ORAL ARGUMENT HELD OCTOBER 26, 2010

Nos. 10-1891 & 10-1921

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, *et al.*,
Plaintiffs-Appellees,
v.
L-3 SERVICES, INC. & ADEL NAKHLA,
Defendants-Appellants.

On Appeal from United States District Court
for the District of Maryland
Case No. 08-cv-1696 (Honorable Peter J. Messitte)

DEFENDANTS-APPELLANTS' RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

Plaintiffs-Appellees' petition for rehearing fails to address, much less meet, the stringent standards for en banc or panel rehearing of Rules 35 and 40 of the Federal Rules of Appellate Procedure. The Court's decision is in harmony with precedent and there is no overlooked legal or factual issue.

The holding that there is jurisdiction over this interlocutory appeal to reverse the denial of defendants-appellants' motions to dismiss, does not, as plaintiffs contend, conflict with the precedent of the Supreme Court or other circuits, but applies settled law. It is the path urged by plaintiffs, not the Court's decision, that would conflict with an en banc decision of this Court, *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), the decision of the D.C. Circuit that the majority here found persuasive in "virtually identic-

al" circumstances, *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011), and other precedent.

In the absence of an intra- or inter-circuit split of authority, the dispute between the majority and dissent over the existence and application of combatant activities preemption is at most a disagreement over whether to follow other circuits in extending established rationales to the battlefield. En banc rehearing is not a tool for reviewing the outcomes of individual cases unless they involve questions of exceptional importance that are likely to recur. This is not such a case. It is rooted in the particular circumstances of claims by enemy aliens based on the military's employment of contractors in battlefield detention facilities. Aside from *Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. Sept. 21, 2011)—decided by the same panel as this case—we know of no other such cases pending in any jurisdiction.

STATEMENT

1. This case and *Al Shimari* arose out of the unique context of wartime detention and interrogation operations of the United States military in Iraq that was first litigated in *Saleh*. Because of critical shortages of military personnel to conduct interrogations, the United States Army turned to CACI and The Titan Corporation (subsequently renamed L-3 Services, Inc.) to provide interrogators and linguists to combat units in Iraq. *See* Op. at 3-4; *Saleh*, 580 F.3d at 2. During the war, the U.S. military seized and detained Iraqis suspected of being enemy fighters or possessing useful intelligence at Abu Ghraib and other military prisons. Op. at 4; *Al Shimari* at 4.

In 2004, counsel for plaintiffs here and in *Al Shimari* brought suit on behalf of Iraqi nationals detained and imprisoned by the U.S. military. *See Saleh*, 580 F.3d at 2. The suit was brought against the same defendants and was based on "circumstances virtually identical to those before" the Court in this case and in *Al Shimari*. *Al Shimari* at 6. Plaintiffs asserted tort claims under both state common law and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and sought class certification, which was denied.

In *Saleh*, the D.C. Circuit, applying the holding in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and the constitutional commitment of the War-Making power to the Federal Government, held state law claims preempted and explained that federal common law claims under the ATS are displaced in the face of Congressional intent to cast an "immunity net" over the battlefield. *Saleh,* 580 F.3d at 6, 16. Plaintiffs petitioned for certiorari. The Supreme Court called for the views of the Solicitor General, who wrote that *Saleh* was consistent with *Boyle* and reasonably relied on the combatant activities exception to the Federal Tort Claims Act ("FTCA") in concluding that there was a need to prevent both federal and state tort law from interfering with military operations on the battlefield. *See* Brief for the U.S. as Amicus Curiae at 13, 15, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011). Certiorari was denied.

