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 and Third-Party Plaintiff – Appellant,

and

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

Defendants,

and

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, Case No. 1:08-cv-00827

REPLY BRIEF OF APPELLANT CACI PREMIER TECHNOLOGY, INC.

John F. O'Connor
Linda C. Bailey
Joseph T. McClure
STEPTOE LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
joconnor@steptoe.com
lbailey@steptoe.com
jmcclure@steptoe.com

Nina J. Ginsberg
GREENSPUN SHAPIRO
GINSBERG & YANG, P.C.
3955 Chain Bridge Road, 2nd Floor
Fairfax, Virginia 22030
(703) 352-0100 – telephone
njg@greenspunlaw.com

Counsel for Appellant CACI Premier Technology, Inc.

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I. INTRODUCTION

Plaintiffs' judgment rests on conspiracy claims holding CACI Premier Technology, Inc. ("CACI") vicariously liable for the vicarious liability of its employees. Specifically, Plaintiffs assert that unnamed CACI interrogators conspired with U.S. soldiers to abuse detainees generally, rendering those employees vicariously liable for torture and cruel, inhuman or degrading treatment ("CIDT") that U.S. soldiers separately inflicted on Plaintiffs. Then, Plaintiffs seek to hold CACI liable, on a *respondeat superior* theory, for the co-conspirator liability unnamed CACI interrogators have for torts committed *by U.S. soldiers*. Neither the law nor the facts support Plaintiffs' judgment.

Plaintiffs heretofore have remained one step ahead of binding precedents foreclosing their claims by relying on the final judgment rule to stave off appellate review. With appellate jurisdiction now inarguable, Plaintiffs' legal arguments must withstand scrutiny on their merits. This they cannot do.

The Alien Tort Statute ("ATS") applies only when sufficient conduct relevant to ATS's focus occurred "in the United States." *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 633 (2021). With no relevant U.S. conduct, Plaintiffs ask the Court to treat Iraq as U.S. territory. Jurisdiction cannot rest on that complete and utter fiction. Plaintiffs' backup argument, that there is adequate conduct *in the actual United States*, fails to apply the mandatory "focus" test and distorts the record.

Plaintiffs also proceed as if implied causes of action are not highly disfavored, if not disallowed, and neither acknowledge nor apply the separation-of-powers test mandated by *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018). That

test is *identical* in words and application to the test for new *Bivens* claims, an exacting test that no plaintiff has ever satisfied. *See Goldey v. Fields*, ___ S. Ct. ___, 2025 WL 1787625 (2025) (summarily reversing decision allowing judge-made *Bivens* action); *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022). The district court erred in creating novel claims for Plaintiffs to pursue under the ATS. That is the prerogative of Congress.

Plaintiffs' other arguments fare no better. Plaintiffs argue that this Court "conclusively rejected" CACI's justiciability argument in *Al Shimari IV*, but that appeal involved allegations of unlawful conduct *by CACI*, allegations Plaintiffs renounced promptly after prevailing in *Al Shimari IV*. Plaintiffs ask the Court to disregard *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024), *cert. granted*, No. 24-924, 2025 WL 1549769 (U.S. June 2, 2025), where this Court held that combatant activities preemption displaces *non-federal* tort duties, which includes international-law torts actionable under ATS. And Plaintiffs have no meaningful response to the manifest unfairness of requiring CACI to defend itself at trial where the state secrets privilege prevented CACI from learning the identities of key witnesses—the Abu Ghraib interrogators—or their training and background.

What Plaintiffs really want is an emotional decision, "good for this case only," that weaves through the impassable minefield of legal doctrines barring their claims based solely on Plaintiffs' allegations of horrific conduct. Straightforward application of Supreme Court and Fourth Circuit precedents requires dismissal for lack of subject-matter jurisdiction or, failing that, entry of

judgment in CACI's favor. The Court should decline Plaintiffs' invitation to bend the law in multiple ways to fashion an affirmable judgment where none exists.

II. ARGUMENT

A. Plaintiffs' Claims Are Impermissibly Extraterritorial

Congress enacted ATS as a domestic-only statute, so courts "cannot give 'extraterritorial reach' to *any* cause of action judicially created under the ATS." *Nestlé*, 593 U.S. at 633 (emphasis added); *see also Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562 (2025) ("[F]ederal courts … resolve cases and controversies consistent with the authority Congress has given them."). Thus, a claim may proceed under ATS only if there is sufficient domestic conduct. This construction of the ATS is settled and permits no exceptions.

Thwarted on statutory construction, and bereft of meaningful U.S. conduct, Plaintiffs' lead argument is that the Court should treat conduct in Iraq as "domestic." Neither case law nor logic support this Orwellian redefinition. Plaintiffs' secondary argument—that contacts with the actual United States are sufficient to support jurisdiction—is equally infirm. This case is fundamentally extraterritorial, as all possibly-relevant conduct, from alleged injuries to alleged tortious conduct to alleged conspiratorial conduct, took place in Iraq.

1. Conduct in Iraq Is Not "Domestic"

Treating conduct in Iraq as "domestic" defies common sense and controlling standards. It also ignores a sister Circuit's decision, not disclosed by Plaintiffs,

comprehensively rejecting their position. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 195-97 (5th Cir.), *cert. denied*, 583 U.S. 824 (2017).

