RECORD NOS. 09-1335, 10-1891, 10-1921

In The

United States Court Of Appeals

For The Fourth Circuit

Suhail Nazim Abdullah AL SHIMARI, et al.

Plaintiffs – Appellees,

v.

CACI INTERNATIONAL INC and
CACI PREMIER TECHNOLOGY, INC.,

Defendants – Appellants.

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, et al.

Plaintiff-Appellee,

v.

L-3 SERVICES, INC., et al.,

Defendants-Appellants.

ON REHEARING *EN BANC* OF AN APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

The United States Government agrees with Plaintiffs that this Court should not disturb either of the judgments of the District Courts for two fundamental reasons. First, the Government agrees with Plaintiffs that this Court lacks any basis to assume jurisdiction over the District Courts' interlocutory orders, and thus concludes that "the appeals should be dismissed for lack of jurisdiction" without considering merits of the lower courts' decisions. Gov't Br. 27. Second, the Government argues that, should this Court reach the merits of this dispute, the Court should affirm the lower courts' judgments denying the motions to dismiss by Defendants L-3 Services, Inc. and CACI, Inc. (collectively, the "Defendants"), and remand for discovery regarding the scope of the relevant government contracts and the substance of Plaintiffs' factual allegations regarding torture and abuse.

The Government does contend that the possibility exists for preempting certain state law tort claims (excluding those asserted here) pursuant to a federal interest embodied in the "combatant activities" exception to the Federal Tort Claims Act's (FTCA) waiver of sovereign immunity, which is a position Plaintiffs disagree with for all the reasons set forth in the prior briefing, *see infra* at Section II, *see also Al Shimari v. CACI, Inc.*, 658 F.3d 413, 429-36 (4th Cir. Sept. 21, 2011) *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011) (King, J., dissenting). Yet, even if this Court were to adopt the Government's theory, the

majority of Plaintiffs' claims survive, as they rest on allegations regarding "sadistic, blatant, and wanton criminal abuses" which "violated U.S. criminal law," *CACI v. Premier Tech.*, 536 F.3d 280, 285-86 (4th Cir. 2008). Thus, the Government agrees such claims should proceed as their adjudication would advance the federal government's significant interests in ensuring conformity with "humane treatment obligations and the laws of war," ensuring that "contractors are held accountable for their conduct by appropriate means," and in promoting the appropriate enforcement of prohibitions against torture embodied in U.S. law. Gov't Br. 14-15.

As evidenced in part by the Defendants' intemperate responses to the U.S. Government's brief, the Government's position is effectively fatal to the Defendants' collective theory on appeal. As Plaintiffs detailed in their Opposition Briefs, each of the Defendants seeks to put themselves in the shoes of the U.S. military, by exaggeratedly contending that these cases would jeopardize military policy, battlefield decision-making, and the Constitution's commitment of war-making to the Executive Branch. Yet, it is clear that the Executive Branch itself does not equally share these concerns, having expressed confidence that Plaintiffs' claims can proceed without interference with *bona fide* sovereign interests.

More specifically, in addition to explaining why this Court lacks appellate jurisdiction over these cases, the Government's brief: (1) rejects the Defendants'

"battlefield preemption" theory, reasoning (contrary to the D.C. Circuit) that state law tort claims can be consistent with the federal government's interests and are not inherently incompatible with armed conflict; (2) rejects Defendants' unsupported assertion that the mere fact of discovery on Plaintiffs' claims would necessarily burden the military; and (3) undermines the Defendants' political question arguments by admitting both that the Executive Branch's constitutionally-committed war-making and foreign-policy prerogatives are not facially threatened, and that 18 U.S.C. § 2340 provides the District Court with a judicially-manageable standard to adjudicate the case.

At this point, neither Congress nor the Executive Branch – whose interests the Defendants purportedly seek to advance – believe these cases should be dismissed. Thus, should this Court even assume jurisdiction over these interlocutory appeals, neither separation-of-powers or federalism requires this Court to reject these expert, considered judgments of the political branches.

