UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*., Plaintiffs,	)	
v.	)	Case No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC. Defendant.	)	
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S SUGGESTION OF LACK OF SUBJECT MATTER JURISDICTION

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Plaintiffs respectfully submit this opposition to the motion by Defendant CACI Premier Technology, Inc. ("CACI") to dismiss this case based on its suggestion that the Court lacks subject matter jurisdiction.

PRELIMINARY STATEMENT

In this, CACI's sixteenth dispositive motion and its fourth seeking dismissal of Plaintiffs' ATS claims for lack of subject matter jurisdiction, including one filed just six months ago, CACI now goes so far as to ask this Court to effectively reverse the decision of the Fourth Circuit in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"). It asserts, on a conclusory analysis, that the 4-3 opinion in a RICO case, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), overturned the "touch and concern" analysis of *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), *sub silentio*, and that now, *Al Shimari III*'s faithful application of *Kiobel* is not good law. CACI's arguments reveal themselves to be little more than restated disagreement with *Al Shimari III*'s holding and reasoning, even as the proper path to have registered that disagreement—a petition for *certiorari*—has long ago passed. In any event, CACI's arguments are dilatory and wrong.

First, even though *RJR Nabisco*'s purported sea change in the law occurred in 2016, CACI has up to now failed to mention this supposedly dramatic development despite its myriad other filings challenging the Court's subject matter jurisdiction—including its July 2017 motion to dismiss the case for lack of subject matter jurisdiction under the political question doctrine (Dkt. 627), and its 2018 motion to dismiss the ATS claims for lack of subject matter jurisdiction pursuant to the Supreme Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (Dkt. 812), a case which expressly reaffirmed *Kiobel*'s "touch and concern" test. Here, CACI merely rehashes political question arguments definitively rejected by the Fourth Circuit and this

Court. CACI's persistent filing of repetitive, often overlapping motions – *seriatim* – approaches an abuse of process and is a senseless burden on the Court and Plaintiffs.

Second, *RJR Nabisco* – and its embrace of a "focus" analysis for evaluating extraterritorial application of statutes – did not revise the "touch and concern" test in *Kiobel*, which itself relied on the focus analysis in presenting a harmonized test for the distinct context of a jurisdictional statute like the ATS. *Al Shimari III* correctly applied this understanding and correctly ruled that the position CACI again advances here—that *all* of the conduct relevant to the claim must have occurred in the United States—was expressly rejected by the majority opinion in *Kiobel*. This argument cannot be revived now. And, *Jesner*, which was decided after *RJR Nabisco*'s imagined rewriting of the law, reaffirmed *Kiobel*'s "touch and concern" test without mention of *RJR Nabisco*'s "focus" test.

Third, even applying CACI's improperly constrained "focus" analysis, relevant U.S.-based conduct here is sufficient to displace the presumption. Indeed, CACI fails to reveal that *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018), upon which it heavily relies, only *favors* Plaintiffs insofar as the court considered less relevant U.S.-based conduct than Plaintiffs have alleged here and still ruled that the case could proceed. Simply put, the "focus" of the ATS is cases that meet the "touch and concern" test articulated in *Kiobel*, and the Fourth Circuit has held that this case satisfies that test – leaving nothing further for this Court to do but continue to carry out the *Al Shimari III* mandate.

Finally, CACI's rehash of the political question doctrine – and refusal to accept the holdings of the Fourth Circuit and this Court – merits no discussion.

ARGUMENT

I. CACI'S MOTION IS DILATORY AND AN ABUSE OF PROCESS

CACI makes the remarkable claim that *RJR Nabisco* established a "*dramatically* different test" than that adopted in *Kiobel* and thereby categorically (albeit tacitly) "rejected" the Fourth Circuit's ruling in *Al Shimari III*. CACI Br., at 4 (Dkt. 1058) (emphasis added). Yet, given that *RJR Nabisco* was decided in June 2016, it is curious that CACI waited approximately 30 months to bring to the Court's attention this "dramatically different" test and its corresponding, putative rejection of Fourth Circuit precedent. *See* CACI Br. (Dkt. 1058). Indeed, CACI filed a motion suggesting a lack of subject matter jurisdiction in 2017, relating to the political question doctrine, and another in May 2018—two years after *RJR Nabisco*—following the Supreme Court's decision in *Jesner*, but CACI did not on either occasion argue or even mention that *RJR Nabisco* ushered in this sea change in the extraterritoriality analysis. CACI also chose not to raise these arguments as part of its December-filed motion for summary judgment which seeks judgment as a matter of law, continuing to disregard the Court's admonition not to file motions *seriatim*. Oct. 25, 2018 Hr'g Tr., at 17:9–18:16 (Dkt. 978) (Mr. LoBue: "The problem we face is that they tend to dribble these motions out, and we keep coming back here." The Court: "[I]t is true that the Court does not favor motions seriatim . . . ."). Whether a strategic decision to keep Plaintiffs busy briefing multiple motions simultaneously or a tactical decision to avoid page limitations,[1] CACI's apparent gamesmanship should end.