The plaintiffs in *Adhikari* contended that the U.S. military presence in Iraq in 2004 transformed Al Asad Air Base into U.S. territory for purposes of the ATS. *Id.* at 195. As *Adhikari* recognized, Supreme Court case law treats conduct as "domestic" when it occurs where the United States exercises *de jure*, meaning lawful and legitimate, *sovereignty*; it does not permit a nebulous inquiry that treats conduct as "domestic" wherever the U.S. military exercises temporary control. *Id.* at 195-96. Indeed, *RJR Nabisco* and *Nestlé* held that an ATS plaintiff must show that "the conduct relevant to the statute's focus occurred *in the United States*." *Nestlé*, 593 U.S. at 633 (emphasis added) (quoting *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016)); *see also Abitron AustriaGmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023) (a claim is domestic for extraterritoriality purposes when "the *conduct relevant to the statute's focus* occurred in the United States").

It hardly requires citation that Iraq is not, and never has been, *in the United States*. To the extent a temporary U.S. military presence at Abu Ghraib, under constant insurgent attack,[1] constitutes a military occupation, occupied territory does not become part of the occupying nation and the occupying nation does not acquire sovereignty over such territory.[2] The U.N. Security Council specifically

[1] CACI Br. 11.

[2] *Adhikari*, 845 F.3d at 196; *see also* 49 U.S.C. § 47301(3)(B) (defining "foreign territory" as including an area "temporarily under military occupation by the United States Government"); Eyal Benvenisti, *The International Law of Occupation* 6 (2012) ("Effective control by foreign military force can never bring

(Continued …)

acknowledged that the temporary Coalition presence in Iraq did not affect "the sovereignty and territorial integrity of Iraq." U.N. Security Council Res, 1483 at 1 (May 22, 2003), https://docs.un.org/en/S/RES/1483(2003) (last visited July 20, 2025). That ends the inquiry; Iraq is not, and never was, U.S. territory.

Plaintiffs invoke *Rasul v. Bush*, 542 U.S. 466 (2004), but as *Adhikari* explained, the result in *Rasul* stems from the Court's historical construction of the federal habeas statute as permitting suit when a prisoner is held overseas and his custodian is served in the district where suit is brought. *Rasul*, 542 U.S. at 479 (quoting *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 497-98 (1973)); *Adhikari*, 845 F.3d at 196-97. By contrast, the settled construction of the ATS is that it has no extraterritorial application. *Nestlé*, 593 U.S. at 633.

Moreover, as *Adhikari* observed, the United States exercises "unchallenged and indefinite control" over Guantanamo Bay, where Rasul was imprisoned. 845 F.3d at 197 (quoting *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring)). This stands in stark contrast to Al Asad, and certainly to Abu Ghraib, where U.S. military control was neither indefinite nor unchallenged. Abu Ghraib was in a war zone, under constant threat of attack from mortars, rocket-propelled grenades, and sniper fire. CACI Br. 11; *see also* JA1249-1250, JA1256-1257 (detailing two Abu Ghraib mortar attacks that, combined, resulted in the deaths of two soldiers and

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about by itself a valid transfer of sovereignty."); Int'l Comm. of Red Cross, *Occupation*, https://www.icrc.org/en/law-and-policy/occupation (last visited July 20, 2025) ("Under occupation law, the occupying power does not acquire sovereignty over the occupied territory and is required to respect the existing laws and institutions of the occupied territory as far as possible.").

twenty-two detainees and injuries to eleven soldiers and eighty detainees). Abu Ghraib was a small part of a much larger war zone in which 3,491 U.S. soldiers and Defense Department civilians were killed by hostile activity and another 31,993 were wounded in action.[3] Temporary military occupation, even without constant threat of attack, does not convert land into U.S. territory. *See Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (rejecting "the notion that [U.S.] *de facto* sovereignty extends to" Bagram Airfield in Afghanistan where "there is no indication of any intent to occupy the base with permanence").[4]

Finally, as the Fifth Circuit observed, the ATS has no extraterritorial application whatsoever, so relying on conduct in Iraq to trigger jurisdiction "would compel the conclusion that federal laws generally applied to [Iraq] in 2004," an absurd, counterfactual premise. *Adhikari*, 845 F.3d at 196 n.4.[5]

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[3] *See* https://www.defense.gov/casualty.pdf.

[4] Plaintiffs misleadingly cite to *Vermilya-Brown v. Connell*, 335 U.S. 377 (1948), which concerned whether the FLSA, which applies to "possessions," reached a Naval base in Bermuda. *Id.* at 386. The ATS, unlike the FLSA, applies only when conduct relevant to the statute's focus occurs *in the United States*. *Nestlé*, 593 U.S. at 633.

[5] *Amici* "federal courts scholars" represent that finding Abu Ghraib to be outside the United States "turns it into an impermissible legal black hole where no law applies." Fed. Ct. Scholars Br. 24-27. The professors' dystopian premise is, predictably, untrue. Extraterritorial laws, including the Anti-Torture Act and Military Extraterritorial Jurisdiction Act, would apply in Iraq. *See Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009) (listing panoply of federal statutes that apply extraterritorially to address misconduct in Iraq). *Amici* also ignore the administrative claims process that Plaintiffs declined to pursue. JA8612; JA284-290.