ARGUMENT

I. THE U.S. GOVERNMENT CORRECTLY CONCLUDES THAT THIS COURT LACKS JURISDICTION OVER THESE APPEALS.

Recognizing that the collateral order doctrine is a "narrow exception" to the congressionally-mandated final judgment rule, Gov't Br. 4, the Government correctly concludes that none of the interlocutory decisions by the District Courts below is subject to collateral order review by this Court. First, the Government

reasons that Defendants' asserted law-of-war immunity is not, in fact, a *bona fide* immunity from the burdens of litigation of the kind that requires review before final judgment. Gov't Br. 9-11. Appreciating the Supreme Court's repeated warnings that courts should "view claims of a 'right not to be tried' with skepticism if not a jaundiced eye," Gov't Br. 10 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)), the Government agrees with Plaintiffs that the principle case on which Defendants rely, *Dow v. Johnson*, 100 U.S. 158 (1879), stands for at most, a jurisdictional rule in which soldiers and officers are not subject to the power of the courts of an invaded country, but are subject to sanction by their own government. Gov't Br. 11.[1] The Government notes that *Dow* does not speak at all of an immunity from suit and classifies the operative principle as a "doctrine of non-liability." *Id*. at 11 (quoting *Dow*, 100 U.S. at 169). *See also* CACI Br. 26 (admitting that the principle in *Dow* is one that "protects parties 'from civil *liability*'") (quoting *Freeland v. Williams*, 131 U.S. 405, 417 (1889) (emphasis added); JA-72 (CACI's motion to dismiss

[1] As Plaintiffs and *amici* Professors of Civil Procedure explain in considerable detail, this is the proper, limited reading of *Dow* and the cases upon which *Dow* was based, *Coleman v. Tennessee*, 97 U.S. 517 (1878) and *The Schooner Exchange*, 11 U.S. 116 (1812). *See* Pls.' L-3 Br. 32-34; Br. Am. Cur. Profs Civil Procedure and Federal Courts 12-17. Indeed, as Plaintiffs also underscored, this is the very reading of *Dow* and *Coleman* that CACI itself proposed in the district court prior to its attempt to repackage this jurisdictional rule into an immunity in order to manufacture a basis for collateral order review. *See* Pls.' CACI Br. 24-25 (quoting extensively from CACI's Motion to Dismiss). In its Reply Brief, CACI fails to respond to this fatal concession.

characterizing holding of *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878), as only that "members of occupying force immune from application of occupied territory's criminal laws"). As such, this law-of-war theory fails the third collateral-order-doctrine requirement, because review of this is available after final judgment. *See Will v. Hallock*, 546 U.S. 345 (2006)*; Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989)*; Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

Second, the Government agrees that review of the Defendants' asserted derivative immunity claims (whether styled as a derivative sovereign immunity by L-3, or a derivative absolute official immunity by CACI) would be "premature," as the District Courts expressly stated that they could not fully evaluate these asserted defenses without reviewing the scope of obligations and prohibitions under operative contracts. Gov't Br. 12. Because the decisions on these asserted defenses were "tentative" and "subject to revision" by the District Courts themselves, appellate intervention at this stage is improper under the first of the collateral-order-doctrine's requirements, *see Jamison v. Wiley*, 14 F.3d 222, 230 (4th Cir. 1994), as such intervention presents "no clearer example of the very redundancy, delay and waste of judicial resources that the final decision rule is intended to prevent." *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398, 403 (3d Cir. 2010).