[1] On December 20, 2018, CACI filed both a 30-page brief in support of a motion for summary judgment (Dkt. 1034) and a 30-page brief in support of a motion to dismiss based on state secrets (Dkt. 1041). It filed this motion to dismiss on January 3, 2019.

As demonstrated below, there is no radical shift in the law. But this continuing serial motion practice—totaling sixteen dispositive motions and over forty total motions—verges on an abuse of process and continues to needlessly burden the Court's and Plaintiffs' time.

II. *KIOBEL* AND *AL SHIMARI III* ARE STILL GOOD LAW

A. *RJR Nabisco* Did Not Change *Kiobel*'s "Touch and Concern" Test or Reject the Fourth Circuit's *Al Shimari III* Decision

In *Kiobel*, the Court held that the presumption against extraterritoriality applies to claims arising under the ATS, and that to displace the presumption would require a showing that "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 569 U.S. at 125; *see also Jesner*, 138 S. Ct. at 1398 (affirming that displacement of the presumption for ATS claims turns on the "touch and concern" test). In support of this standard, the Court cited Part IV of its opinion in *Morrison v. National Australia Bank Ltd*., 561 U.S. 247, 266-273 (2010), *id*., which sets the territoriality threshold as the "focus" of the statute and asks whether the relevant conduct is that which "the statute seeks to 'regulate.'" *See Morrison*, 561 U.S. at 267*; see also Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 193 (5th Cir.) ("Notably, in discussing the claims that 'touch and concern' the United States, the Court cited to *Morrison* and its 'focus' inquiry."), *cert. denied*, 138 S. Ct. 134 (2017).

In applying the presumption against extraterritoriality to civil RICO claims, *RJR Nabisco* discussed the reasoning of *Kiobel*, and did not modify this standard or cast any doubt on the continued vitality of the *Kiobel* holding. First, in *RJR Nabisco* the Court reiterated that the territoriality inquiry examines whether the "relevant" conduct falls within the statute's focus – as opposed to merely *any* conduct. *RJR Nabisco*, 136 S. Ct. at 2101 ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic

application even if other conduct occurred abroad."). But, as *RJR Nabisco* explained, in *Kiobel*, the Court "did not need to determine, as we did in *Morrison*, the statute's 'focus,'" because on the facts presented—a foreign corporation aiding and abetting a foreign government to commit violations against foreign citizens in a foreign country— "*all* the relevant conduct" regarding the international law violations occurred abroad – *i.e.*, none occurred in the U.S. *Id*. (emphasis added).

The Fourth Circuit faithfully applied this understanding of *Kiobel* in *Al Shimari III*. The court recognized that *Kiobel* used the concept of "relevant conduct" to "frame its 'touch and concern' inquiry," even as it observed that the Supreme Court did not expressly define what "relevant conduct" would be, since all conduct "relevant" to the claims in *Kiobel* occurred abroad (and because the defendant's "mere corporate presence" in the U.S. was not relevant to the claims in *Kiobel*). *Al Shimari III*, 758 F.3d at 527. *Al Shimari III* also stressed that the Supreme Court required that the "claims," as opposed to "the alleged tortious conduct," must "touch and concern" U.S. territory with sufficient force. *Id*. *Al Shimari III* then held that, in contrast to *Kiobel*, Plaintiffs' claims here reflect "extensive 'relevant conduct' in United States territory," and otherwise recognized that the claims had "substantial ties to United States territory." *Id*. at 528; *see also id*. ("[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.").

The Fourth Circuit thus found the following "relevant conduct" made Plaintiffs' claims "'touch and concern' the territory of the United States with sufficient force" to displace the presumption:

> (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.

