No. 25-1043

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellees,

– AND –

TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E,
Plaintiffs,

– v. –

CACI PREMIER TECHNOLOGY, INC.,
Defendant-Appellant and Third-Party Plaintiff-Appellant,

– AND –

TIMOTHY DUGAN; CACI INTERNATIONAL, INC.; L-3 SERVICES, INC.,
Defendants,

– v. –

UNITED STATES OF AMERICA; JOHN DOES 1-60,
Third-Party Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF *AMICI CURIAE* SCHOLARS OF FEDERAL COURTS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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STATEMENT OF *AMICI*[1]

Amici curiae, whose names and affiliations are set forth in the attached Addendum, are distinguished scholars who teach, lecture, and write about federal courts. *Amici* are nationally recognized experts and have collectively published extensively on issues implicated in this case, including federal jurisdiction, extraterritoriality, conflict of laws, and canons of statutory construction.

This case brings into play the most basic commitment of our legal system: to fairly, effectively, and lawfully adjudicate matters in the interests of justice. *Amici* have an academic and professional interest in ensuring that federal courts continue in the great tradition of serving that purpose. This case is of significant importance to *Amici* both because of the compelling claims at issue and the jurisdictional issues, which relate to the historical and theoretical understanding governing the presumption against extraterritoriality. Thus, *Amici* seek to apprise this Court of their view that this case does not involve an impermissible extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350. Accordingly, *Amici* respectfully submit that this Court should affirm the decision below.

[1] Pursuant to Fed. R. App. P. 29(a)(2), *Amici* state that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4), *Amici* further state that no party or party's counsel authored this brief in whole or in part, and no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their counsel. No disclosure statement is required by Fed. R. App. P. 26.1 or Loc. R. 26.1.

SUMMARY OF ARGUMENT

This case is significant because it delivers an historic measure of accountability for one of the most shameful periods of human rights abuses in the twenty-first century. Plaintiffs-Appellees ("Plaintiffs") in this case suffered notorious and horrific atrocities while detained at the Abu Ghraib prison in United States-occupied Iraq. On November 12, 2024, nearly sixteen years after the case was originally brought, a federal jury awarded Plaintiffs $9 million in compensatory and $33 million in punitive damages for the torture they suffered at the hands of Defendant-Appellant CACI Premier Technology, Inc. ("CACI"). CACI appeals from the January 10, 2025 amended final judgment, bringing this case before this Court for a sixth time.

In doing so, CACI argues that the district court lacked subject-matter jurisdiction; one of its main contentions is that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, does not apply extraterritorially, and so is of no force here. This, and the other jurisdictional arguments advanced by CACI, fail. The district court correctly determined that the "focus" of the ATS, under the framework articulated in *Nestlé USA Inc. v. Doe,* 593 U.S. 628 (2021), is to prevent "international discord" that would result if the U.S. failed to redress international law violations inflicted on foreign nationals by U.S. conduct. *Al Shimari v. CACI Premier Tech., Inc.,* 684 F.Supp.3d 481, 497 (E.D. Va. 2023). The district court properly held that the conduct

here at issue—both the substantial continental United States-based conduct in this case and the fact of the United States' complete jurisdiction and control over Iraq during the commission of the torts—show that Plaintiffs' claims really involve a domestic application of the ATS. *Id.* Thus, *Amici* urge this Court to affirm the correct judgment below.

While the district court assumed that the presumption against extraterritoriality applied in this case—but went on to find that Plaintiffs' claims represent a permissible "domestic application" of the ATS, *id.*—it is *Amici's* view, based upon their expertise in federal jurisdiction in general and extraterritorial applications of the law in particular, that the presumption has no force in a case like this in the first place. *First,* that is because Iraq and Abu Ghraib were not truly "extraterritorial" during the commission of the actions at issue here; rather Iraq was under the control and jurisdiction of the United States ("U.S.") making it *de facto* U.S. territory. *Second*, the primary rationale of the presumption—to avoid conflict with other countries—is not implicated and actually counsels the very opposite—that applying the presumption against extraterritorial application would exacerbate relations with other nations.[2] Finally, to consider Abu Ghraib "extraterritorial"—regardless of whether Plaintiffs prevail under *Nestlé*, as they do here—would turn it

[2] In addition to undermining the applicability of the presumption against extraterritorial application, these arguments also demonstrate why, if it is applied, Plaintiffs prevail under *Nestlé*. *See* Pl.'s Br. 29-38.

into an impermissible "legal black hole," contrary to both the law and the interests of justice.