2. Faithful Application of the Focus Test Shows That Plaintiffs' Claims Are Extraterritorial

a. Plaintiffs' Proffered Domestic Conduct

That Plaintiffs would lead by arguing that Iraq was U.S. territory underlines their wholesale absence of relevant U.S.-based conduct. This is not a new development. At oral argument in *Al Shimari V*—after discovery had closed—panel members warned Plaintiffs that, eventually, they were going to have to provide "not just theories, [but] evidence with JA cites" of "the conduct that happened in the United States," JA4182 (Quattlebaum, J.), and that "this case rises and falls on that," JA4183 (Floyd, J.). Plaintiffs' only "JA cites" of "conduct that happened in the United States" are not relevant to the Iraq-focused violations they assert against CACI.

Plaintiffs distill all the facts they have into six bullet points. Pl. Br. 36-37. These alleged facts, even taken as Plaintiffs describe them, are not relevant to ATS's focus, though Plaintiffs' characterization of the record is severely distorted.

- Contracting, Hiring, and Training. Plaintiffs' first two bullet points are general corporate activity that cannot create jurisdiction. *Nestlé*, 593 U.S. at 634.

- Management of Interrogators. CACI's U.S.-based personnel provided *administrative* support to employees in Iraq, "time cards, pay raises, performance appraisals, travel arrangements, those types of things." CACI Br. 11-14; *see* JA7361. None of Plaintiffs' record citations contravene this fact. Plaintiffs cite Amy Monahan's testimony that CACI administrative staff in Iraq "technically" reported to her (JA7138-40), but omit her emphasis that "the military" supervised CACI personnel in Iraq (JA7139), and that her communications were admin-focused—"pay and benefits and leave." JA7140-7141. Other than reading the contractual statement of work, Ms. Monahan was not even "aware of what it was the military wanted the CACI employees to

be doing." JA7140. She had no knowledge of, or involvement in, operational matters.

Plaintiffs breathlessly aver that CACI managers received "*daily* reports" from Iraq. Pl. Br. 37. But, again, the reports are admin-focused, listing employee geographic locations, leave schedules, and the like. JA12171-12358; *see also* JA8144-8157 (emails cited by Plaintiffs as "reports"). None addresses detainee treatment, intelligence-gathering, or interrogations. Plaintiffs note a CACI executive made trips to Abu Ghraib (JA7464-7466), but omit his uncontradicted testimony that he visited to check employee welfare and morale (JA7465), that "[a]s a company, we did not manage interrogators," that he lacked the ability to "manage intel-types," and that CACI was "giving [the Army] qualified individuals, and they were managing those qualified individuals." JA7459. Plaintiffs further assert CACI managers "evaluated and made promotion decisions as to Iraq-based employees" (Pl. Br. 37), but omit that the decisions required *input from the Army leadership*, as CACI's U.S.-based managers lacked visibility into the operational performance of CACI interrogators. JA7358-7359; JA7377; JA7399.

- Supposed *Reports* of Detainee Abuse. Plaintiffs tout "reports" of abuse, but cite just one email from October 2003, months before any Plaintiff arrived at Abu Ghraib (JA8451-8452), in which a former CACI employee told Ms. Monahan that he had seen a single unspecified violation of the Interrogation Rules of Engagement ("IROEs") by junior enlisted soldiers, *and that no CACI employees were involved*. JA7464-7466.

- Daniel Johnson. Plaintiffs suggest CACI defied an Army directive to fire Daniel Johnson. Pl. Br. 37. False. Long after detainee abuse at Abu Ghraib had been discovered and investigated—after any purported conspiracy ended—Army contracting personnel stated an intention to direct Johnson's removal from the contract, *but invited CACI to request reconsideration*. JA11280-11282; JA8012. CACI did so at the request of the Army operational chain of command, which wanted to keep Johnson. JA7463.

- Steven Stefanowicz. Plaintiffs imply CACI made Steven Stefanowicz administrative site lead after the Army accused him of misconduct. Pl.

> Br. 37. But Stefanowicz became site lead in late 2003 or early 2004 (JA6138-6139; JA7281-7282), and CACI did not learn of allegations against Stefanowicz until spring 2004, when the Taguba report was leaked. Prior to that, the Army had assured CACI that its employees had been cleared of wrongdoing. JA7474.

b. The Record Evidence Does Not Satisfy the Focus Test

The Supreme Court recently described the "well-established framework" for evaluating claims under domestic-only statutes:

> [C]ourts must start by identifying the "focus" of congressional concern underlying the provision at issue. 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.
>
> ….
>
> We have repeatedly and explicitly held that courts must identify the statute's "focus" *and* ask whether the *conduct relevant to that focus* occurred in the United States.
>
> ….
>
> Of course, if all the conduct regarding the violations took place outside the United States, then courts do not need to determine the statute's focus.

Abitron, 600 U.S. at 418-19 (cleaned up). Because "all the conduct regarding the violations [alleged by Plaintiffs] took place outside the United States," *id.*, this Court can direct dismissal without even determining ATS's focus. But the focus test only reinforces the necessity of dismissal.