2. While *Saleh* was pending before the D.C. Circuit, plaintiffs' counsel brought the *Al Shimari* case against CACI in the Eastern District of Virginia and this case against L-3 Services and its former employee, Adel

Nakhla, in the District of Maryland, on behalf of previously unnamed members of the putative class in *Saleh*. Each case alleged, as had the plaintiffs in *Saleh*, that the defendants conspired with the military to torture plaintiffs. L-3 and Nakhla moved to dismiss the complaint on numerous grounds. Viewing the case as an "ordinary tort suit against a non-governmental entity," the district court denied the motions to dismiss in all respects. *See Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010). L-3 and Nakhla appealed the district court's order on grounds of law of war immunity, derivative immunity, the political question doctrine, and combatant activities preemption under *Saleh*. On appeal, plaintiffs challenged the Court's jurisdiction and defended the district court's ruling. While plaintiffs contended that *Saleh* was wrongly decided and that the district court should be affirmed, they did not argue that any claims would survive if this Court followed *Saleh* as L-3 and Nakhla urged. This case and *Al Shimari* were scheduled for oral argument before the same panel.

In a divided opinion, this Court adopted the reasoning of *Saleh* (as set forth in its opinion in *Al Shimari* issued the same day as and incorporated by the opinion here). Op. at 5. The majority recognized the unique circumstances under which L-3 employees were integrated into wartime military functions, over which the military retained command authority. *Al Shimari* at 9-10. Under such circumstances, "'the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations.'" *Al Shimari*

at 10 (quoting *Saleh*, 580 F.3d at 7). The majority also relied upon the Congressional policy of eliminating tort as a means of regulating federal wartime conduct to free military commanders from potential civil suit. *Al Shimari* at 10. Constitutional separation-of-power principles undergird the Court's finding that "conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation." *Al Shimari* at 12. The Court concluded that "'the very purposes of tort law are in conflict with the pursuit of warfare.'" Op. at 11 (quoting *Saleh*, 580 F.3d at 7).

This Court also rejected plaintiffs' contention that it lacked jurisdiction. It acknowledged that although the "collateral order doctrine is intended to be modest in scope," Op. at 6, this interlocutory appeal falls within the "narrow class" of cases that are immediately appealable, Op. at 8. The Court made this determination in the unique circumstances of this case where "the denial of immunity and preemption in the battlefield context must be immediately appealable." Op. at 10. The Court recognized that this case "presents substantial issues relating to federal preemption, separation-of-powers, and immunity that could not be addressed on appeal from final judgment," that the district court conclusively determined the issue on which the Court reversed, and that "the disputed questions are collateral to resolution on the merits." *Id.* at 8. The Court also explained that the preemption here is not the traditional preemption doctrine under the discretionary function exception to the FTCA, Op. at 9, but is akin to immunity, *Al Shimari* at 8, as it vindicates the public interest of insulating "the battlefield from the

unjustified exertion of power by the courts…and [ ] free[s] military operatives from the fear of possible litigation and the hesitancy that such fear engenders." *Id.* at 10.

Judge King dissented on jurisdiction and incorporated by reference his dissent on the merits in the *Al Shimari* case, *see* Op. at 11 n.1. On the merits, Judge King followed the dissent in *Saleh*, contending that it was wrong to extend *Boyle* to this context. *Al Shimari* at 24-41 (King, J., dissenting). He heavily relied on plaintiffs' misinterpretation of certain Department of Defense regulations, *id.* at 31, a position that was rejected by the *Saleh* majority and repudiated by the United States in the Solicitor General's brief opposing certiorari in *Saleh*. *See* Brief for the U.S. as Amicus Curiae at 14 n.6, *Saleh*, No. 09-1313, (U.S. May 27, 2011). On jurisdiction, Judge King did not dispute that L-3 and Nakhla made substantial claims of immunity that fall within the collateral order doctrine, but disagreed with the majority's decision to apply *Saleh* without deciding the other immunity issues.

ARGUMENT

Rehearing by the full court "is not favored" and ordinarily will not be ordered unless (1) it is "necessary to secure or maintain uniformity of the court's decisions" or (2) "the proceeding involves a question of exceptional importance." *See* Fed. R. App. P. 35(a). A petition for review by the full court must begin with a statement that identifies precisely how the petition meets this standard. *See* Fed. R. App. P. 35(b). Similarly, a petition for panel rehearing must contain an introduction stating how, in counsel's judgment,

(i) a material factual or legal matter was overlooked, (ii) a change in the law after the case was submitted was overlooked, (iii) the opinion fails to address a conflict with a decision of the Supreme Court, this Court, or another court of appeals, or (iv) the proceeding involves a question of exceptional importance. Local Rule 40(b).