Id. at 530-31; *see also WesternGeco LLC v. ION Geophysical Corp*., 138 S. Ct. 2129, 2137 (2018) ("The focus of a statute is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." (quotation marks and brackets omitted)).

CACI suggests, in a disingenuous reading of the opinion, that the Fourth Circuit in *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017), has itself subsequently abandoned *Kiobel*'s "touch and concern" test and *Al Shimari III*'s analysis, and adopted CACI's interpretation of the ATS. CACI Br., at 10 (Dkt. 1058). A proper reading of the case reveals, however, the application of precisely the same analysis that the Fourth Circuit employed in *Al Shimari III*, albeit with a different outcome because of the obviously different factual circumstances in the two cases.[2] In *Warfaa*, the court expressly endorsed *Al Shimari III*'s understanding and application of *Kiobel*, 811 F.3d at 659, and observed that "[b]ased on that extensive relevant conduct" in United States territory alleged by the *Al Shimari* plaintiffs, their "claims sufficiently touched and concerned the United States to establish jurisdiction under the

[2] *Warfaa* was decided even before *RJR Nabisco*, so if it so evidently adopted the test CACI advocates or somehow meaningfully departed from *Kiobel*, it is unclear why CACI did not raise this conflict in the nearly three years since *Warfaa* was decided.

ATS." *Id*. (quotation marks and brackets omitted); *see also id.* (Plaintiffs' "extensive 'relevant conduct'" in U.S. territory "distinguished their case from *Kiobel*."). The Fourth Circuit underscored that, in contrast to *Al Shimari III*, "all of the relevant conduct" in *Warfaa* occurred outside the U.S. and "[n]othing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States." *Id*. at 660; *cf. id.* (The "alleged campaign of torture and intimidation was launched, managed and controlled by the Somali army."). *Warfaa* further explained that the U.S. residency of the defendant was not conduct relevant to the claims since, unlike here, such residence was acquired "long after the alleged events of abuse," and that "[m]ere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context." *Id.* at 661.

Finally and critically, having fully embraced an overbroad reading of *Jesner* in seeking to dismiss Plaintiffs' ATS claims in 2018, CACI barely makes any mention of the decision in this new motion – except to restate that this Court got its prior decision wrong. CACI Br., at 5 n.2 (Dkt. 1058). That silence is telling because, even *after RJR Nabisco* was decided, *Jesner* expressly reaffirmed *Kiobel*'s touch and concern test, confirming there is no dissonance between *Kiobel* and *RJR Nabisco*. *See Jesner*, 138 S. Ct. at 1398 (restating touch and concern test); *id.* at 1406 (declining to apply touch and concern test given that foreign-corporate status of defendant resolved the case); *see also id.* at 1429, 1435 (Sotomayor, J., dissenting) (discussing *Kiobel*'s touch and concern test).

B. *Al Shimari III*'s Analysis of the Relevant Conduct Is Consistent with the Proper Understanding of the Focus of the ATS Claims Plaintiffs Raise

In any event, CACI's view of the "focus" of the ATS is plainly incorrect. CACI asserts that the focus of the ATS is "unquestionably the tort committed in violation of the law of nations" and thus, "[t]he only relevant conduct for purposes of ATS jurisdiction is the conduct comprising

the alleged international law violations." CACI Br., at 10 (Dkt. 1058). This is exactly what CACI argued to the Fourth Circuit five years ago: "The district court's conclusion that *the alleged violation of the law of nations* is what must occur domestically for ATS to apply flows directly from *Kiobel*." CACI Br., at 15, *Al Shimari III*, 758 F.3d 516 (4th Cir. 2014) (No. 13-1937) (Dkt. No. 69). And this is exactly the argument the Fourth Circuit rejected in *Al Shimari III* as foreclosed by the majority opinion in *Kiobel*. 758 F.3d at 527. The Fourth Circuit observed that CACI's argument represented the view of Justice Alito's concurring opinion in *Kiobel*, which was joined by only Justice Thomas, and that the analysis advanced in this concurrence was "far more circumscribed than the majority opinion's requirement that the claims touch and concern the territory of the United States." *Id.* (quotation marks omitted).[3]

