. Plaintiffs quote one-half of a sentence from *McVey* for the proposition that "'when a trial court concludes that it has insufficient facts before it on which to make a ruling' as

[4] Plaintiffs quote a sentence fragment from *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989), to argue that immunity-based collateral order appeals must "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur." Pl. Br. at 16. Plaintiffs hedge that assertion in *Al Quraishi*, as qualified immunity would not qualify. Pl. *Al Quraishi* Br. at 19 n.2. Moreover, the quoted language from *Midland Asphalt* addresses the unique treatment of the collateral order doctrine in the *criminal* context. *Midland Asphalt*, 489 U.S. at 799.

here, such conclusion would not be directly appealable." Pl. Br. at 19 n.4 (quoting in part *McVey*, 157 F.3d at 275-76). But Plaintiffs' proffered quotation is from a paragraph addressing how one might view the issue "at first blush." *Id.* at 275-76. The Court proceeds to explain that this "first blush" instinct is unsound because the right not to participate in discovery is irrevocably defeated even if the immunity defense can be reasserted on summary judgment. *Id.*at 276.

Indeed, denial of immunity at the motion to dismiss stage involves no factual inquiry whatsoever because what is scrutinized is "the defendant's conduct *as alleged in the complaint*." *Id.*, *see also Behrens*, 516 U.S. at 310. In *McVey*, this Court contrasted the pure legal questions posed by a motion to dismiss based on immunity, where a collateral order appeal lies, with factual disputes on summary judgment as to what the plaintiff could prove at trial, where a collateral order appeal is not available. *McVey*, 157 F.3d at 275 (citing *Johnson v. Jones*, 515 U.S. 304 (1995)). Here, CACI accepts Plaintiffs' well-pleaded allegations as true, and challenges the district court's legal conclusion that it is not immune from suit on these alleged facts.

3. Plaintiffs Mischaracterize CACI's Jurisdictional Argument Regarding Political Question

Plaintiffs effectively acknowledge that if there are immediately appealable issues in the district court's order, *e.g.*, immunity, this Court has jurisdiction to consider, and should consider, whether the political question doctrine renders this case nonjusticiable. Pl. Br. at 20. As both of CACI's immunity defenses are properly before this Court, this Court should decide whether this case is justiciable

under the political question doctrine. That result flows from the principle that subject matter jurisdiction is a threshold question.

4. Plaintiffs' Amici Demonstrate That CACI's Preemption Defenses Are Inextricably Intertwined With CACI's Immunity Defenses

In its opening brief, CACI explained how the tests for CACI's immunity and political question defenses so overlap with the applicable test for preemption that pendent appellate jurisdiction exists over CACI's preemption defense. CACI Br. at 8-10.[5] Plaintiffs steer clear of any discussion of the tests for immunity, political question, and preemption because, as CACI argued, those tests involve consideration of substantially the same issues.

While Plaintiffs steadfastly avoid comparing the tests for immunity and preemption, Plaintiffs' own *amici* make CACI's point. *See* Br. of Prof. of Civ. Proc. & Fed. Cts. as *Amici Curiae* ("Law Prof. Br.") at 17-18. *Amici* seek to quash appellate review of derivative absolute official immunity by arguing that the considerations for this defense are essentially the same as for CACI's preemption defenses. *Id.* at 17 ("Defendants have repackaged their government contractor preemption defense into an 'immunity' claim . . . ."); *id.* at 22 (calling defendants' derivative absolute immunity defenses "reiterations of their primary defense under the government contractor doctrine"). It might be that these *amici* would resolve

[5] Plaintiffs chide CACI for supposedly dropping "necessarily" from its description of the test for pendent jurisdiction. Pl. Br. at 22 n.6. However, CACI argued that "[t]his Court's decision on either CACI's immunity defenses or the political question doctrine will *necessarily* answer the central question presented by CACI's appeal regarding preemption . . . ." CACI Br. at 8 (emphasis added).

this substantial overlap by not recognizing derivative absolute official immunity, but this Court has already crossed that bridge in *Mangold*, 77 F.3d at 1447-50, and other courts have followed suit.[6] The consequence of the substantial overlap between CACI's immunity and preemption defenses is not to deny immediate appeal of a well-recognized immunity, but to exercise pendent jurisdiction over CACI's preemption defenses. *See Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006).