First, as *Amici* know based on their extensive work regarding the geographical reach of federal jurisdiction, federal courts do not decide whether a particular territory is "extraterritorial" based entirely on whether that territory is outside U.S. borders. Instead, federal courts look at the extent of the actual control that the U.S. has over that territory. Thus, in *Rasul v. Bush,* 542 U.S. 466 (2004) the Supreme Court held in no uncertain terms that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application," as a threshold matter, with respect to territory over which the U.S. has "complete jurisdiction and control." *Id.* at 480. Indeed, caselaw over the past century has extended domestic protections to territories where the U.S. exercised actual control, based on an understanding that such territory constituted *de facto* U.S. territory. In this case, the record is clear that during the U.S. occupation, Abu Ghraib, in Iraq, was just such a *de facto* U.S. territory, as to which a presumption against extraterritoriality ought not be applied. In any event, if this Court assumes that the presumption applies, Plaintiffs nevertheless prevail under the *Nestlé* analysis, pursuant to which it looks to whether the conduct relevant to a statute's "focus" occurred in the U.S, "even if other conduct occurred abroad." 593 U.S. at 633 (quoting *RJR Nabisco v. European Cmty.,* 579 U.S. 325, 337 (2016)). Here, the

substantial domestic conduct involved, as well as "the claims' overall connections to the United States," showed that it did, as the district court found. *Id.* at 494; *see also id.* at 496-97 (discussing "Iraq's status as territory under United States control" and holding that it "established considerable connections between plaintiffs' claims and the United States").

Second, the primary rationale of the presumption against extraterritoriality—to avoid the kind of conflict with a foreign sovereign that would occur were the United States to impose tort liability for actions occurring in a foreign nation—is not implicated in this case. During the commission of the tortious conduct here at issue, Iraq was not a separate sovereign entity because the U.S. had overthrown the Iraqi government. Accordingly, this case did not present any conflict between nations. Instead, the implication of declining to impose liability in a case like this would be to increase international tensions, because the torts at issue here were committed by U.S. personnel acting in *de facto* U.S. territory while being governed by U.S. law, as the record shows. For this reason, even if the presumption against extraterritoriality is applied here, the very purpose of avoiding international discord that is the "focus" of the ATS—under the *Nestlé* test—means that Plaintiffs prevail, as the district court correctly held. *Al Shimari,* 684 F.Supp.3d at 495.

Finally, to consider Iraq and Abu Ghraib "extraterritorial" would have the impermissible consequence of creating a "legal black hole" in which no law would

govern private military contractors who commit atrocities in places like Abu Ghraib. That is, the U.S.-run Coalition Provisional Authority ("CPA"), which served as the interim government of U.S.-occupied Iraq, expressly granted immunity to contractors like CACI from "Iraqi Legal Process" and directed that they were exclusively subject to U.S. law. To then invoke the presumption against extraterritoriality in U.S. courts—regardless of the fact that Plaintiffs prevail under *Nestlé*—creates a legal catch-22 that is contrary to law and to the interests of justice.

For these reasons, as set forth in further detail below, this Court should affirm the landmark judgment both because the presumption against extraterritoriality has no force in the first place and because even if this Court applies it, as the district court did, Plaintiffs readily prevail under *Nestlé's* "focus" test.

ARGUMENT

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY HAS NO FORCE IN THIS CASE BECAUSE ABU GHRAIB IS NOT "EXTRATERRITORIAL" FOR THE PURPOSES OF PLAINTIFFS' CLAIMS.

The presumption against extraterritoriality is an established canon of statutory construction.[3] It tells courts that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction

[3] *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality,* 133 Harv. L. Rev. 1582 (2020) (chronicling a brief history of the presumption and discussing the evolving nature of canons of construction).

of the United States." *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). But whether a particular location is "extraterritorial"—or not "within the territorial jurisdiction of the United States," *id*.—does not depend solely on whether that territory is outside formal U.S. borders. Instead, federal courts look to the extent of control that the U.S. has over that location, given all of the facts. In this case, Abu Ghraib was under complete U.S. control and jurisdiction at the relevant time, as the U.S. invaded Iraq in March 2003, occupied Iraq for well over a year, and displaced Iraqi law and applied U.S. law instead. Thus, Abu Ghraib was not "extraterritorial" for the purposes of Plaintiffs' claims and the presumption against extraterritoriality should have no force as a threshold matter.

A. Whether a particular territory is "extraterritorial" for the purposes of Plaintiffs' claims is dependent upon the extent of actual control the United States has over that territory.

For over a century, federal courts have extended domestic law to territories outside formal U.S. borders. Many of these cases involved territories that the U.S. had newly acquired as a result of war, international treaties, or other agreements. These cases underscore a key threshold principle: Domestic law extends to locations based upon the U.S.'s actual governance and control of the territories, despite the fact that the U.S. lacks formal sovereignty over the territories, meaning "a claim of right" over the territories to the exclusion of others. *Boumediene v. Bush,* 553 U.S.