As explained, *Kiobel* found no need to expressly analyze the focus of the ATS because all of the relevant conduct in that case was foreign – *i.e.*, a foreign defendant sued for aiding and abetting violations in a foreign country against foreign victims. *See RJR Nabisco*, 136 S. Ct. at 2101. In *Morrison*, to determine whether the "focus" of Section 10(b) of the Securities Exchange Act was to prevent deceptive conduct (as plaintiffs had argued) or to regulate the purchase or sale of securities on U.S. exchanges, the Court looked to the overall objective of the Exchange Act and found that "purchase-and-sale transactions" are "the objects of the statute's solicitude" and what "the statute seeks to regulate." 561 U.S. at 267 (quotation marks omitted). In *WesternGeco*, the Court identified the focus of Section 271(f) of the Patent Act by considering that this provision "was a direct response to a gap in our patent law" which sought to "reach[] components that are manufactured in the United States but assembled overseas" and to "protect[]

[3] Justice Kennedy's concurrence – which represented the fifth vote for what would otherwise have been a plurality decision – likewise rejected CACI's (and Justice Alito's) view that the international law violation must occur domestically, as he emphasized that *Kiobel* left open the application of the ATS for "human rights abuses committed abroad" in cases not covered by the "reasoning and holding" of *Kiobel*. *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring).

against domestic entities who export components from the United States." 138 S. Ct. at 2138 (quotation marks and ellipsis omitted).

Following this guidance and the Supreme Court's explication of ATS jurisprudence, the corresponding objective of the ATS comes into clear focus. As an initial matter, because the ATS is a jurisdictional statute, the presumption against extraterritoriality does not apply to the statute itself, but to "claims" arising under the statute. *Kiobel*, 569 U.S. at 124. The Court has made clear that not just any violations of customary international law are actionable, only those "violations of international law norms that are 'specific, universal and obligatory.'" *Kiobel*, 569 U.S. at 117 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). The very reason for such a limitation stems from what the Court has identified as the "objective" of the ATS:

> [T]o avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.

Jesner, 138 S. Ct. at 1397; *see also Sosa*, 542 U.S. at 715 ("It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort."); *Kiobel*, 569 U.S. at 123-24 ("[O]ffenses against ambassadors violated the law of nations, and if not adequately redressed could rise to an issue of war. . . . The ATS ensured that the United States could provide a forum for adjudicating such incidents." (quotation marks omitted)); *Al Shimari III*, 758 F.3d at 529-30 ("A basic premise of the presumption against extraterritorial application is that United States courts must be wary of 'international discord' resulting from 'unintended clashes between our laws and those of other nations.'" (quoting *Kiobel*, 569 U.S. at 115)).

Thus, to determine whether a claim under the ATS is within the subject matter jurisdiction of the court, a court must consider whether the conduct relevant to its focus—providing redress for international law violations without which the U.S. would be deemed "responsible" and risk international discord—"touch[es] and concern[s] the territory of the United States . . . with sufficient force" to displace the presumption against extraterritoriality. *Kiobel*, 569 U.S. at 124-25. That is what Plaintiffs argued to the Fourth Circuit in 2013,[4] and this is precisely what the Fourth Circuit held in *Al Shimari III*. *See Al Shimari III*, 758 F.3d at 530 (noting that "litigation of these ATS claims will not require unwarranted judicial interference in the conduct of foreign policy" in part because the "political branches already have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals" (quotation marks omitted)).

In sum, it is hard to imagine a constellation of facts that would provide greater support for displacing the presumption than those presented in this case: (i) the claims arise out of universally condemned acts (torture and war crimes), perpetrated against foreign nationals who were actually under the authority and implicit international law responsibility of the U.S. given the U.S. occupation and then-plenary authority over Iraq and Abu Ghraib; (ii) there was no conflicting Iraqi law or sovereign government in place and, indeed, during the U.S. occupation of Iraq, it was United States law that expressly applied via President Bush's creation of the Coalition Provisional Authority (CPA), which during the time in question "exercise[d] powers of government temporarily in order to provide for the effective administration of Iraq," and was

[4] *See* Pls.' Br., at 27, *Al Shimari III*, 758 F.3d 516 (4th Cir. 2014) (No. 13-1937) (Dkt. 28) ("In *Kiobel*, the Supreme Court recognized that the focus of the ATS – or the object of its solicitude – is to provide jurisdiction over civil claims by aliens for core international law violations, including those committed against ambassadors in the U.S. and those committed by U.S. citizens, so as to avoid diplomatic strife or even breaches of international law giving rise to war." (citations omitted)).