C. CACI Is Immune From Suit

1. CACI Is Immune From Plaintiffs' Suit Under the Law of War

Law of war immunity provides an immunity from civil suit for "any act done in the prosecution of a public war." CACI Br. at 26 (quoting *Freeland v. Williams*, 131 U.S. 405, 417 (1889)). Given Plaintiffs' allegation that CACI's "acts took place during a period of armed conflict, in connection with hostilities" (JA.0032), their claims fall squarely within this immunity.

Plaintiffs contend that law of war immunity affects only the jurisdiction of courts in occupied territories, and has no effect on suits brought in other courts or on the application of the occupied territory's laws to occupation personnel. Pl. Br. at 24-26. Plaintiffs' position is contradicted by *Dow*, where the Court explained that its holding had no effect on the *criminal laws* of the occupier, but that occupation personnel "are amenable to *no other tribunal*." *Dow*, 100 U.S. at 166

[6] *See* note 3, *supra*.

(emphasis added). To punctuate the effect of its holding on civil litigation, the Court explained that neither "the civil law of the invaded country," nor "*the civil law of the conquering country*" could govern conduct in the prosecution of war. *Id.* at 170 (emphasis added). Law of war immunity has been applied in many cases filed in courts outside of occupied territory, cases that would have come out the other way if Plaintiffs' position were correct.[7]

As for Plaintiffs' claim that law of war immunity has no effect on the occupying personnel's amenability to Iraqi *law*, the Supreme Court held in *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878), that the defendant was "*not subject to the laws* nor amenable to the tribunals of the hostile country."[8] The administrator of the occupation government in Iraq reaffirmed in CPA Order 17 that "under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the *laws or*

[7] *See, e.g.*, *Moyer*, 212 U.S. at 85 (suit filed in federal district court); *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897) (suit filed in federal district court); *Freeland*, 131 U.S. at 418 (suit filed in West Virginia state court); *Ford v. Surget*, 97 U.S. 594, 606-07 (1878) (suit filed post-war in Mississippi state court).

[8] *See also Madsen v. Kinsella*, 343 U.S. 341, 361-62 (1952) (absent express application to non-inhabitants by occupying government, personnel accompanying occupying force not subject to local laws); *Dostal*, 652 F.2d at 176-77; *Bennett v. Davis*, 267 F.2d 15, 18 (10th Cir. 1959) (habeas petitioner "was not amenable to the criminal laws of the occupied state"); *Hamilton v. McClaughry*, 136 F. 445, 448 (C.C. D. Kan. 1905) (military personnel quelling Boxer Rebellion "not amenable to the laws of the government of China"); *In re Lo Dolce*, 106 F. Supp. 455, 459 (W.D.N.Y. 1952) (former servicemember immune from laws of German-occupied Italy).

jurisdiction of the occupied territory." JA.0102 (emphasis added).[9] This ironclad immunity from Iraqi law is important here, as the district court in *Al Quraishi* held that Iraqi law applies to those plaintiffs' claims (*Al Quraishi* Joint App. at JA.0914), and Virginia choice of law rules would dictate the same result here. *See Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007). Plaintiffs argue that Virginia public policy might lead to a rejection of Iraqi law (Pl. Br. at 28), but have not identified a Virginia policy that would reject application of a body of law rendering occupying personnel immune from suit, or why a *state* would have a legitimate interest in deciding what law applies to the United States' prosecution of war.[10] No state has intervened in this action, nor has any state adopted any statute targeting interrogation of detainees in Iraq, that in any way reflects a state policy or interest.

Plaintiffs rely on a snippet from *Freeland v. Williams* to argue that law of war immunity applies only with respect to acts "done in accordance with the usages of civilized warfare."[11] Plaintiffs' sleight of hand is but an attempt to re-define immunity so as to render it meaningless. One of the defenses in *Freeland*

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[9] Plaintiffs quote language from CPA Order 17 about personnel being subject to the laws of the "sending state." Pl. Br. at 27. The "sending state" here, of course, is the United States, and not one or more states of the union.