ATS's focus is the "tort … committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, which here is torture and CIDT. The "tort" is the only conduct identified in the statute. *Twitter, Inc. v. Taamneh*,

598 U.S. 471, 494 (2023) ("'Enterprises' or 'conspiracies' alone are therefore not tortious—the focus must remain on the tort itself."). The Supreme Court implied as much in *RJR Nabisco*, explaining that it did not reach the focus test in *Kiobel* because "all the relevant conduct regarding ***those violations*** 'took place outside the United States.'" *RJR Nabisco*, 579 U.S. at 337 (emphasis added) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). Likewise, in *Nestlé*, the United States took the position that for secondary liability claims under ATS, the "focus" is the primary tort. CACI Br. 25.

Plaintiffs praise the district court for disregarding what Plaintiffs call a "stray line" from *United States v. Elbaz*, 52 F.4th 593, 604 (4th Cir. 2022), in which this Court ruled that Elbaz's federal conspiracy charge was domestic because the primary unlawful conduct (wire fraud) occurred in the United States, even if Elbaz's conspiratorial conduct occurred in Israel. Pl. Br. 35 n.13. But that language was far from "stray," as the Court's affirmance of Elbaz's conspiracy conviction depended entirely on its holding that the focus of a federal conspiracy charge is the primary unlawful conduct, not the conspiracy itself. There is no logical basis for assigning different focuses to a federal conspiracy charge and an ATS conspiracy claim. Because any torture or CIDT unquestionably occurred in Iraq, Plaintiffs' claims are extraterritorial under the focus test.

In this case, however, the analysis is even simpler because any conspiratorial conduct occurred in Iraq as well. This much is plain from the fact that Plaintiffs' theory of liability depends entirely on holding CACI responsible under *respondeat superior* for *interrogators'* purported conspiratorial conduct, which indisputably

occurred *in Iraq*. JA7718-7721. Taking Plaintiffs' record citations for what they say, and not how Plaintiffs characterize them, the record shows only general corporate activity such as contracting, recruiting, and hiring, occurred in the United States. It shows that CACI's U.S.-based personnel performed basic administrative functions, "time cards, pay raises, performance appraisals, travel arrangements, those types of things" (JA7361), but had no role in, or even visibility into, interrogation operations. CACI Br. 11-14. Notably absent is any U.S.-based injury, tortious conduct, or conspiratorial conduct.

The domestic conduct here pales when compared to *Nestlé*, where the allegations, taken as true on a motion to dismiss, were that the defendants' U.S. management *knew* that their trading partners in the Ivory Coast were using child slaves and financed their operations anyway. CACI Br. 21; *Doe v. Nestlé*, 906 F.3d 1120 (9th Cir. 2018). In a footnote, Plaintiffs contend that the Court should shield its eyes from the facts found inadequate in *Nestlé* because many of them appear in the Ninth Circuit's opinion and not the Supreme Court's opinion. Pl. Br. 35 n.14. But it was the Ninth Circuit's opinion detailing the factual allegations that the Supreme Court reviewed and reversed. *Nestlé*, 593 U.S. at 634. To say that this Court cannot consider the allegations the Ninth Circuit found sufficient, but the Supreme Court found wanting, ignores the square import of *Nestle's* holding.

Thus, while ATS's focus is the tort itself, the reality is that Plaintiffs' claims are extraterritorial under any "focus" this Court conceivably could adopt. That requires dismissal.

B. The District Court Erred in Creating Plaintiffs' Private Damages Actions

"[T]here was a time in the mid-20th century when 'the Court assumed it to be a proper judicial function to provide' whatever 'remedies' it deemed 'necessary to make effective a statute's purpose." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 131-32 (2017)). Those days are over. As the Supreme Court emphasized as recently as June 2025,

> the decision whether to let private plaintiffs enforce a new statutory right poses delicate questions of public policy…. The job of resolving how best to weigh those competing costs and benefits belongs to the people's elected representatives, not unelected judges charged with applying the law as they find it.

Id.; *see also Goldey*, 2025 WL 1787625, at *1 ("[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts."). Plaintiffs fail to come to terms with how disfavored implied causes of action have become, both under the ATS and generally. These developments are fatal to their claims.

Sosa held that claims under ATS must be based on international norms that are universally-accepted and specifically-defined. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004). But *Sosa* also emphasized that courts must exercise "great caution" and engage in "vigilant doorkeeping" based on several considerations, including that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727, 729. Plaintiffs proceed as if they only need to show that "torture" and "CIDT" are specifically-

defined and universally-accepted norms. Pl. Br. 38. They neither acknowledge nor apply the required test for vigilant doorkeeping.

Jesner prescribed a clear test for "vigilant doorkeeping" of asserted ATS claims, even where the proposed international tort (there, funding terrorism) is well-defined and universally-accepted. *Jesner*, 584 U.S. at 264. Plaintiffs reject CACI's supposedly "unsupportable contention" that the "test for creating *Bivens* and ATS claims is *identical*." Pl. Br. 39. But the proof is in the pudding, as the *Jesner* test is drawn, word-for-word, from the *Bivens* test applied in *Ziglar*:

***Ziglar*, 582 U.S. at 137**	***Jesner*, 584 U.S. at 264 (quoting *Ziglar*)**
"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy ... courts must refrain from creating the remedy in order to respect the role of Congress ...."	"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, ... courts must refrain from creating the remedy in order to respect the role of Congress."