723, 754 (2008); *see* Restatement (Third) of Foreign Relations Law of the United States § 206, cmt. b (Am. L. Inst. 1987) (sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."). Thus, in the twentieth century, federal courts in the *Insular Cases*[4] extended constitutional protections to the newly-acquired territories of Puerto Rico, Guam, and the Philippines. This was also true with regard to U.S. governance of the Panama Canal Zone and the Trust Territory of the Pacific Islands. *See, e.g., Jimenez v. Tuna Vessel "Granada",* 652 F.2d 415 (5th Cir. 1981) (holding that due process applies in the Canal Zone); *Canal Zone v. Castillo,* 568 F.2d 405 (5th Cir. 1978) (recognizing that due process applies in Canal Zone), *cert. denied,* 436 U.S. 910 (1978); *Ralpho v. Bell,* 569 F.2d 607, 618-19 (D.C. Cir. 1977) (holding that the due process clause applied to a federal agency's adjudication of Pacific Islands inhabitants' claims).

In those cases, federal courts determined the reach of the Constitution rather than of statutes. But in its landmark Guantánamo Bay decision in *Rasul v. Bush*, the Supreme Court reinforced the principle of those constitutional cases in a statutory context. Specifically, the *Rasul* Court considered whether a presumption against

[4] *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene, 82 S. Cal. L. Rev. 259, 263 n.22 (2009) ("This term refers to the series of cases from *De Lima v. Bidwell,* 182 U.S. 1 (1901), to *Balzac v. Porto Rico,* 258 U.S. 298 (1922) that established the framework for selective application of the Constitution to "unincorporated overseas territories.").

extraterritoriality applied to the petitioners' statutory claims, including those brought under the ATS. Declining to apply the presumption, the Court held: "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application" in territory over which the U.S. exercises "complete jurisdiction and control." *Rasul,* 542 U.S. at 480.

In emphasizing "control and jurisdiction," *id.,* the Supreme Court invoked the same approach to territoriality that guided its prior constitutional decisions. Under this approach, domestic protections follow the exercise of actual U.S. control in overseas territories. Accordingly, the *Rasul* Court established that a presumption against extraterritoriality cannot arise in a territory that is under such U.S. control as to render it *de facto* U.S. territory. In doing so, the *Rasul* holding built on prior Supreme Court decisions in which the Court held that domestic statutes applied to overseas territory over which the U.S. exercised a high level of control. In those cases, the Court found dispositive the existence of U.S. "rights, power and authority" and "control" over a U.S. Naval Base in Bermuda, *Vermilya-Brown v. Connell,* 335 U.S. 377, 382 & n.4 (1948), and, conversely, a lack of "some measure of legislative control" in Iraq and Iran in 1942 and 1943, *Foley Bros. v. Filardo,* 336 U.S. 281, 285 (1949), for overseas applications of the Fair Labor Standards Act.

The Supreme Court reinforced its *Rasul* holding in *Boumediene v. Bush*, where the Court observed that "it is not altogether uncommon for a territory to be

under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another." 553 U.S. at 754. The *Boumediene* Court made even clearer its *Rasul* assessment of Guantánamo Bay, declaring: "In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* at 768. Based on this territorial assessment and other factors, the Supreme Court held that the Suspension Clause had "full effect" at Guantánamo Bay, *id.* at 771, just as it held in *Rasul* that a statutory presumption against extraterritoriality had no application in such territory.[5]

Accordingly, the fact that Abu Ghraib is outside formal U.S. borders simply starts, but does not decide, this Court's jurisdictional inquiry. Federal courts determine whether a territory is truly "extraterritorial" by determining the extent of U.S. control over that territory. Thus, for purposes of the application of U.S. law, Guantánamo Bay and other territories under complete U.S. jurisdiction and control are *de facto* U.S. territory as to which the statutory presumption against

[5] The Supreme Court has also made clear that there is no need for federal courts to conclusively reach the question of the political sovereignty of a territory in order to make the factual assessment that a territory is under actual U.S. control. *See Rasul,* 542 U.S. at 475 (habeas statute applies where the U.S. exercises "plenary and exclusive jurisdiction, but not 'ultimate sovereignty'"); *Boumediene,* 553 U.S. at 755 (rejecting the "Government's premise that de jure sovereignty" is the "touchstone for extraterritorial habeas jurisdiction"); *see also id.* at 754 ("We therefore do not question the Government's position that Cuba . . . maintains sovereignty, in the legal and technical sense . . . . But this does not end the analysis. Our cases do not hold it is improper for us to inquire into the objective degree of control the Nation asserts over foreign territory.").

extraterritoriality has no force. The same is true of Abu Ghraib, which was also under U.S. control during the time frame pertinent to this case.