"*vested by the President with all executive, legislative and judicial authority* necessary to achieve its objectives"[5]; (iii) the international law violations were committed by U.S. actors, in a conspiracy with U.S. soldiers (who were themselves court-martialed by the U.S. military for their role in the conspiracy), via a contract with the United States government, thereby implicating a U.S. obligation under international law to punish American tortfeasors and provide a remedy to their victims; and (iv) CACI managers acting inside the United States took actions to reward abusive employees and cover up its role in the scandal. *See Al Shimari III*, 758 F.3d at 530-531; *cf. Jesner*, 138 S. Ct. at 1406-07 (detailing the ways in which international "discord" may follow by extending the reach of the ATS to *foreign* corporations).

C. Even Under CACI's Constricted View of the ATS Focus, Plaintiffs' Claims Survive

Even if the Court were to adopt CACI's proposed focus analysis to conclude that the only relevant conduct is the location of the tort or the aiding and abetting that occurred in the United States – in contravention of *Al Shimari III* and the binding Supreme Court precedent in *Kiobel* and *Jesner*, *see supra* Part II.B – Plaintiffs' claims still survive. Among the allegations supporting the Fourth Circuit's findings were "that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it." *Al Shimari III*, 758 F.3d at 531. As set forth in Plaintiffs' Opposition to CACI's Motion for Summary Judgment and accompanying exhibits, the evidence shows that CACI managers in the U.S. contributed to, knew of, and covered up the abuse and even rewarded interrogators implicated in it. *See* Pls.' Br., at 15-17 (Dkt. 1086).

[5] OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS PURSUANT TO SECTION 1506 OF THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003 (PUBLIC LAW 108-11) (June 2, 2003) (emphasis added).

CACI relies heavily on *Doe v. Nestle, S.A.*, but fails to mention the actual holding, which only supports Plaintiffs. In *Nestle*, the court identified relevant conduct occurring in the United States that itself did not amount to a law-of-nations violation, but nevertheless was relevant to the claim, even as injury (child slavery) occurred abroad. That conduct included providing "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier," and having "employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions, or 'financing arrangements,' originated." *Nestle, S.A.*, 906 F.3d at 1126. This conduct was relevant because it "paint[s] a picture of overseas slave labor that defendants perpetuated from headquarters in the United States." *Id*. Plaintiffs' allegations – and evidence – here paint an even clearer picture of U.S.-based conduct that facilitated injury occurring in Abu Ghraib.

And, as the Fourth Circuit has already observed, the allegations here stand in contrast to those that have failed CACI's proposed test in other circuits. The court specifically contrasted the claims here to those in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), where "the Second Circuit declined to extend ATS jurisdiction to claims involving foreign conduct by South African subsidiaries of American corporations." *Al Shimari III*, 758 F.3d at 529. In *Balintulo*, the only conduct alleged in the United States was "affirmative steps in this country to circumvent the sanctions regime" against South Africa as opposed to actions taken for the purpose of facilitating the conduct that led to the customary international law violations – and the actual torts were committed by foreign actors. *Balintulo*, 727 F.3d at 192. The same can be said of the allegations in the decisions cited by CACI. In *Adhikari*, the recruitment, transportation, and alleged detention by foreign companies all occurred in Nepal, Jordan, and Iraq and, while U.S.-

based defendant KBR "transferred payments to [Daoud] from the United States, using New York Banks," the plaintiffs "failed to connect the alleged international law violations to these payments or demonstrate how such payments—by themselves—demonstrate that KBR's U.S.-based employees actually engaged in trafficking the Deceased or forcing Plaintiff Gurung to work on its base." 845 F.3d at 198. Unlike here, the *Adhikari* plaintiffs "failed to introduce any evidence indicating that KBR's U.S.-based employees either (1) understood the circumstances surrounding Daoud's recruitment and supply of third-country nationals like Plaintiffs or (2) worked to prevent those circumstances from coming to light or Daoud's practices from being discontinued." *Id.* (quotation marks omitted).

None of these decisions justify revisiting the reasoned judgment of the Fourth Circuit in *Al Shimari III*.