Plaintiffs have no response to CACI's observation that the Supreme Court has repeatedly cited *Bivens* cases in applying the test for recognizing claims under ATS and *vice versa*. CACI Br. 28-29. Thus, Plaintiffs are left with the quixotic argument that the tests for ATS and *Bivens* claims are somehow different even though they use the exact same words and the Supreme Court cites the case law for both types of claims interchangeably.

Plaintiffs seek to distance their claims from the test for *Bivens* claims because, as this Court has recognized, that test is essentially fatal. *Dyer*, 56 F.4th at 277. Plaintiffs criticize CACI's contention that the required test for ATS claims

might preclude any new ATS claims other than the three torts contemplated when Congress enacted the ATS. According to Plaintiffs, such a result defies *Sosa* and is the product of a three-Justice plurality from *Nestlé*. Pl. Br. 40 & n.15. But the Supreme Court *majority* in *Jesner* recognized that this arguably was the result of the required "vigilant doorkeeping":

> In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case.

Jesner, 584 U.S. at 265. And it is irrefutable that the Supreme Court has *never* endorsed a claim under ATS beyond the three international torts contemplated when Congress enacted the ATS. By summarily reversing *Goldey*, the Supreme Court punctuated the principle that it is for Congress, not the courts, to recognize new *Bivens* claims. *Bivens* and ATS claims thus stand on equal footing.

To be clear, as in *Jesner* and *Nestlé*, the Court need not determine that the door is completely closed to new claims under ATS for CACI to prevail. There are so many reasons why courts are not better equipped than Congress to decide whether to permit Plaintiffs' claims (CACI Br. 29-31) that dismissal is required without deciding whether new ATS claims are ever permissible.

Plaintiffs misdescribe their claims in arguing that they should be allowed under the ATS. Plaintiffs' claims against CACI are not for "torture" and "CIDT." Pl. Br. 38. Those claims were dismissed. JA618. The trial court judgment against CACI rests on a unique and unprecedented imposition of two levels of vicarious

liability on CACI. Specifically, the district court instructed the jury that it did not need to find that CACI conspired to mistreat Plaintiffs, or that CACI employees abused Plaintiffs, directed the abuse of Plaintiffs, or even knew about any abuse of Plaintiffs. Instead, the district court instructed the jury that CACI could be held liable for injuries it did not know about, from a conspiracy it did not know about, if one or more CACI interrogators conspired with U.S. soldiers to abuse detainees *and those U.S. soldiers* (or their other co-conspirators) in fact abused Plaintiffs. JA7718-7719 (Plaintiffs "do not allege that any CACI personnel … directly mistreated them," but allege that "CACI interrogators" conspired with "Army military personnel," which led to soldiers mistreating Plaintiffs.). That is, the district court allowed the jury to apply concepts of co-conspirator liability to find that individual CACI employees were liable for misconduct by U.S. soldiers and then to rely on *respondeat superior* to hold that the co-conspirator liability of individual CACI employees could be transferred to CACI. This allows the imposition of liability on CACI without its entry into a conspiracy or knowledge of detainee abuses.

Whether to impose secondary liability for the actions of others involves policy considerations better left to legislative judgment. *Janus Capital Corp. v. First Derivative Traders*, 564 U.S. 135, 144 (2011); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189-90 (1994). This is doubly true when liability rests on two layers of secondary liability, where an employer is being held liable for the torts committed by its employees' alleged co-conspirators. The Ninth Circuit rejected "such a mischievous new rule" in the civil

RICO context as inconsistent with the policies underlying secondary liability. *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 777 (9th Cir. 2002). Imposing *respondeat superior* liability on an employer for the actions of its employees' co-conspirators is a bridge too far because the employer does not have the same ability to monitor its employees' co-conspirators' conduct. *Id.* This is particularly true here, as CACI's management was denied visibility into interrogation operations.

In a similar vein, Plaintiffs argue that their claims are removed from the military setting and the conduct of war because detainee abuse is illegal and some abuse occurred outside of interrogations. Pl. Br. 40-41. But Plaintiffs ignore that CACI is being held liable for abuse inflicted *only by U.S. soldiers* who the U.S. Army gave dominion and control over detainees at Abu Ghraib. JA7718-7719. The connection to the military's combat role is inextricable.

Moreover, Plaintiffs' citation to laws prohibiting torture and CIDT is self-defeating. Pl. Br. 41-42. These laws have one thing in common—they *do not* encompass Plaintiffs' claims. The Torture Victims Protection Act, 28 U.S.C. § 1350 note, does not apply to corporations, *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 451-52 (2012), and President Bush signed the TVPA into law on his express understanding that "the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad."[6] Indeed, the

[6] Statement by President of the United States, Statement by President George [H.W.] Bush upon Signing H.R.2092, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992).