B. During the commission of the tortious acts at issue in this case, the United States had complete jurisdiction and control over Abu Ghraib, rendering it a *de facto* United States territory.

On March 20, 2003, the U.S. launched a military invasion of Iraq and overthrew the Iraqi government.[6] President George W. Bush appointed L. Paul Bremer III as civil administrator of Iraq[7] and executive of the Coalition Provisional Authority ("CPA"), which was to serve as the new executive government of Iraq. In that capacity, Mr. Bremer reported to President Bush.[8]

The authority of the CPA was total. Specifically, "[t]he CPA exercise[d] powers of government temporarily in order to provide for the effective administration of Iraq . . . . The CPA [was] vested by the President with all executive, legislative and judicial authority necessary to achieve its objectives."[9] The U.S.

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[6] George Bush White House Archives, *President Bush Announces Major Combat Operations in Iraq Have Ended* (May 1, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html.
[7] Kathleen T. Rhem, *Bush appoints state department official to administer Iraq,* U.S. Air Force News (May 6, 2003), https://www.af.mil/News/Article-Display/Article/139266/bush-appoints-state-department-official-to-administer-iraq/.
[8] Off. of Mgmt. & Budget, Exec. Off. of the President, Report to Congress: Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11) at 2 (June 2, 2003).
[9] *Id.*

military "directly support[ed]" and enforced that authority.[10] The CPA was active from at least May 16, 2003,[11] to June 28, 2004,[12] covering the entire period during which the tortious acts at issue in this case were committed.

Within weeks of Mr. Bremer's arrival in Baghdad, the CPA disestablished the previously governing Iraqi political party and effectively prohibited its existence.[13] The CPA thus dissolved major Iraqi governmental institutions, including ministries, legislative bodies, and army and security forces, and suspended Iraqi laws.[14] The CPA issued ninety-eight other Orders exerting control over all aspects of Iraqi

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[10] Coalition Provisional Authority Regulation 1 (May 16, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

[11] *Id.*

[12] James Dobbins, et al., *Occupying Iraq: A History of the Coalition Provisional Authority* xxxviii (2009).

[13] Coalition Provisional Authority Order 1 (May 16, 2003), https://www.govinfo.gov/content/pkg/GOVPUB-S-PURL-LPS44094/pdf/GOVPUB-S-PURL-LPS44094.pdf.

[14] Coalition Provisional Authority Order 2 (May 23, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf.

society,[15] including media,[16] trade,[17] border control,[18] taxation,[19] security and emergency services,[20] currency,[21] environmental management,[22] intellectual

[15] GovInfo, The Coalition Provisional Authority, CPA Official Documents, https://govinfo.library.unt.edu/cpa-iraq/regulations/ (last accessed Apr. 29, 2025).

[16] Coalition Provisional Authority Order 14 (Jun. 10, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030610_CPAORD_14_Prohibited_Media_Activity.pdf.

[17] Coalition Provisional Authority Order 20 (Jul. 14, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030717_CPAORD_20_Trade_Bank_of_Iraq.pdf.

[18] Coalition Provisional Authority Order 26 (Aug. 24, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030824_CPAORD_26_Creation_of_the_Dept_of_Border_Enforcement.pdf.

[19] Coalition Provisional Authority Order 37 (Sep. 19, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030919_CPAORD_37_Tax_Strategy_for_2003.pdf.

[20] Coalition Provisional Authority Order 28 (Sep. 3, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20030903_CPAORD_28_Est_of_the_Iraqi_Civil_Defense_Corps.pdf.

[21] Coalition Provisional Authority Order 43 (Oct. 14, 2003). https://govinfo.library.unt.edu/cpa-iraq/regulations/20031014_CPAORD_43_New_Iraqi_Dinar_Banknotes.pdf.

[22] Coalition Provisional Authority Order 44 (Nov. 11, 2003), https://govinfo.library.unt.edu/cpa-iraq/regulations/20031126_CPAORD44.pdf.

property systems,[23] national intelligence,[24] electoral processes,[25] oil distribution,[26] and more. The CPA brought Iraqi judges, police, and prosecutors under its control[27] and transferred authority over all Iraqi prisons—including Abu Ghraib[28]—to the CPA-controlled Ministry of Justice.[29] The U.S.'s control over Iraq was such that the U.S. notified the United Nations[30]—and the United Nations agreed—that the U.S. was an occupying power in Iraq. Accordingly, the CPA and the United Nations considered the U.S. bound by relevant international laws, including the 1907 Hague

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[23] Coalition Provisional Authority Order 83 (Apr. 29, 2004), https://govinfo.library.unt.edu/cpa-iraq/regulations/20040501_CPAORD_83_Amendment_to_the_Copyright_Law.pdf.