[10] Plaintiff make a cursory argument that CACI did not assert law of war immunity below. But CACI asserted immunity under both *Dow* and *Coleman* in the district court, and CACI's further explanation that, absent immunity, Iraqi law would govern Plaintiffs' claims does not detract from this claim of immunity. JA.69-73.

[11] Pl. Br. at 26 (quoting *Freeland*, 131 U.S. at 416).

involved a West Virginia constitutional provision precluding judgment for actions taken "according to the usages of civilized warfare, in the prosecution of [the Civil War]." *Freeland*, 131 U.S. at 411. The *Freeland* majority merely parroted the state constitutional language in explaining that the constitutional provision was irrelevant because claims falling within the constitutional provision also triggered the immunity recognized in *Dow*. *Freeland*, 131 U.S. at 416. Rather than narrowing *Dow* (as the district court posited in *Al Quraishi*[12]), the *Freeland* Court reaffirmed its holding in *Dow*. *Freeland*, 131 U.S. at 417 ("It is not here denied that the doctrine of *Dow v. Johnson* is correct, and that parties are protected by that doctrine from civil liability for any act done in the prosecution of a public war."). Indeed, the Court anticipated Plaintiffs' argument in *Dow*, holding that immunity applies even if the defendant is "guilty of wanton cruelty to persons, or of unnecessary spoliation of property, *or of other acts not authorized by the laws of war*." *Dow*, 100 U.S. at 166 (emphasis added).

Plaintiffs cite a number of criminal statutes applicable to personnel serving in Iraq, arguing that these statutes somehow show that occupation personnel have no immunity. Pl. Br. at 26 (citing the Anti-Torture Statute, 18 U.S.C. § 2240A; the War Crimes Act, 18 U.S.C. § 2441; and the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. §§ 3261-3265). These federal criminal statutes only prove CACI's point. Law of war immunity does not immunize occupation personnel from the occupier's criminal laws. *See Dow*, 100 U.S. at 166. The

[12] *Al Quraishi* Joint App. at JA.0849.

existence of fully-applicable United States criminal statutes is consistent with law of war immunity, and reinforces the availability of tools such as criminal prosecution, adverse contract actions, and administrative claims regimes, all controlled by the Executive, for addressing misconduct by those participating in a military occupation. Indeed, Congress responded to reports of contractor misconduct in Iraq not by creating a civil damages remedy, but by passing legislation designed to expand federal *criminal* jurisdiction over contractors serving overseas.[13]

Plaintiffs also claim that the extension of habeas corpus rights to detainees at Guantanamo Bay in *Rasul v. Bush*, 542 U.S. 466, 484 (2004), undercuts CACI's argument. But the *Rasul* Court relied heavily on the fact that the petitioners (unlike Plaintiffs and the petitioners in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)) were not enemy aliens. *Rasul*, 542 U.S. at 476. Moreover, *Rasul* has no relevance to battlefield detention facilities. *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).

Finally, Plaintiffs have mischaracterized a small handful of cases to argue that private tort suits historically have been available for wartime injuries. Pl. Br. at 27-28. In *The Paquete Habana*, 175 U.S. 677, 678-79 (1900), and *Little v.*

[13] *See* Ronald W. Reagan Nat'l Def. Auth. Act for Fiscal Year 2005, Pub. L. 108-375, § 1088, 118 Stat. 1811, 2066 (2004) (expanding scope of MEJA jurisdiction over contractors); John Warner Nat'l Def. Auth. Act for Fiscal Year 2007, Pub. L. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (expanding statutory court-martial jurisdiction to cover civilians serving in the field during a contingency operation).

Barreme, 6 U.S. (2 Cranch) 170, 171-72 (1804), it was the *United States* that sought statutorily-prescribed judicial review by filing libels seeking forfeiture of vessels. *See The Paquete Habana*, 189 U.S. 453, 464-65 (1903); *Little*, 6 U.S. (2 Cranch) at 177.