Supreme Court just reiterated that creating a judge-made cause of action is particularly inappropriate when "Congress has actively legislated" in an area "but has not enacted a statutory cause of action for money damages" that would encompass the plaintiffs' claims. *Goldey*, 2025 WL 1787625, at *2; *see also Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 426 (2011); *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981). "Otherwise, foreign plaintiffs could bypass Congress' express limitations on liability … simply by bringing an ATS suit," *Jesner*, 584 U.S. at 265-67 (plurality opinion), which is exactly what Plaintiffs did here.

C. CACI Is Entitled to Derivative Sovereign Immunity

Plaintiffs do not substantively defend the district court's ruling that the United States impliedly waived sovereign immunity for *jus cogens* violations, stating in a single sentence that the district court was right and referring the Court to a brief from six years ago as to why. Pl. Br. 49. By not developing this argument, Plaintiffs waived it. *Schulman v. Axis Surplus Ins. Co.*, 90 F.4th 236, 245 n.5 (4th Cir. 2024). Tellingly, although Plaintiffs alleged direct abuse solely by U.S. soldiers, Plaintiffs never sued the United States or individual soldiers, even after the district court ruled that the United States lacked immunity.

Rather than defend the district court's ruling, Plaintiffs argue that CACI waived its defense of derivative sovereign immunity based on invited error and judicial estoppel. *Id.* But CACI expressly asserted that its immunity should be coextensive with the United States' immunity, whatever that scope of immunity might be. Dist. Ct. Dkt. #713 at 2; Dist. Ct. Dkt. #752 at 12. This position is

consistent with the nature of third-party claims, which depend on the third-party plaintiffs' defenses having failed. 6 Wright & Miller, *Federal Practice & Procedure* § 1455 (3d ed. 2004); *see also* Fed. R. Civ. P. 8(d) (contemplating alternative pleadings).

Plaintiffs next argue that CACI is not entitled to derivative sovereign immunity because the jury's verdict proved CACI "violated both federal law *and* its government contract." Pl. Br. 50 (conceding both violations are required to defeat derivative immunity). The verdict proved neither, as the jury did not need to find a breach of contract or a violation of federal law to render a verdict for Plaintiffs. Plaintiffs never sought a special verdict on breach of contract or violation of federal law, thus waiving the issue. *United States ex rel. Oberg v. Penn. Higher Ed. Asst. Agency*, 912 F.3d 731, 737 (4th Cir. 2019) (citing *Bunn v. Oldendorff Carriers GmbH & Co.*, 723 F.3d 454, 469 (4th Cir. 2013)). Equally important, CACI's contracting partner, the United States, has never alleged that CACI breached its interrogator contracts or violated federal law. *See Saleh*, 580 F.3d at 2.

Plaintiffs cite no authority for stripping a government contractor's derivative immunity based on its employees' secondary liability for a third-party's tortious conduct, the theory on which Plaintiffs prevailed. This is because all the case law goes against Plaintiffs' position. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 157 (2016); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 647 (4th Cir. 2018) (no corporate liability when corporate conduct violated federal law but not the government contract); *In re KBR, Inc., Burn Pit Litig.*, 744

F.3d 326, 332 (4th Cir. 2014) (potential corporate liability for corporation's failure "to properly handle and incinerate waste" and provision of contaminated water).

Plaintiffs ask the Court to ignore the absence of a jury finding that CACI breached its contract, *see* CACI Br. 34-35, by characterizing CACI's contract performance as merely "staying within the thematic umbrella of the work that the government authorized," a concession that no breach occurred. Pl. Br. 51 (citing *Burn Pit*, 744 F.3d at 345). CACI always acted in conformity with its contract and underlying delivery orders, CACI Br. 11, 34-35, and—consistent with the delivery orders—the interrogators that CACI supplied always acted under the direct operational control of the U.S. Army, *id.* at 11-14. In short, CACI was wrongfully deprived of the ability to seek derivative sovereign immunity, which can only be rectified by dismissal or, failing that, a new trial.[7]

D. This Court Has Not "Conclusively Rejected CACI's Political Question Argument"

If this Court "conclusively rejected CACI's political question argument" in *Al Shimari IV* (Pl. Br. 42), why did it remand and direct the district court to "examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place" in order

[7] Former military leaders and lawyers, as *amici*, urge that because contract employees were not subject to court-martial, long-established immunities should not apply to them. Former Mil. Leaders & Lawyers Br. 8-13. This argument was not raised in the district court, never adopted by any court, and ignores the variety of ways civilians serving with the military abroad are subject to prosecution in the United States. *See* note 5, *supra*.

to determine whether any conduct is "protected under the political question doctrine"? *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*"). *Al Shimari IV* made clear that the only conduct to which the political question doctrine categorically did not apply was "*intentional* acts *by a government contractor* that were unlawful at the time they were committed." *Id.* at 162 (emphasis added). The judgment against CACI does not rest on such conduct.

When this Court decided *Al Shimari IV*, the case's posture was vastly different. This Court ruled based on *allegations*, including allegations of horrific direct conduct *by CACI*. This included "torture and war crimes" as well as "assault and battery, sexual assault and battery, and intentional infliction of emotional distress." *Id.* at 151. After remand, Plaintiffs promptly dismissed, with prejudice, their common-law claims. JA433. Plaintiffs also disclaimed that any CACI employee ever "laid a hand" on them (JA489), resulting in dismissal of their claims of direct conduct by CACI. JA618. During trial, the district court entered judgment *for CACI* on Plaintiffs' aiding-and-abetting claims for lack of proof. JA7621. By the close of evidence, eighteen of the twenty counts in the Third Amended Complaint had been resolved in CACI's favor.