[24] Coalition Provisional Authority Order 69 (Apr. 1, 2004), https://govinfo.library.unt.edu/cpa-iraq/regulations/20040401_CPAORD69_Delegation_of_Authority_to_Establish_the_Iraqi_National_Intelligence_Service_with_Annex.pdf.

[25] Coalition Provisional Authority Order 92 (May 31, 2004), https://govinfo.library.unt.edu/cpa-iraq/regulations/20040531_CPAORD_92_Independent_Electoral_commission_of_Iraq.pdf.

[26] Coalition Provisional Authority Order 36 (Oct. 3, 2003) https://govinfo.library.unt.edu/cpa-iraq/regulations/20031219_CPAORD36.pdf.

[27] Coalition Provisional Authority Order 7 (Jun. 9, 2003) https://govinfo.library.unt.edu/cpa-iraq/regulations/20030610_CPAORD_7_Penal_Code.pdf.

[28] Abu Ghraib—and, in particular, the "Hard Site" where Plaintiffs were held—were under the "brotherhood" of CACI interrogators and military personnel. Pl.'s Br. 6.

[29] Coalition Provisional Authority Order 10 (Jun. 8, 2003) https://govinfo.library.unt.edu/cpa-iraq/regulations/20030605_CPAORD10_Management_of_Detention_and_Prison_Facilities.pdf.

[30] G.A. Res. 1483, U.N. SCOR, preamble, U.N. Doc. S/RES/1483 (2003) (noting the May 8, 2003 letter from the Permanent Representatives of the U.S. and United Kingdom "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command").

Regulations, which affirm: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends . . . where such authority has been established and can be exercised." Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.[31] In fact, the extent of U.S. control over Iraq may have exceeded even the limits prescribed by international law. *See, e.g.,* Robert Bejesky, *Not an Update to the Customary International Law of Occupation but the Nucleus of Blowback with the Emergence of ISIS*, 42 Syracuse J. Int'l L. & Com. 273, 297 (2015) ("An occupying foreign military cannot alter the structure of government or institutions in the occupied country . . . Instead of heeding the lawful parameters of occupation Law, the CPA . . . freehandedly imposed controversial reforms from its inception, and adopted at least thirty new laws relating to the economy over its fourteen months of existence. . . ").

So characterized, the extent of U.S. control over Iraq during the period at issue in this case was at least equivalent to the extent of U.S. control in Guantánamo Bay. There, the 1903 Lease Agreement between the U.S. and the Republic of Cuba allows the U.S. to assert "complete jurisdiction and control" over the naval base "during the

[31] Coalition Provisional Authority Orders 2 through 100 all begin with variations of the statement: "Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war . . . ".

period of occupation." Lease of Lands for Coaling and Naval Stations, Feb. 23 1903, U.S.-Cuba, Art. III, T.S. No. 418. Similarly, after invading Iraq, the U.S. promulgated a written regulation to expressly vest itself with complete jurisdiction and control over Iraq through the CPA (vesting itself with "*all* [emphasis added] executive, legislative, and judicial authority),[32] and the United Nations adopted Resolution 1483, formalizing the U.S.'s occupation of Iraq.[33] In Guantánamo Bay, the U.S.'s continuing occupation of the naval base is not dependent on the consent of the Cuban government—indeed, the Cuban government has described the U.S. presence as "illegal" [34] and has not cashed the annual rent payment the U.S. tenders pursuant to the 1903 Lease Agreement since 1960.[35] In Iraq, of course, U.S. invasion and subsequent occupation by their very nature did not depend on the consent of the Iraqi government, which was overthrown by the United States. In Guantánamo Bay, a 1934 treaty permits the 1903 Lease Agreement to remain in effect unless and until the U.S. chooses to end the Agreement or leave. Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, Art. III, 48 Stat. 1683, T.S. No. 866. Similarly in Iraq, the duration of the U.S. occupation was dependent on the will of the U.S.—no

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[32] Coalition Provisional Authority Regulation 1, *supra* n.10.
[33] U.N. Doc. S/RES/1483 (2003), *supra* n.30.
[34] *See Bird v. United States,* 923 F.Supp. 338, 341 n.6 (D. Conn. 1996)
[35] Guantánamo Bay Memory Project, The Annual American Check, https://gitmomemory.org/timeline/guantanamos-legal-black-hole/the-annual-american-check/ (last accessed Apr. 29, 2025).

domestic or international law imposed an expiration date on the U.S.'s occupation.[36] U.S. government officials stated that the U.S. would stay in Iraq "as long as needed," underscoring the U.S.'s sole discretion over the duration of its occupation.[37]