Mitchell v. Harmony, 54 U.S. 115, 128-29 (1851), involved seizure of property from an American citizen even though the Executive had expressly authorized his trading activities. In *Dow*, the Supreme Court endorsed the result in *Mitchell* because the plaintiff had been a loyal American trader specifically authorized to conduct business.[14] *Dow*, 100 U.S. at 170. In *Ford v. Surget*, 97 U.S. 594, 605 (1878), the Court rejected tort liability, holding a civilian immune for claims arising out of his performance of an "act of war upon the part of the military." And significantly, none of Plaintiffs' cases involved application of state or foreign law.

2. CACI is Entitled to Derivative Absolute Official Immunity

Plaintiffs suggest that CACI claims an entitlement to derivative absolute official immunity argument "because '[i]nterrogations and investigations are classic discretionary functions of government.'" Pl. Br. at 28 (quoting CACI Br. at 32). But CACI's opening brief devotes an entire section to showing that this immunity requires a *governmental function*, and that the district court erred in

[14] Plaintiffs' brief mistakenly states that the plaintiff was a Mexican citizen. Pl. Br. at 36. This error is significant given that the Court in *Dow* expressly distinguished *Mitchell* based on the plaintiff's citizenship.

requiring a *discretionary function*. CACI Br. at 30-33.[15] CACI did point out in its brief that the conduct of interrogations is a prototypical discretionary function, but has never contended that such a finding is required for derivative absolute official immunity. CACI Br. at 32.[16]

Plaintiffs argue that derivative absolute official immunity cannot apply because "CACI violated U.S. law and military regulation and precedent." Pl. Br. at 32. In Plaintiffs' view, a defendant can only receive immunity if their conduct, after discovery and trial, is upheld as appropriate. Of course, in that context immunity is redundant. Absolute immunity, however, is immunity from suit. This Court held in *Mangold* that the defendants were immune with respect to claims they knowingly provided *false official statements* to government investigators, conduct that, if true, violates federal law. *See* 18 U.S.C. § 1001. *Amici* law professors argue that *Mangold* extends only to witness responses to government investigators. Law Prof. Br. at 21. Those same *amici*, however, add a footnote to

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[15] Indeed, Plaintiffs express *faux* puzzlement as to why CACI cited *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). Pl. Br. at 31. But CACI cited *Butters* because this Court in *Butters* described *Mangold* as applying to *governmental functions*, and not solely to discretionary functions as the district court held here.

[16] Plaintiffs also argue that derivative absolute official immunity cannot be determined without knowing whether CACI acted within the "scope of its *government contract*." Pl. Br. at 28 (emphasis added). All that is required is that CACI personnel were acting within the scope of their *employment*, *Mangold*, 77 F.3d at 1446-47, an entirely different concept. The doctrine of scope of employment is broad, and encompasses all manner of illegal and/or tortious conduct occurring during an employee's time at work. *See*, *Beebe*, 129 F.3d at 1289.

acknowledge several cases that have applied derivative absolute official immunity in other contexts. *Id.* at 21 n.5.

Plaintiffs argue that the public interest is *advanced* by importing state law into a foreign battlefield because of it allows states to participate in controlling the battlefield conduct of contractors. But Plaintiffs' only response to the intergovernmental immunity doctrine – which precludes state regulation of federal government operations[17] – is to say that that their position would allow states to regulate only *some* of the federal government's wartime activities. Pl. Br. at 32. Plaintiffs also fail to address the public values associated with the constitutional commitment of war powers to Congress and the Executive, as well as cases recognizing that regulating the conduct of military operations is not an appropriate task for the states or the judiciary. CACI Br. at 34, 38.

D. Plaintiffs' Common-Law Tort Claims Are Preempted

1. Plaintiffs' Attempt to Avoid Constitutional Preemption Is Based on a Mischaracterization of Precedent

The Constitution is the "supreme Law of the Land," "the fundamental and paramount law of the nation" and the ultimate binding authority on this Court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Supremacy Clause makes it of binding effect on the States, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Chief Justice Taney, speaking for a unanimous Court, said that this reflected the Framers' "anxiety to preserve it [the

[17] *See* CACI Br. at 34.

Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. . . ." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1859).