Thus, as this case went to the jury, there was no evidence of "intentional," "unlawful" acts directed at Plaintiffs *by CACI* that would preclude application of the political question doctrine. Significantly, Plaintiffs did not ask for any jury finding that CACI had engaged in any intentional acts that were unlawful at the time of commission. That argument was therefore waived, which is fatal to

Plaintiffs' position on justiciability.[8] The case proceeded to judgment on a double-vicarious-liability theory holding CACI liable under *respondeat superior* for the co-conspirator liabilities of unnamed CACI employees for acts committed by soldiers who conspired with those unnamed CACI employees. JA7718-7719; JA7727-7728 (jury instructions). This Court in *Al Shimari IV* was not asked to hold—and did not hold—that the political question doctrine was categorically inapplicable to such an attenuated theory of liability disconnected from any intentional wrongdoing by CACI.

Plaintiffs, having hung their hat on the argument that *Al Shimari IV* "categorically precluded" CACI's justiciability argument, and having failed to seek any jury finding on intentional, unlawful acts by CACI, did not meaningfully dispute that CACI's conduct was sufficiently tied to military operations and decisions as to satisfy that aspect of the political question inquiry. With Plaintiffs having failed to meet their burden of proving jurisdiction, dismissal under the political question doctrine is warranted.

E. Plaintiffs' Claims Are Preempted

In *Hencely*, 120 F.4th at 426,[9] this Court held that combatant activities preemption is designed to further the "federal interest in eliminating *non-federal*

[8] The political question doctrine implicates federal courts' subject-matter jurisdiction, and therefore Plaintiffs bear the burden of proof on the issue. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009).

[9] This Court's mandate issued in *Hencely*, and *Hencely* remains the law of this Circuit unless it is reversed or overruled by the Supreme Court or this Court. *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005). The question in (Continued …)

tort regulation of the military during wartime." *Id.* (emphasis added). *Hencely* was correctly decided, as litigation would have required the trial court to evaluate military decisions during combat operations in Afghanistan—precisely what the combatant-activities exception is designed to prevent. Yet that is exactly what occurred in this case, with the district court instructing that torture and CIDT included interrogation approaches authorized under the Army's Interrogation Rules of Engagement. CACI Br. 38.

In Plaintiffs' view, this Court's language can be discounted as a "single stray reference" with no legal significance. But the Court in *Hencely* described the scope of preemption as "non-federal tort regulation" for a reason, as international-law tort duties impair the federal government's prosecution of war just as much as state-law tort duties. *Id.* at 426, 430.

Plaintiffs next contend that preemption is unavailable because Plaintiffs' claims are "federal claims brought under a federal *statute*." Pl. Br. 45. Notably, they do not identify the federal statute creating a cause of action. That is because there is none. This Court, moreover, has expressly recognized that Plaintiffs "seek to impose liability on CACI for alleged violations of international law." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 525 (4th Cir. 2014). Plaintiffs' position also is inconsistent with their argument, accepted by the district court, that

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Hencely on which review was granted is: "Should *Boyle* be extended to allow federal interests emanating from the FTCA's combatant-activities exception to preempt state tort claims against a government contractor for conduct that breached its contract and violated military orders?"

Plaintiffs' "torture expert" could not be cross-examined on the content of federal law because Plaintiffs' claims were grounded in *international law*, not federal law. JA5836-5837.

And, even if the Plaintiffs' claims could somehow be regarded as federal claims, the result is the same. The claims are still precluded by the combatant activities exception to the FTCA, as one federal law may displace another, as when the securities laws preclude application of the antitrust laws. *See Credit Suisse v. Billing*, 551 U.S. 264, 276 (2007).

Finally, CACI has not waived its preemption defense. Plaintiffs rely on *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 453-54 (2005), to argue CACI waived its preemption defense by not insisting that the jury be instructed on "whether CACI in fact engaged in 'combatant activities.'" Pl. Br. 45. This argument fails for three reasons. First, *Bates* is not about waiver, and merely provides that a jury *can* be instructed on a preemption defense that is tried based on factual disputes. *Id.* Second, there was no triable fact on preemption because the district court's pretrial ruling on preemption found the defense unavailable *as a matter of law* based on its incorrect view that Plaintiffs' claims were federal in nature. JA613 ("Therefore, the FTCA does not preempt plaintiffs' ATS claims."). Post-trial, the Court corrected its error in casting Plaintiffs' claims as *federal*, recognizing that Plaintiffs' claims "involved ... international law," but made a new error by holding that combatant activities preemption applies only to state-law tort duties, and not all "non-federal" tort duties as *Hencely* commands. JA6463; JA6470-6471. Third, CACI agrees with Plaintiffs that preemption should have

been resolved as a matter of law, except that the resolution should have been in CACI's favor. That legal determination has nothing to do with a jury trial. *Dupree v. Younger*, 598 U.S. 729, 735 (2023) ("The point of a trial, after all, is not to hash out the law.").