It is true that other countries besides the U.S. were involved in the CPA. But that did not render Iraq "extraterritorial" during the time of the tortious activity in this case, for several reasons. *First*, the structure of the CPA speaks for itself: the highest ranking executive of the CPA—Administrator Paul Bremer—answered directly to the President of the United States and not the leader of any other nation. The CPA exclusively designated the U.S. military as its enforcing power on the ground in Iraq.[38] And the U.S. exercised final authority via the CPA over Iraqi governance, dominant over other countries and over any Iraqi body. *See, e.g.,* CPA Regulation 1, *supra* n.10 at 2 (CPA Orders require only "the approval or signature of the Administrator" and no other entities.) As such, Iraq was under the unified

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[36] While the 1907 Hague Resolutions and the Fourth Geneva Convention presume that occupations are temporary in nature, they do not impose a specific time limit on occupations. Indeed, occupations around the world have lasted decades, with no end in sight. *See also* David Hughes, *Moving from Management to Termination: A Case Study of Prolonged Occupation,* 44 Brook. J. Int'l. L. 109 (2018); DLP Forum, The Law of Occupation (Mar. 28, 2023), https://www.dlpforum.org /2023/03/28/the-law-of-occupation/.

[37] *Press Briefing by National Security Advisor Dr. Condoleezza Rice,* White House (Apr. 4, 2003), https://georgewbush-whitehouse.archives.gov/news/releases /2003/04/20030404-12.html.

[38] Off. of Mgmt. & Budget, Exec. Off. of the President, Report to Congress, *supra* n.8 at 2.

command of the United States. The fact that the U.S. delegated some CPA duties to coalition members from other countries demonstrates, rather than undermines, the U.S.'s leadership and final authority over all CPA activities.[39]

Second, as the Supreme Court held in *Munaf v. Geren,* 553 U.S. 674 (2008), the facially "multinational character" of a coalitional force is of no moment when it operates pursuant to a "United States chain of command." *Id.* at 688. The *Munaf* Court thus held that the habeas statute, 28 U.S.C. § 2241, bound the U.S. government acting through the multinational force. In this case, the CPA indisputably involved U.S. chain of command, "ending with the President of the United States." 553 U.S. at 687 (citations omitted). Moreover, the multinational force in *Munaf* operated with the specific purpose of "contribut[ing] to the maintenance of security and stability in Iraq," U.N. Security Council, U.N. Doc. S/Res/1546, ¶ 10 (June 2004), in contrast to the CPA's explicit mission to function as the wholesale government of Iraq, with plenary authority over Iraq's laws and institutions. Accordingly, if the multinational force in *Munaf* was a "United States entity," 553 U.S. at 877, there can be little doubt that the CPA in this case was a U.S. entity that rendered Abu Ghraib and Iraq *de facto* U.S. territory during the commission of the torts.

[39] The CPA promulgated a list of "Countries Eligible to Compete for Contracts Funded with U.S. Appropriated Funds for Iraq Reconstruction," available at https://govinfo.library.unt.edu/cpa-iraq/pressreleases/20031211_Coalition_Country_List.pdf.

The district court thus correctly concluded that Iraq was "effectively under United States governance and control" during the commission of the tortious actions that were at issue in this case. *Al Shimari,* 684 F.Supp.3d at 496. That conclusion was correct: as was the case with regard to Guantánamo, the United States exercised complete "control and jurisdiction" over Iraq.[40]

II. CONSIDERING ABU GHRAIB "EXTRATERRITORIAL" IN THIS CASE RUNS CONTRARY TO THE PRIMARY RATIONALE OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

Beyond the clear facts set forth above, the presumption against extraterritoriality should have no force in this case because the primary rationale for the presumption is not here applicable. To the contrary, application of that rationale to this case would subvert the very purpose of the presumption, even as—the district court correctly concluded—it also fails to further the important "focus" of the ATS, under the *Nestlé* analysis.

[40] The district court so concluded in applying the presumption against extraterritoriality and thereafter conducting the analysis mandated by *Nestlé.* Under that analysis, "Abu Ghraib's unique status during the relevant time period"—meaning the fact that it constituted "foreign territory controlled by the U.S. government"—established the connections between Plaintiffs' claims and the United States that *Nestlé's* "focus" test requires. *Al Shimari,* 684 F.Supp.3d. at 496. While *Amici* argue that the presumption has no force in the first place, the district court was correct that Plaintiffs in any event show a proper domestic application of the ATS even if some conduct occurred abroad, under *Nestlé*. *See* Pl.'s Br. 29-38.