The Government also underscores an important principle that Defendants misconstrue. Even an already established claim of immunity (unlike the ones asserted by Defendants here), such as qualified immunity "is not immediately appealable if it turns on questions of disputed fact. Gov't Br. 9 (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). *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"). [2] While the Government does not expressly address the Defendants' attenuated reliance on *Mangold* in support of their claim for collateral order review, the Government does emphasize that a claim to immunity must be "substantial – not merely colorable or non-frivolous," Gov't Br. 12 – a standard the Government believes the Defendants have failed to meet. This is likely because the "full justification" for *Mangold*'s assertion of jurisdiction

[2] The only conceivable exception to this principle, which has only arisen in the well-established qualified immunity context, is where the disputed factual question upon which the district court seeks further discovery is legally irrelevant to the disposition of the asserted immunity. Thus, qualified immunity should be resolved on the pleadings only where possible. *See McVey v. Stacy*, 157 F.3d 271, 276 (1988) (normally, "when a trial court concludes that it has insufficient facts before it on which to make a ruling," such conclusion would not be directly appealable, but concluding that legally relevant issues before district court "do not raise factual issues."). The Government agrees that the legally relevant factual issues outstanding in these cases here preclude review. *See* Gov't Br. 12 ("The district courts denied defendants' motions seeking dismissal not because immunity could never be available but because defendants' entitlement to immunity would depend on further discovery.").

necessarily turned on the need to protect the "long-standing" and "well established" common law privilege to testify with absolute immunity in courts of law, before grand juries and before government investigators. *Id*. at 1448. Those substantial public interests – absent here –would be irretrievably lost while awaiting appeal from final judgment. *Mangold v. Analytic. Systems, Inc.*,77 F.3d 1442, 1449 (4th Cir. 1996). ("[W]itnesses might be reluctant to come forward to testify. . . .) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983)). The Government perhaps also believes Defendants' absolute immunity claims are not substantial because Defendants have failed to identify a single case providing absolute immunity to contractors conducting interrogations or conducting detention operations. *Cf. Richardson v. McKnight*, 521 U.S. 399, 404-406 (1997) (denying private prison guards claim for qualified immunity).

Third, the government correctly concludes, as has "every other court of appeals to consider the question," that rulings on preemption defenses are not immediately appealable. Gov't Br. 7 (citing cases). The Government also correctly classifies preemption as "a defense to liability" – *i.e.*, as described in *Boyle* itself, a right to avoid the imposition of a money judgment after trial, *Boyle v. United Technologies Corp*., 487 U.S. 500, 514 (1988) – and thus does not give rise to a "right to avoid trial" of the kind cognizable by the collateral order doctrine, even where the Government believes the cases implicate "unique federal

interests" including the impact of discovery "on military discipline and readiness." Gov't Br. 5.

The Government makes two additional points which more generally undermine Defendants' jurisdictional theory. First, the Defendants (and the panel majority) seek to amalgamate a variety of concerns across the various defenses to support jurisdiction that would otherwise not exist for each of the defenses alone. *See Al-Quraishi v. L-3 Svcs, Inc.*, 657 F.3d 201, 205 (4th Cir. 2011), *vacated* and *reh'g en banc granted* (4th Cir. Nov. 8, 2011) (jurisdiction based on combination of "substantial issues relating to federal preemption, separation-of-powers, and immunity"); L-3 Reply Br. 6 ("Avoiding judicial second-guessing of military decision-making and judicial interference with military operations through discovery and trial are important public interests that *are common to all three defenses*.") (emphasis added). Yet, as the Government stresses, this doctrinal move is improper. The Supreme Court requires not "an individualized jurisdictional inquiry" but a focus on "the entire category upon which a *claim* belongs." *Mohawk Indust. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (emphasis added). Thus, the Government rightly concludes, the "particular combination of doctrines, issues, and considerations at issue in these does not create appellate jurisdiction where the individual issues themselves would not support immediate review." Gov't Br. 7. This is in large part because the Supreme Court prefers

bright line jurisdictional rules. *Richardson-Merrel Inc.* v. *Koller*, 472 U.S. 424, 436 (1985) ("[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 promote greater predictability."). Accordingly, if each of the preemption claim, the immunity claims, or the political question claim on their own cannot satisfy the strict collateral-order-doctrine criteria,[3] those claims (or even pieces of those claims) cannot satisfy them in combination.