CACI argued in its opening brief that Plaintiffs' war-zone tort claims were preempted by the Constitution's express and exclusive allocation of war powers to the federal government,[18] leaving no room for states to regulate the conduct of war through common-law tort actions. CACI Br. at 35-38; *see also City of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 168 (4th Cir. 2002) ("Federal law that may give rise to preemption may be the constitution itself."). Plaintiffs' brief nowhere addresses the myriad Constitutional provisions cited by CACI wherein war powers are exclusively committed to the federal government and denied to the states. CACI Br. at 23, 36, 48. Instead of taking on this core issue, Plaintiffs' two responses misunderstand the nature of constitutional preemption and misapply relevant precedent.

First, Plaintiffs repeatedly argue that "state tort law cannot be categorically preempted without evidence of clearly expressed Congressional intent." Pl. Br. at 33; *see also id.* at 34, 36, 39. However, when *the Constitution* is the source of preemption, what matters is the *Constitutional* allocation of powers and the case law makes clear that there is no room for state tort regulation of the conduct of war:

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[18] *See* U.S. Const. art. I, § 8, cls. 1, 11-16; *id.* § 10, cl. 1; *id.* § 10, cl. 3; U.S. Const. art. II, § 2, cl. 1; *see also Eisentrager*, 339 U.S. at 788; *The Federalist* Nos. 24, 69 (Hamilton);

> No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. *It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees.*

United States v. Pink, 315 U.S. 203, 233 (1942) (emphasis added). Plaintiffs have no response to *Deutsch v. Turner Corp.*, where the Ninth Circuit invalidated a state law "because it intrudes on the federal government's power to make and resolve war, *including the procedure for resolving war claims.*" 324 F.3d 692, 712 (9th Cir. 2003) (emphasis added). Plaintiffs cite *Deutsch* in a footnote in their political question discussion (Pl. Br. at 50 n.18), but conspicuously avoid addressing the case's principal holding on constitutional preemption.

Second, Plaintiffs argue that foreign-affairs-based constitutional preemption reaches only state laws specifically targeted at foreign affairs. Pl. Br. at 37. But "it is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law." *Saleh*, 580 F.3d at 12 n.8 (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)). It would be absurd to hold that the Constitution allows states to regulate the prosecution of war so long as they do not employ state laws that expressly pursue that objective.[19]

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[19] "Federal foreign policy is a pleonasm. What foreign policy can a federal nation have except a national policy? That fifty individual states or one individual state should have a foreign policy is absurdity too gross to be entertained." *United States v. Arizona*, 641 F.3d 339, 367 (9th Cir. 2011) (Noonan, J. concurring), *cert.*

(Continued …)

2. CACI Is Entitled to Combatant Activities Preemption

Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988), recognizes a preemption framework whereby state tort law is preempted in areas of unique federal interest where a significant conflict exists between an identifiable federal policy or interest and the application of state law. CACI Br. at 40. Plaintiffs' brief alternates between misstating CACI's arguments and misstating the holdings of relevant precedent.

a. Uniquely Federal Interest

Civil liabilities arising out of the performance of government contracts is an area of uniquely federal concern, thus satisfying the first half of the *Boyle* framework. *Boyle*, 487 U.S. at 505-06; CACI Br. at 44. Plaintiffs argue that this cannot be an area of uniquely federal interest because, if it were, all tort claims against all government contractors would be preempted. Pl. Br. at 41. But CACI has never argued that the existence of a uniquely federal interest, by itself, is sufficient for *Boyle* preemption. Rather, as CACI has explained, a contractor must show not only a uniquely federal interest, but also a conflict between the federal interest and the imposition of state tort law. *Boyle*, 487 U.S. at 506.

b. There is a Substantial Conflict Between the Federal Interests Embodied in the Combatant Activities Exception and the Imposition of State Tort Duties

Plaintiffs argue there is no conflict because the FTCA, by its terms, only immunizes the United States and not contractors. Pl. Br. at 36. This argument is

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granted, ___ U.S. ___ (Dec. 12, 2011).

just "quarrel[ing] with *Boyle*, where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors." *Saleh*, 580 F.3d at 6.[20]

Plaintiffs argue that there can be no combatant activities preemption because CACI's employees are not combatants. Pl. Br. at 43. But the statutory provision is not a "combatants" exception, but a "combatant activities" exception. 28 U.S.C. § 2680(j). Plaintiffs' position also cannot be squared with *Koohi*, *Saleh*, or this Court's alternative holding in *Taylor*, all of which found preemption for defense contractors who were not themselves combatants.[21] Indeed, the statute does not even limit its reach to combatant activities themselves, but encompasses injuries *arising out of* combatant activities. 28 U.S.C. § 2680(j); *see also* Brief of United States as *Amicus Curiae* at 16, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. filed May 2011).