Plaintiffs failed to include the statements required by Rule 35(b) and Local Rule 40(b), and do not otherwise clearly identify which issues they seek to have reviewed by the full court, which they seek to have the panel rehear, or the precise basis for seeking rehearing. Plaintiffs appear to argue that the case should be reheard: (1) to "clarify" the instructions on remand to change what they order; (2) to avoid a supposed conflict with decisions of other courts of appeals with respect to jurisdiction; and (3) to reverse on the merits based upon arguments made in the petition for rehearing in *Al Shimari*, which they improperly attempt to incorporate by reference here. *See* Fed. R. App. P. 35(b)(2)-(3); *cf.* Fed. R. App. P. 28(i). Rehearing is not warranted for any of these reasons, either by the panel or the full court.

1. Plaintiffs first argue that either the panel or full court should rehear the case to "clarify" the Court's instructions on remand. Pet. at 4. But there is no ambiguity and no basis for rehearing. The Court clearly ordered the entire case dismissed: "On contractor's appeal, we reverse and remand with instructions to dismiss this case for the reasons given in *Al Shimari v. CACI International.*" Op. at 5; *see also id.* at 10 ("[W]e reject plaintiffs' challenge to our jurisdiction; reverse the district court's order denying L-3's mo-

tion to dismiss; and remand with instructions to dismiss."). Plaintiffs' attempt to create the illusion of ambiguity by assiduously avoiding reference to the Court's instructions to dismiss "this case" provides no basis for rehearing by the panel or full court.

There is also no basis to rehear the case to address what is implicit in this Court's decision and expressly addressed by the D.C. Circuit. This Court was correct to order dismissal of the entire case, including the ATS claims. The majority adopted the reasoning of *Saleh*, "'both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.'" *Al Shimari* at 10 (quoting *Saleh*, 580 F.3d at 7). This rationale operates like sovereign immunity leaving "no federal law addressing the claim." *Al Shimari* at 8. *Saleh* not only held that state law is pre-empted, it also explained that the same uniquely federal interests that preempt state law also bar use of the ATS to apply "international law to support a tort action on the battlefield." *See Saleh*, 580 F.3d at 16. In adopting the reasoning of *Saleh*, this Court's rationale clearly disposes of all common law tort claims—whether arising under state or federal law—and fully supports the instructions to dismiss the case. Moreover, allowing ATS claims to proceed where state law claims are barred would repudiate the Supreme Court's instruction to use "great caution" in implying federal common law claims under the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004).

Nor was the majority required to address the ATS claims separately from its careful and thorough discussion of preemption and underlying separation of powers concerns. *See United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999). That is particularly true here, where plaintiffs never argued that state and federal claims should be treated differently under *Saleh*. In response to L-3's argument that *Saleh* required dismissal of all claims, *see* L-3 Br. at 38, 40; L-3 Reply at 6, plaintiffs argued only that this Court should reject *Saleh*'s holding, *see* Pls.' Br. at 39-44. Plaintiffs did not argue that the ATS claims would survive if the Court adopted *Saleh*. Plaintiffs cannot obtain rehearing based upon arguments that they failed to make before the panel. *See Mironescu v. Costner*, 480 F.3d 664, 677 n.15 (4th Cir. 2007) (appellee waives issue by omitting it from brief on appeal).

2. Plaintiffs' arguments about appellate jurisdiction also do not warrant en banc review. Contrary to plaintiffs' attempt to paint the majority's decision as encompassing all "denials of motions to dismiss premised on Federal Tort Claims Act (FTCA) preemption grounds," Pet. at 5, the majority, aware of the "modest" scope of the collateral order doctrine, carefully and correctly determined that this case was different than cases asserting traditional *Boyle* preemption, bringing it within the Court's collateral order jurisdiction. Only by significantly overstating the scope of the holding are plaintiffs able to assert that the majority's opinion conflicts with holdings in other circuits, none of which presented the interplay of issues that gave rise to jurisdiction here. The exercise of jurisdiction in this case does not conflict with

other decisions. If anything, it is plaintiffs that seek to repudiate the law of this Circuit, which they carefully avoid discussing.

a. The decision here does not create a conflict with the decisions of other circuits as plaintiffs argue. *See* Pet. at 5 (citing *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir. 2010); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010); *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398 (3d Cir. 2010)). Plaintiffs' authorities do not involve the immunity issues present here or the unique concerns implicated by suits by enemy aliens based on their treatment during battlefield detention in military prisons.