In addition, the Government rejects the very factual premise for Defendants' amalgamated jurisdictional theory – a theory that depends entirely on asserted (and exaggerated) burdens to the military that would ensue from discovery on Plaintiffs' claims. *See, e.g.*, L-3 Reply Br. 9-13. By urging these cases be dismissed on jurisdictional grounds and, in the alternative, concluding that these cases could proceed on the merits without disrupting military interests or inappropriately diverting government resources, the Government has largely eviscerated the foundation of Defendants' broad-based theory of jurisdiction.

[3] *See* Gov't Br. 8 (explaining why political question doctrine does not permit interlocutory review) (citing *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007)).

II. *BOYLE* PREEMPTION CANNOT BE EXTENDED, AS THE GOVERNMENT PROPOSES, TO COVER COMBATANT ACTIVITIES.

The Government correctly concludes that, because these appeals should be dismissed for lack of jurisdiction, this Court need not reach any decision regarding the merits of the dispute or scope of Defendants immunity or preemption defenses. Gov't Br. 27. The Government does not, in the alternative, address the Defendants' political question arguments or either of their claims for immunity, suggesting that the Government does not consider them to be serious claims meriting consideration.[4]

The Government does propose, however, that if this Court reaches the merits of the preemption defense, this Court should remand to consider the defense under slightly different criteria than Plaintiffs propose.[5] Specifically, the government

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[4] In addition, because the Executive Branch suggests that its constitutionally-committed war-making and foreign-policy prerogatives are not facially threatened by this case and because the Executive Branch believes that, at a minimum, 18 U.S.C. § 2340 provides the district court with judicially manageable standards to adjudicate the case, the Government has implicitly rejected the purported bases for Defendants' political question defense.

[5] The Government's preemption analysis is limited, correctly, to Plaintiffs' *state* law claims. Plaintiffs in both cases brought claims under both state law and federal law. Specifically, Plaintiffs brought federal claims under the Alien Tort Statute, 28 U.S.C. § 1350, which provides jurisdiction over violations of the law of nations such as Plaintiffs' claims of torture, war crimes, and cruel, inhuman and degrading treatment. The District Court in *Al-Quraishi* allowed Plaintiffs' ATS claims to proceed, while the District Court in *Al Shimari* granted Defendants' motion to dismiss "only to the extent that Plaintiffs' claims rely on ATS

argues that some state tort laws can be preempted by invoking federal interests implicitly protected by the "combatant activities" exception to sovereign immunity in the FTCA, but believes that the Plaintiffs should be permitted to proceed with discovery and on the merits of state law claims that would vindicate the federal interests embodied in the federal torture statute, 18 U.S.C. § 2340.

Plaintiffs address the Government's proposal here. At the outset, however, it is critical to observe that, by proposing a remand to the district court to conduct tailored discovery and to pursue allegations that Defendants tortured Plaintiffs, the Government has unambiguously rejected Defendants' primary argument for "battlefield preemption." This is particularly significant insofar as the Defendants' asserted basis for battlefield preemption (and the basis underlying their entire appeal) is that any discovery and any proceedings on the merits would impermissibly impede on military policy or the Executive's war-making prerogatives. The U.S. Government, speaking for the U.S. military and Executive Branch more broadly, flatly disagrees with Defendants' categorical assessment of the Government's interests in this case.

Under the Government's proposal, the majority of Plaintiffs' claims would proceed, as they rest on allegations of direct acts of and a conspiracy to commit torture. *See* CACI J.A. 18-21; L-3 J.A. 23-61. There is ample precedent for

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jurisdiction." Those federal claims remain unaffected under a preemption analysis.

permitting state torts that embody federal interests in prevention of "conduct that violates the fundamental norms of the customary laws of war," including torture. *See, e.g., Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992). Plaintiffs believe, however, that the doctrinal basis for the Government's position incorrectly requires that *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988) be given an "exceedingly robust elasticity." *Al Shimari*, 658 F.3d at 429 (King, J., dissenting) Specifically, the Government's theory of preemption does not require, as it must, a conflict between state law and federal law or policy before allowing state law claims to be preempted; the theory likewise ignores the Supreme Court's essential requirement in *Boyle* that the acts at issue be acts considered and approved by the Government or its officers and not simply be discretionary acts undertaken by the contractor itself. *See Boyle*, 487 U.S. at 512.