Plaintiffs rely on *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947), to defend the district court's conclusion that "combatant activities" is basically confined to the actual act of firing a weapon at an enemy. Pl. Br. at 45-46. Describing *Skeels* as the "prevailing law" on the subject (Pl. Br. at 10-11),

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[20] Plaintiffs' brief seeks to create the impression that they do not know the contents of CACI's government contract. Pl. Br. at 40 ("Plaintiffs have not yet undertaken discovery, but surely the United States did not write its contracts to permit, let alone *require*, contractors to torture and abuse detainees."). As Plaintiffs well know, CACI produced its contracts to these same Plaintiffs' counsel in *Saleh*, and these contracts are a matter of public record. *See* Public Joint Appx., *Saleh v. CACI Int'l Inc*, No. 09-7001, at JA.0319-88 (D.C. Cir.).

[21] *Koohi v. United States*, 976 F.2d 1328, 1336-37 (9th Cir. 1992); *Saleh v. Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009); *Taylor*, 658 F.3d at 411.

Plaintiffs fail to address the four court of appeals decisions that have construed the term more broadly to include "activities both necessary to and in direct connection with actual hostilities."[22] Given the importance of battlefield intelligence operations to the conduct of war, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), there is no credible argument that Plaintiffs' claims do not arise out of combatant activities.

Plaintiffs also argue that there is no conflict between state tort law and the interests embodied in the combatant activities exception because the United States surely does not condone what Plaintiffs describe as illegal conduct. Pl. Br. at 39-40. But courts analyzing the combatant activities exception consistently have recognized that the federal interest behind the provision is the complete elimination of tort duties on the battlefield.[23] Given that purpose, the imposition of *any* state-law tort duty conflicts with the prevailing federal interest. *Saleh*, 580 F.3d at 7. Indeed, the Ninth Circuit held in *Koohi* that the combatant activities exception

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[22] *Johnson v. United States*, 170 F.2d 767, 770 9th Cir. 1948); *see also Taylor*, 658 F.3d at 413 (Shedd, J., concurring) (majority of *Taylor* panel holding that injuries caused by ramp repair activities at a tank maintenance facility arose out of combatant activities); *Saleh*, 580 F.3d at 6 (combatant activities include "detention of enemy combatants"); *Koohi*, 976 F.2d at 1333 n.5.

[23] *See Saleh*, 580 F.3d at 7 ("In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield . . . ."); *Koohi*, 976 F.2d at 1376 ("[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005) ("The exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which tort claims are simply inappropriate.").

would be implicated even if the United States *intentionally* shot down a civilian airliner in order to provoke a military conflict. *Koohi*, 976 F.2d at 1330 n.2, 1336 n.6.

Finally, Plaintiffs remain undeterred in relying on a Defense Department response to rulemaking comments to argue that the United States does not believe preemption is available. Pl. Br. at 44-45. The D.C. Circuit rejected Plaintiffs' argument in *Saleh*, 580 F.3d at 9-10, and the United States has *twice* stated that Plaintiffs' construction of these comments is inaccurate. *See* Brief for United States as *Amicus Curiae* at 12 n.4, *Carmichael v. Kellogg, Brown & Root Svcs., Inc.*, No. 09-683 (U.S. filed May 28, 2010) ("To the extent there is ambiguity, this response was not intended to opine on the state of the law."); Brief of United States as *Amicus Curiae* at 14 n.6, *Saleh v. Titan Corp.*, No. 09-1313 (U.S., filed May 2011) (same).