Rodriguez involved discretionary function preemption, which is rooted in different concerns than combatant activities preemption, Op. at 9 (quoting *Saleh*, 580 F.3d at 7). And *Rodriguez* did not involve the immunity issues implicated here. Nor do *Harris* and *Martin* conflict with this Court's decision. Those cases involved suits on behalf of contractor employees or U.S. soldiers, not enemy aliens seeking to recover in the context of core combatant activities such as interrogation and detention. Accordingly, there was no claim to law of war immunity. Indeed, in *Harris*, there was no claim to immunity at all, s*ee* 618 F.3d at 399-400, and in *Martin*, the claim to official immunity was insubstantial because the defendant was not engaged in a government function, *see* 618 F.3d at 484. In contrast, no panel member in this case disputed that L-3 has a substantial claim to immunity or, as the district court found, that defendants here were engaged in a public function in support of "one of the most basic governmental functions, and one for which

there is no privatized equivalent." 728 F. Supp. 2d at 749. Finally, the *Harris* court held that combatant activities preemption had not been conclusively determined, 618 F.3d at 404, but no member of the panel here disputed that the preemption issue was conclusively determined by the district court.

b. En banc review also is not warranted because the Court's exercise of jurisdiction here is rooted in case-specific determinations that amount at most to a disagreement over the application of settled precedent about which the majority was correct. The disagreement between the majority and the dissent was not, as plaintiffs characterize it, whether there was a basis for jurisdiction over the appeal, but rather which issues in the appeal should have been reviewed. In overstating the issue, plaintiffs ignore what was not disputed by the dissent: that taking jurisdiction over a trial court order denying law of war immunity is not an expansion of the collateral order doctrine, nor would be taking jurisdiction over the claims of derivative absolute or sovereign immunity. *See* Op. at 23 (King, J., dissenting). While Judge King disagreed with Judge Niemeyer about whether the derivative immunity ruling was final, *compare* Op. at 23 (King, J., dissenting), *with Al Shimari* at 22-24 (Niemeyer, J., concurring), and whether *Saleh* preemption in this context where contractors were embedded in battlefield prisons under military control was a form of sovereign immunity that brought the denial of immunity within the class of appealable orders, *compare* Op. at 18 n.6 (King, J., dissenting), *with* Op. at 10, he did not disagree that there was a basis for collateral order jurisdiction, Op. at 23 (King, J., dissenting).

Because there was a clear basis for jurisdiction over the appeal—which distinguishes this case from those relied upon by plaintiffs—the disagreement reduces to whether combatant activities preemption is sufficiently intertwined with the substantial claim to immunity asserted by defendants. *See Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). This is a case-specific determination that is plainly unsuitable for en banc rehearing. Indeed, beyond a passing citation to Judge King's disagreement about the degree to which these issues are intertwined, *see* Pet. at 15 n.5, plaintiffs do not attempt to explain how this issue warrants rehearing. And to the extent that plaintiffs and Judge King are arguing that it was necessary to rule on the immunity issue before reaching the preemption issue, that argument conflicts with this Court's en banc decision in *Jenkins*, 119 F.3d at 1159 & n.2, and other circuit precedent, *e.g.*, *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008).

c. The majority was correct to exercise jurisdiction here. The issues on appeal clearly satisfy the *Cohen* factors. The dissent concedes that L-3's substantial claims to law of war immunity and combatant activities preemption were conclusively determined by the district court. And a defendant's entitlement to immunity is recognized as an issue separate and apart from the merits of plaintiffs' tort claims, satisfying the second *Cohen* factor. *See Smith v. McDonald*, 737 F.2d 427, 428 (4th Cir. 1984), *aff'd*, 472 U.S. 479 (1985). As required by *Will v. Hallock*, 546 U.S. 345 (2006), the issues in the appeal would be effectively unreviewable absent immediate appeal because it

would allow judicial scrutiny of military policies and practices in a way that could not be remedied in an appeal from the final judgment. Op. at 8. And the issues underlying this appeal implicate important public interests including separation of powers, *supra* at 5, in contrast to the private interests in the cases relied upon by plaintiffs, *see* Pet. at 7-8.