Plaintiffs further contend, that even if the Court were to accept that federal preemption of state law claims were appropriate in this case, the Government has significant federal interests in vindicating not only those principles embodied in the federal torture statute, but also those federal interests embodied in other federal laws, such as the prohibitions against cruel, inhuman and degrading treatment embodied in the Convention Against Torture and the Geneva Conventions. Those were in force in Iraq, as set forth in the War Crimes Act, 18 U.S.C. § 2441. Thus,

even under the Government's theory, the scope of the District Court's preemption inquiry should be slightly broader than the Government's Brief proposes.

A. The Extension of Boyle Preemption Advanced by the Government Is Inappropriate.

The Government asserts that *Boyle* is the "proper starting point for the preemption analysis in these cases." Gov't Br. 14. Plaintiffs agree. The Government, however, argues for an expansion and departure from *Boyle* that cannot be reconciled with the Supreme Court's stress in that seminal case on the limiting principles and narrow basis for preemption of state law claims against contractors. For each of the following reasons, this Court should reject the Government's urged expansion of the government contractor defense.

First, the Government's theory appears to permit the preemption of state law claims even when the sovereign's discretion and decision-making is not at issue. *See* Gov't Br. 25. *Boyle* allows for preemption of state law claims under a limited set of circumstances based on the underlying rationale that the contractor is doing no more that "executing [the] will" of the government, 487 U.S. at 506, and therefore preemption is necessary to give effect to the discretionary function exemption of the FTCA that protects *sovereign* acts. The Supreme Court requires a finding that the U.S. approved the conduct at issue (in *Boyle*, precise specifications of a helicopter design) and that the "equipment" or product provided conformed to the Government's specifications. *Boyle*, 487 U.S. at 512. Here,

Plaintiffs allege that the conduct at issue was unauthorized and unlawful, and that the Defendants were exercising their own discretion – not the Government's discretion – when they chose to commit sadistic, unlawful acts against the Plaintiffs. Moreover, Plaintiffs allege that Defendants violated the terms of their contract when they tortured and otherwise seriously mistreated Plaintiffs. The Court's critical rationale underlying its decision in *Boyle* – to shield sovereign discretionary acts from liability – is simply not satisfied in this case.

Second, the Government's analysis disregards a central requirement of *Boyle*, namely that there be a conflict between the application of state law and federal law or an identifiable federal policy or interest before allowing for the displacement of state law. 487 U.S. at 508 (finding the degree of the conflict can vary, "[b]ut conflict there must be"). *See also id.* at 508-510 (finding that there would be no preemption where there was no duty contrary to the duty imposed by the government contract, and where "the contractor could comply with both its contractual obligations and the state-prescribed duty of care"). The Government position appears to support a finding that state law that would "'frustrate specific objectives' of federal legislation" can "supplant an 'entire body of state law'" even absent a conflict. Gov't Br. 14.[6] To the extent that the Government argues that *Boyle* stands for the proposition that there is "a need for federal primacy" simply

[6] Notably, the Government has not relied on the line of cases setting out field preemption, which the D.C. Circuit embraced. *See* Pls.' CACI Br. 34-39.

where "government contractors had been sued on products liability theories for the design of military equipment built for the United States," *id.*, it is incorrect.