E. Plaintiffs' Claims Present Nonjusticiable Political Questions

Plaintiffs argue that "[d]amages claims against private actors are constitutionally committed to the Judiciary, not the Executive or Legislative Branches." Pl. Br. at 49. Plaintiffs' argument is circular, as the political question doctrine determines the *scope* of the judiciary's power under the Constitution. Moreover, Plaintiffs' proposed rule cannot be squared with this Court's decision in *Taylor*, 658 F.3d at 410, or the many other cases in which courts have dismissed damages claims against private actors based on the political question doctrine.[24]

[24] *See, e.g., Carmichael v. Kellogg, Brown & Root Svcs.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009) (tort suit against contractor); *Corrie v. Caterpillar, Inc.*, (Continued …)

Plaintiffs argue that this case does not infringe on the political branches' constitutionally-committed powers to prosecute war because "Plaintiffs do not challenge the conduct or decisions of the U.S. military." Pl. Br. at 52. In a particularly crass formulation of this argument, Plaintiffs submit that any argument that Plaintiffs' claims arise out of the actions of government officials "insults the thousands of men and women in uniform who served honorably in Iraq." Pl. Br. at 48. Plaintiffs' unbefitting hyperbole aside, their argument cannot withstand even the most minimal scrutiny.

As this Court explained in *Taylor*, 658 F.3d at 409, a political question analysis requires consideration of how the plaintiff might prove his or her claim and how the contractor would defend. Here, Plaintiffs' Amended Complaint alleges no contact whatsoever between Plaintiffs and any CACI employee. JA.0018-21. Instead, Plaintiffs proceed on a co-conspirator theory. JA.0022. CACI is at a loss to understand how Plaintiffs can seriously assert that they neither "challenge the conduct or decisions of the U.S. military" (Pl. Br. at 52), nor base their claims on "actions of government officials" (Pl. Br. at 48), when Plaintiffs' Amended Complaint expressly seeks to hold CACI liable for the actions of military personnel.

Moreover, Plaintiffs seek to improve their position on appeal by recasting their ever-malleable "torture conspiracy" to now include only "low-level" military personnel. Pl. Br. at 6. Plaintiffs sang a different tune in the district court, arguing

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503 F.3d 974, 982-83 (9th Cir. 2007) (tort suit against contractor).

that a Senate Armed Services Committee Report "spells out in some detail how *high-level Executive Branch and military officials conspired to encourage the torture of detainees.*" JA.0382 (emphasis added). In *Saleh*, these Plaintiffs' counsel identified the "Torture Conspirators" as definitively including Secretary Rumsfeld, three Undersecretaries of Defense, five Army Generals, eleven other Army officers, and fourteen enlisted soldiers. JA.0197-98. Many if not most of the actions of which Plaintiffs complain were enhanced interrogation techniques approved at the highest level of government for use at Guantanamo Bay, and which migrated through high-level government and military channels to military interrogation facilities in Afghanistan and Iraq. CACI Br. at 17-18. Because the prosecution of and defense against Plaintiffs' claims would require review of "actual, sensitive judgments made by the military," and to decide whether the interrogation policies adopted by Executive and military leadership were reasonable, the political question doctrine bars Plaintiffs' claims. *Taylor*, 658 F.3d at 412; *Carmichael*, 572 F.3d at 1284-85.

Plaintiffs also give short shrift to the lack of judicially discoverable standards for deciding tort claims brought by persons detained as enemies in a war zone. Tort law involves trade-offs among competing policies in determining reasonable standards of care. *See Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 285 (4th Cir. 1998). "[W]hen it comes to collecting evidence and drawing factual inferences in [the areas of national security and foreign relations], 'the lack of competence on the part of the courts is marked.'" *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (quoting *Rostker v. Goldberg*, 453 U.S. 57,

65 (1981)). The Executive, with its superior ability to discover battlefield facts and to balance duties of care with wartime exigencies, *has* established an administrative process for paying legitimate claims of detainee abuse. *See Saleh*, 580 F.3d at 2-3. There is no reason for the judiciary to break with precedent and provide a war claims compensation scheme to compete with the arrangement made available by the political branches to which war matters are constitutionally committed.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order, and remand with instructions to dismiss Plaintiffs' action with prejudice.

Respectfully submitted,

/s/ John F. O'Connor

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December 27, 2011

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

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

1. I am an attorney representing Appellants CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 6,984 words.

/s/ John F. O'Connor

John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2011, 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