The statutory presumption against extraterritoriality has as its purpose to prevent foreign conflict. Specifically, the presumption is based upon the "foreign policy consequences" of "impos[ing] the sovereign will of the United States onto…the territorial jurisdiction of another sovereign." *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108, 121 (2013). Indeed, the *Kiobel* Court specifically found the presumption appropriate in light of recent objections articulated by several foreign governments to extraterritorial applications of the ATS. *See id.* at 125 (in turn referencing *Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 77-78 (D.C. Cir. 2011) (listing objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom on the grounds that extraterritorial applications would impair their country's relations with the U.S. and interfere with their rights to regulate the conduct of their own citizens)). For example, the Indonesian embassy in *Exxon Mobil Corp.,* expressly stated in a letter that Indonesia "cannot accept" a suit against an Indonesian government institution, and that U.S. courts should not adjudicate "allegation[s] of abuses of human rights by the Indonesian military." 654 F.3d at 59. *See also Jesner v. Arab Bank, PLC,* 584 U.S. 241, 271 (2018) (concern with regard to "litigation that already has caused significant diplomatic tensions with Jordan for more than a decade").

But that primary rationale is simply not implicated in this case, where no foreign sovereign existed during the commission of the tortious acts here at issue. To the contrary, the U.S. overthrew the sovereign Iraqi government.[41] And, though it is obvious, *Amici* further draw upon their expertise to highlight that international law recognizes the temporarily sovereignless nature of territory under military occupation. *See* Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics,* 13 Eur. J. Int'l L. 1037, 1038 (2002) (describing that "in such situations sovereignty is no longer an applicable legal concept"). That is, not only is there no expressed objection by any foreign sovereign in this case—as there could not be—but there is also no "affected sovereign" for this Court's inquiry to even consider. *RJR Nabisco, Inc. v. European Cmty.* 579 U.S. 325, 349 (2016). Given that this basic premise is missing, it cannot follow that a presumption against extraterritoriality should apply in this case.[42]

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[41] George Bush White House Archives, *supra* n.6.

[42] In that respect, this case is like that of pirates, similarly subject to no foreign sovereign, as they are on the "high seas, beyond the territorial jurisdiction of the United States or any other country." *Kiobel,* 569 U.S. at 109. The Supreme Court opined that the foreign conflict rationale does *not* apply to pirates in international waters, because "[a]pplying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences." *Id.* The same logic applies in this case, since occupied Iraq is also a sovereignless territory. But, of course, this case is a stronger one for the application of U.S. law, given that, as discussed above, Iraq was operating within the territorial jurisdiction of the United States.

If anything, foreign policy consequences would result from applying a presumption against extraterritoriality that would foreclose claims for relief in this case. As Justice Sotomayor stated, concurring in *Nestlé*, there is "[an]other side of the equation: that foreign nations may take (and, indeed, historically have taken) umbrage at the United States' refusal to provide redress to their citizens for international law torts committed by U.S. nationals." 593 U.S. at 653-54. The extraterritoriality analysis mandated by *Nestlé* thus cuts just the other way.

In fact, the district court followed precisely the instruction of *Nestlé* in properly determining that the focus of the ATS "is to provide foreign citizens with redress for torts committed in violation of the law of nations." *Al Shimari,* 684 F.Supp.3d at 493. The district court properly concluded that "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." (quoting *Jesner v. Arab Bank, PLC,* 584 U.S. 241, 270 (2018)).

Thus, foreclosing Plaintiffs' claims would both risk the very foreign conflict the presumption seeks to avoid and frustrate the "focus" of the ATS, per the analysis dictated by *Nestlé*. Indeed, the district court correctly recognized that "the foreign policy concerns from the failure to provide redress for the alleged international law violations is particularly heightened" (citation omitted) because the actions at issue

here—grave violations of international law—"occurred in territory that was effectively under the control of the United States military at the time." *Al Shimari,* 684 F.Supp.3d at 495. And the district court also properly held that the resultant "unique status" of Iraq and Abu Ghraib significantly distinguished the case at hand from other cases which did not involve territories under U.S. control or did involve objecting foreign sovereigns. *Id.* at 496.

And, as noted, the atrocities committed at Abu Ghraib are among the most egregious instances of state-sanctioned human rights violations in recent history. It is entirely understandable that failure to provide redress in this case could lead to negative foreign policy consequences. This is especially so given the continued global calls for accountability for these abuses. *See, e.g.,* Amnesty International, *Iraq: 20 years since the US-led coalition invaded Iraq, impunity reigns supreme* (Mar. 20, 2023), https://www.amnesty.org/en/latest/news/2023/03/iraq-20-years-since-the-us-led-coalition-invaded-iraq-impunity-reigns-supreme/ ("Twenty years on, impunity reigns supreme and accountability remains elusive for the human rights violations committed in Iraq."); Human Rights Watch, *Iraq: Torture Survivors Await US Redress, Accountability* (Sep. 25, 2023) https://www.hrw.org/news/2023/09/25/iraq-torture-survivors-await-us-redress-accountability ("Twenty years on, Iraqis who were tortured by US personnel still

have no clear path for filing a claim or receiving any kind of redress or recognition . . . ").