Boyle, of course, required far more than simply a finding that contractors were designing military equipment for the U.S.; it required both a uniquely federal interest and a specified conflict between the operation of state law and federal law or policy, 487 U.S. at 507-508; further, as a "limiting principle," the Court required that the U.S. approved reasonably precise specifications, the equipment provided 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. Accordingly, the fact that Defendants were contracted to work with the military in Iraq during a time of armed conflict cannot be sufficient to allow for the preemption of state law claims. Here, there is neither a conflict between the operation of state law and federal interests, nor any allegation – or evidence – that the Defendants' acts at issue were, in fact, what the Government ordered it to do.[7]

Third, the Government's position regarding the "scope of the contractual relationship" as a guide for preemption potentially leads to a result similar to that which led the *Boyle* Supreme Court to reject application of *Feres v. United States*,

[7] The Government's belief that discovery can proceed without "intruding into the military command decision-making process," Gov't Br. 3 or interfere with "military prerogatives" is evidence that the Government understands the conduct at issue to relate to conduct undertaken by the contractor itself, without Government authorization or at the Government's behest.

340 U.S. 135 (1950), to contractors: it "logically produces results that are in some respects too broad and in some respects too narrow." *Boyle*, 487 U.S. at 510. Thus, the Government's position that nearly any state-law tort claim that can somehow be linked to, or arise out of, the contractual relationship between the contactor and the government is preempted, as Defendants argue, CACI Supp. Br. 10; L-3 Supp. Br. 13-14, ignores the Supreme Court's rejection of *Feres*, and proposes a government contractor defense wholly unmoored from *Boyle*, and the federal interest. Such a reading is far too broad. It encompasses "conduct that violated the terms of the contract, exceeded contractual duties, violated approved interrogation techniques or other military directives, or was otherwise unlawful." L-3 Supp. Br. 13. Such conduct is clearly not that which was ordered or authorized by the Government when they contracted with the Defendants, *c.f. Boyle*, 487 U.S. at 512, and is not, and indeed cannot be, of the kind which is to be protected by the FTCA, i.e., discretionary acts *of the sovereign*. *See Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940). There is simply no public interest in protecting the unlawful and authorized acts from liability. The only conduct that could be shielded from state law tort liability under the government contractor defense is conduct that is required by contract ("the defendants' contractual obligations," Gov't Br. 13), which is necessarily lawful conduct that complies with state, federal and international law obligations.

Fourth, and finally, Defendants are not combatants. While the Government recognizes that under the laws of war Defendants must be given the status of civilian rather than combatants, Gov't Br. 16-17, it fails to appreciate the import of this conclusion. Combatants are representatives of the United States Government and their combatant activities are understood to be acts of the sovereign. It is for this reason that the U.S. military's combatant activities are exempted from liability under the FTCA. Contractors do not fall within the military chain of command, are not subject to discipline through a responsible chain of command and do not have the same responsibility to the American people and the United States Government as members of the armed forces. *See* Br. Am. Retired Military 5-6, 17-21; *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1346-1349 (11th Cir. 2007) (underscoring fact that a "private contractor agent is not in the chain of command," in rejecting extension of *Feres* immunity to military contractors). Critically, contractors cannot exercise the sovereign acts of combat. *Id.* at 14-15. The federal interest in protecting the combatant activities of the sovereign is not served (and is instead undermined) by extending any limitation on liability for the sovereign's combatant activities to unlawful acts of the private contractors that do not – and cannot – be qualified as combatant activities. Private contractors, as civilians and as corporate entities, are necessarily regulated in large part through

tort law. *See* Br. Am. Retired Military 23-26.[8] To eliminate such liability is, in fact, to undermine the federal interest of "ensuring that contractors are held accountable for their conduct" that the Government identified as one of the interests at stake in this case. Gov't Br. 2.

B. Under Government's Theory, the Federal Interest Is Served by Allowing State Law Claims Based on Allegations of Conduct Akin to Torture to Proceed.