Finally, Plaintiffs have previously argued further in the alternative that, under Supreme Court precedent, the presumption does not apply in the first instance because of the extent of de facto control the U.S. government exercised over Iraq when the violations occurred. As the Supreme Court explained in *Rasul v. Bush*, "whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application [to places] within 'the territorial jurisdiction' of the United States." 542 U.S. 466, 480 (2004) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Despite Cuba's retention of "ultimate sovereignty" over Guantánamo Bay Naval Base, the *Rasul* Court concluded that the base was within the "territorial jurisdiction" of the United States because the U.S. government maintained "complete jurisdiction and control" over it. *Id.* at 471, 480. *Compare Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 382 & n.4 (1948) (Fair Labor Standards Act ("FLSA") does apply to U.S. naval base in Bermuda because relevant lease granted "rights, power and authority" and "control" to the

U.S.), *with Foley Bros.*, 336 U.S. at 285 (FLSA does not apply to corporation acting in Iraq/Iran absent "some measure of legislative control" or "transfer of any property rights" to the U.S.). As detailed in prior briefing,[6] the governing structure during the period in question left the United States with **"**all executive, legislative and judicial authority necessary to achieve its objectives" and stipulated that contractors were subject to liability in U.S. courts under U.S. law (which would include the ATS and substantive legal standards the ATS incorporates). Given its holding that the relevant conduct alleged displaces the presumption against extraterritoriality, the Fourth Circuit declined to reach the alternative argument that the presumption would not even apply in this case.[7] However, if the Court were to disagree with the foregoing and the correctness of the Fourth Circuit's holding, Plaintiffs respectfully request the Court consider this alternative argument, with reference to the additional relevant briefing.

III. THE FOURTH CIRCUIT AND THIS COURT HAVE ALREADY REJECTED CACI'S POLITICAL QUESTION DEFENSE

As with so many of its arguments, CACI appears to believe that repetition enhances reason. It only results in exhaustion. Each and every one of the arguments CACI raises here has been raised before (multiple times) and rejected directly by the Fourth Circuit and by this Court.

[6] Pls.' Br., at 17-21 (Dkt. 399); Pls.' Br., at 26-30, *Al Shimari III*, 758 F.3d 516 (4th Cir. 2014) (No. 13-1937) (Dkt. 28).

[7] The court explained: "Because of our holding that the plaintiffs' ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application, we need not address the plaintiffs' alternative argument that the relevant conduct did not occur within the territory of a foreign sovereign because the Abu Ghraib prison constituted the 'de facto territory' of the United States." *Al Shimari III*, 758 F.3d at 531 n.8. But the court also stressed that "ATS jurisdiction is not precluded by the fact that the alleged conduct occurred while the plaintiffs in this case were detained in the custody of the United States military," because *Rasul* has held "nothing . . . categorically excludes aliens detained in military custody outside the United States from [asserting an ATS claim] in U.S. courts." *Id*. at 531 n.7.

First, as CACI itself has correctly conceded, *see* CACI Br., at 11-12 (Dkt. 222), and as Plaintiffs have repeatedly stressed, *see, e.g.*, Pls.' Br., at 36 (Dkt. 639), Pls.' Br., at 30-31 (Dkt. 1086), Plaintiffs do not need to show CACI personnel themselves carried out the torture of Plaintiffs. As this Court has already held in rejecting CACI's reprised argument, CACI's "unlawful acts against the Plaintiffs," derive from its conspiratorial agreement and aiding and abetting of others to harm Plaintiffs. *See Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 783-88 (E.D. Va. 2018).

Second, even though Plaintiffs have vigorously contested the level of command and control the military exercised over CACI given, among many other things, the "command vacuum" that permitted abuses outside of interrogations to occur, that question is no longer relevant because this Court has already found that unlawful acts of torture, war crimes and cruel inhuman and degrading treatment occurred, *id.* at 781-82, and "any acts of the CACI employees that were unlawful when committed, irrespective whether they occurred under actual control of the military, are subject to judicial review," *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 159 (4th Cir. 2016). Torture is a legal question, not subject to discretionary decisions of the military. *See also id.* at 161 (affirming that questions here are subject to judicially manageable standards).

CONCLUSION

For all of the foregoing reasons, CACI's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2019, I electronically filed Plaintiffs' Opposition to Defendant's Suggestion of Lack of Subject Matter Jurisdiction through the CM/ECF system, which sends notification to counsel for Defendants and the United States.

/s/ John Kenneth Zwerling
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