In addition, the issues underlying the Court's holding are intertwined with—if not precisely the same as—those underlying *Dow v. Johnson*, 100 U.S. 158 (1880), where the Supreme Court recognized that requiring the occupying forces to respond to suits by the occupied would destroy military efficiency. *See Dow*, 100 U.S. at 165; *see also Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010). Both immunity and preemption issues in these circumstances turn on the military's control, the nature of the battlefield, and the nature of the claims being made. As the Solicitor General explained in his brief in the Supreme Court, there is a unique federal interest in "avoiding unwarranted judicial second-guessing of sensitive judgments by military personnel and contractors with which they interact in combat-related activities, and ensuring that there are appropriate limits on private tort suits based on such activities." Brief for the U.S. as Amicus Curiae at 11-12, *Saleh*, No. 09-1313 (U.S. May 27, 2011).

Likewise, plaintiffs' suggestion that the immunity required to support an interlocutory appeal in a civil case must arise from an explicit statutory or constitutional guarantee conflicts with circuit precedent. *Compare* Pet. at 8, *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996) (ex-

ercising collateral order jurisdiction over claim of derivative absolute immunity by civilian contractor). In any event, the immunity at issue here is grounded in separation of powers, *see supra* at 5, and has a good pedigree in public law, *see Dow*, 100 U.S. 158.

Plaintiffs and the dissent are wrong to assert that the Court's thoughtful determination that there was appellate jurisdiction has created a circuit conflict or will open the floodgates to interlocutory appeals in this Court.

3. To the extent that plaintiffs are seeking rehearing on the merits of the preemption issue in this case by referring to and attempting to incorporate the petition filed in *Al Shimari*, Pet. at 2—a case in which appellants were not a party and despite having reached the page limit for its petition without that material—the petition should be denied because rehearing is not warranted for the reasons set forth below (and for all of the reasons set forth at greater length by the defendants-appellants in that case).

Rather than resolve a conflict, plaintiffs urge the Court to grant rehearing to *create* one with the D.C. Circuit decision in *Saleh*, which the D.C. Circuit declined to rehear en banc and the Supreme Court refused to review just last term. Creating a circuit split where none previously existed is not a reason to grant en banc rehearing. *See also Koohi v. United States,* 976 F.2d 1328 (9th Cir. 1992) (holding state and ATS claims against military contractors preempted where they arise out of wartime combatant activities of the U.S. military); *Vance v. Rumsfeld*, 653 F.3d 591, 620-22 (7th Cir. 2011) (distinguishing alien claims from those of U.S. citizens in war zones). And while

the Solicitor General's brief opposing certiorari in *Saleh* speaks for itself, the U.S. has recently endorsed the holding of *Al Shimari* as well:

> [T]he D.C. Circuit has correctly held that courts must look to Congress before providing a damage action to persons formerly detained by the military overseas during an armed conflict. *See also Al Shimari v. CACI Int'l*, _ F.3d _, No.-9-09-1335, slip op. 12 (4 Cir. Sept. 21, 2011) (ordering dismissal of claims of harsh interrogations, holding that "conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation").

Pet. for Reh'g and Suggestion for Reh'g En Banc of the Defendant-Appellant at 9-10, *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011) (No. 10-1687).

CONCLUSION

For the reasons set forth above, the petition for rehearing and rehearing en banc should be denied.

Respectfully submitted,

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October 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2011, I caused a true copy of the foregoing Response to Petition for Rehearing and Rehearing En Banc to be filed through the Court's electronic case filing system and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of the foregoing to be sent by United Postal Service, postage prepaid, to the same below-listed counsel:

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