The Government carves out an exception to its preemption analysis for state law claims "based on allegations that the contractor committed torture, as defined in 18 U.S.C. § 2340." Gov't Br. 22. Plaintiffs welcome the Government's recognition of the prohibition against torture as a federal interest that is served, rather than frustrated, by the application of state tort law. Plaintiffs understand the Government's identification of this interest to be based on the severity of the

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[8] Indeed, just this term, the Supreme Court affirmed the central role of state law torts in regulating actions of government contractors. In *Minneci v. Pollard*, __ S.Ct. __, 2012 WL 43511 (Jan. 10, 2012), the Court held that courts should not imply a federal *Bivens* remedy against private prison officials where state tort law would similarly advance the goals of deterrence and compensation. *Id*. at *3. The nearly unanimous Court thus explained that when the conduct of federal government officials is challenged, federal remedies (via *Bivens*) may be appropriate but where conduct of private contractors is challenged, state torts are an appropriate remedy particularly where, as here, there is no congressional act affirmatively preempting such remedies. *Id*. at *7 (observing that, because of the Westfall Act, "[p]risoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government…But prisoners ordinarily *can* bring state-law tort actions against employees of a private firm.") (emphases in original.) Accordingly, *Minneci* strongly counsels for application of state tort law in this case.

conduct that falls within the Anti-Torture statute, as well as the Government's interest in giving effect to the obligations it undertook as a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) ("CAT") to both prohibit torture (Art. 2) and to provide redress to torture victims (Art. 14). Based on this rationale, Plaintiffs contend that at least two modest extensions of the Government's exception are in order.

First, the United States is a signatory to the four Geneva Conventions, which, it confirmed, applied to the conflict in Iraq and the Plaintiffs in this case. *See* Pls.' CACI Br. 40, 43; Pls.' L-3 Br. 37-38. The War Crimes Act, 18 U.S.C. § 2441, codifies and punishes those acts which constitute violations of the laws of war, including Common Article 3 of the Third and Fourth Geneva Conventions. Such prohibited acts include torture, as well as mutilation, cruel treatment, rape and sexual assault or abuse. The United States has the same federal interest in ensuring that government contractors do not commit war crimes as they do with torture, and has the same interest in ensuring contractors are held accountable when they commit war crimes as they do for torture. *See Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992) (permitting state tort lawsuit to proceed where state torts embodied federal interests in prevention of "conduct that violates

the fundamental norms of the customary laws of war," including torture).[9] Accordingly, Plaintiffs submit that there is no doctrinal reason or logical reason to find the federal interest embodied by the Anti-Torture Statute warrants an exception from preemption without finding a similar interest – and a similar exemption – for acts that fall with the scope of 18 U.S.C. § 2441. *See* CACI J.A. 31-32; L-3 J.A. 74-5.

Second, as a signatory to CAT, the United States undertook the obligation to prevent and punish cruel, inhuman and degrading treatment. CAT, Art. 16. In so doing, the U.S. expressed a federal interest in ensuring that such conduct is not committed, and that those who do undertake such acts, are held accountable. The United States reiterated its commitment to preventing and punishing cruel, inhuman and degrading treatment when it reported to the Committee Against Torture in 2006. *See* United Nations, Convention Against Torture, Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Second Supplemental Report of the United States of*

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[9] Indeed, despite CACI's asserted puzzlement about the Government's proposal in this case, CACI made a similar proposal recently before this Court. In *CACI v. Premier Tech.*, CACI brought a defamation suit arising out a radio-hosts characterization of CACI's conduct as "torture," and specifically argued that the state tort of defamation should be informed by the content of the federal torture statute – a concept they now suggest is untenable in this case. *See* 536 F.3d 280, 285-86 ("CACI argues that abuse is not a synonym for torture and that Rhodes must be held to have accused CACI of torture in the sense that word is used in the U.S. criminal code [under] 18 U.S.C. § 2340(1).").

America, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006). This federal interest is *served* by holding private contractors accountable for acts that constitute cruel, inhuman and degrading treatment. There is no conflicting federal interest identified by the Government (or the Defendants) that would justify or require preempting state law tort claims based on allegations of cruel, inhuman and degrading treatment. CACI J.A. 72-4; L-3 J.A. 30-1.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' Opposition Briefs, this Court should dismiss this appeal for lack of jurisdiction. Alternatively, should this Court assume jurisdiction over these interlocutory appeals, it should affirm the District Courts' judgments in both cases.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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