In sum, for all of these reasons, the foreign conflict rationale not only does not apply, but in fact runs in the other direction. Accordingly, the presumption against extraterritoriality should not apply in this case, but if this Court applies it, the foreign policy consequences of foreclosing Plaintiffs' claims leads Plaintiffs to prevail under *Nestlé's* "focus" analysis. This Court should affirm the correct judgment below.

III. CONSIDERING ABU GHRAIB "EXTRATERRITORIAL" IN THIS CASE TURNS IT INTO AN IMPERMISSIBLE LEGAL BLACK HOLE WHERE NO LAW APPLIES.

Finally, the presumption against extraterritorial application should have no force here given the consequences of considering Abu Ghraib "extraterritorial" during the tortious activity at issue. Those consequences amount to an acceptance that Abu Ghraib was, in effect, a legal black hole where no law applied, giving free rein to those—including private military contractors—who would commit the kind of atrocities that, the record shows, occurred here. But that cannot be, particularly given the natures of those atrocities: Plaintiffs were sexually assaulted and humiliated; forced to be naked or wear women's underwear for extended periods; beaten viciously; threatened and attacked with dogs; threatened or had their family members threatened; and placed in painful and prolonged stressed positions. Pl.'s Br. 4-5.

That legal black hole would exist because, as the Court is aware, the CPA issued an Order expressly providing that the CPA and Coalition Forces "shall be immune from Iraqi Legal Process."[43] The Order dedicated a section to "Contractors," decreeing that contractors "shall not be subject to Iraqi laws or regulations" and "shall be immune from Iraqi legal process."[44]

Fortunately, however, the Order specified that all "Personnel"—military and contractors—"shall be subject to the exclusive jurisdiction of their Sending States, and shall be immune from local criminal, civil and administrative jurisdiction."[45] CACI's "Sending State" is the U.S. That is, the CPA expressly designated U.S. courts as the sole forum for adjudicating claims of the nature that Plaintiffs bring against CACI. Given this, it cannot be the case that claims brought under the only laws that applied to CACI—in the only forum designated to adjudicate such claims—can be precluded.

Indeed, the very notion of such a legal black hole was rejected by the Supreme Court in *Rasul*, following the global criticism that such a law free zone was what Guantánamo Bay amounted to. *See, e.g.,* See Johan Steyn, *Guantanamo Bay: The Legal Black Hole, Twenty-Seventh FA Mann Lecture at the British Institute of*

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[43] Coalition Provisional Authority Order 17 (Revised) (Jun. 27, 2004), https://govinfo.library.unt.edu/cpa-iraq/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.
[44] *Id.* at 5.
[45] *Id.* at 4.

International and Comparative Law (Nov. 25, 2003) (describing Guantánamo Bay as a "monstrous failure of justice," where "the purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors."). Placing people—and human rights violations—beyond the law is antithetical to basic constitutional principles and international norms.[46] But in fact, offshore systems of detention are designed to achieve exactly that. *See* Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* 11-80 (2011) (charting the way the U.S.'s global detention system is carefully designed to evade judicial review and facilitate unrestrained executive power). Of course, invoking the presumption and considering Abu Ghraib "extraterritorial" would legitimize that very process, and the injustice of allowing torture and abuse—even if connected to the exercise of U.S. executive power—so long as it occurs outside formal U.S. borders. Sadly, these lessons may be needed more than ever today. This Court should decline to invoke the presumption against extraterritoriality—even though Plaintiffs prevail under

[46] *See, e.g.*, David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* 2 (2006) (describing how legal black holes conflict with the rule of law, which is a "rule of fundamental constitutional principles . . ."); Amnesty International, *USA: Guantánamo detainees—the legal black hole deepens* (Mar. 12, 2003), https://www.amnesty.org/en/documents/amr51/038/2003/en/ (decrying the U.S.'s use of unchallengeable offshore detention in Guantánamo Bay because such a practice violates "a basic principle of international law . . . ").

Nestlé—and instead affirm that U.S. federal courts remain powerful forums for justice when U.S. personnel commit atrocities in U.S.-controlled territory.

CONCLUSION

More than twenty years after the horrors of Abu Ghraib came to light, this Court is poised to deliver an important and timely ruling. This Court should affirm the judgment below on all grounds, including that Abu Ghraib was not impermissibly "extraterritorial" at all during the atrocities. In doing so, this Court will affirm the important principle that those who grossly violate the law cannot escape liability by going offshore, exerting the very control under which these atrocities occur, and then asserting that they are somehow subject to no jurisdiction—federal or otherwise. Where the U.S. exercises control and jurisdiction, federal courts do, too. *Amici* submit that they have properly done so in this case.

Dated: May 8, 2025

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Dated: May 8, 2025

s/ Lawrence S. Lustberg
Lawrence S. Lustberg

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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