F. The District Court Erred in Refusing to Dismiss this Case on State Secrets Grounds

CACI was forced to defend this case while being denied, on state secrets grounds, (1) the identities of the Army *and CACI* interrogators who interacted with Plaintiffs, (2) evidence of the training and background of those interrogators (even though Plaintiffs pursued—and continue to pursue (Pl. Br. 36)—a theory that CACI interrogators were unqualified, (3) detailed interrogation plans showing exactly what the U.S. Army chain of command approved for each interrogation of Plaintiffs, and (4) contemporaneous reports summarizing Plaintiffs' interrogations. CACI Br. 7. This resulted in a trial that centered on the alleged discrete bad acts (never connected to Plaintiffs) of three CACI employees while simultaneously denying CACI the ability to prove that these three employees had no meaningful interaction with Plaintiffs. It also placed the testimony of Army and CACI interrogators denying Plaintiffs' claims of abuse, presented through mind-numbing pseudonymous telephonic depositions,[10] on a far-inferior footing to the testimony of Plaintiffs, who were permitted to testify live even if they were barred from

[10] Interrogator depositions were so littered with state-secrets objections that CACI was forced to edit the depositions to remove the majority of the objections, which resulted in choppy and incoherent presentation.

entering the country. This imbalance severely prejudiced CACI by prohibiting it from calling Plaintiffs' interrogators as trial witnesses so the jury could assess their demeanor, a crucial data point in judging credibility. *See Agosto v. INS*, 436 U.S. 748, 755 (1978); *Djondo v. Holder*, 496 F. App'x 338, 342 (4th Cir. 2012).

In arguing that these state secrets restrictions were inconsequential, Plaintiffs focus on *their* evidentiary needs, which they say "did not depend on linking specific CACI interrogators to Plaintiffs' abuse." Pl. Br. 58. But that ignores *CACI's* evidentiary needs. *El-Masri* is clear that dismissal is required not only if state secrets concerns eliminate evidence central to the plaintiffs' claims, but also if those concerns impede the defendant's ability to defend against those claims. *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007). The only way for CACI to fairly defend was to show that the CACI interrogators having any connection to Plaintiffs were not the few CACI interrogators implicated in discrete acts of misconduct—thus rebutting any inference of conspiracy. The district court's privilege rulings denied CACI that opportunity. *El-Masri* affirmed dismissal of a detainee abuse case where the state secrets privilege precluded discovery of the identities of those interacting with the plaintiff and the interrogation approaches approved for his interrogations. *Id.* This case is no different.

Plaintiffs' contention that the case could proceed because both sides were equally harmed by the state secrets privilege is factually wrong and legally irrelevant. Pl. Br. 60. Plaintiffs were *benefited* by the denial of discovery into the identities of interrogators interacting with Plaintiffs. Plaintiffs embrace the fact that they did not need (or even desire) interrogator identities to present their case;

their case proceeded by sullying a few CACI interrogators and using innuendo to speculate that they had something to do with Plaintiffs' treatment and acted conspiratorially in doing so. Pl. Br. 58. It was *CACI* that needed evidence of who actually interacted with Plaintiffs to dispel Plaintiffs' innuendo. Moreover, the essence of state secrets law is not that cases may go forward if the harm runs in both directions (which it does not here). If facts important to the prosecution or defense of a claim are subject to the privilege, dismissal is required. *Id.*

G. The Borrowed Servant Doctrine Precludes CACI's Liability

Plaintiffs' arguments supporting the supplemental instruction—which essentially told the jury that CACI could be held liable based on any miniscule exercise of supervision—rely on unpublished cases from this Court and the district court, inapplicable state law, selective quotes from secondary sources, and overt mischaracterizations of precedent. Pl. Br. 51-55. Plaintiffs rely on an unpublished, *per curiam* opinion, applying West Virginia law, that mentions the borrowed servant doctrine in *dicta* in a footnote to argue that the employer must "completely relinquish[] control" for the doctrine to apply. *Id.* at 52 (citing *US Methanol, LLC v. CDI Corp.*, No. 21-1416, 2022 WL 2752365, at *5 n.4 (4th Cir. July 14, 2022)). That is simply incorrect. This Court has recognized that the borrowed servant doctrine applies if "an individual [is] the agent of two principals at the same time." *Estate of Alvarez v. Rockefeller Found.*, 96 F.4th 686, 693 (4th Cir. 2024) (the doctrine applies to an agent in the general employ of one and particular employ of

another). Thus, the existence of two principals does not defeat the doctrine, but is a *prerequisite* to its application.

Contrary to Plaintiffs' claim,[11] this Circuit has never embraced the notion that a so-called "dual servant" is distinguishable from a "borrowed servant," because a borrowed servant is—by definition—a dual servant. This Court's precedents ask, between the loaning and borrowing employers, "whose work is being performed" which is determined by "who has the power to control and direct the servants *in the performance of their work*." *Id.* at 694 (citation and quotation omitted) (emphasis added). Under that inquiry, it is irrelevant that the loaning employer retains general authority over the employee. *Id.* (citing Restatement (Second) of Agency § 227 cmt. a (1957) ("[T]he important question is not whether or not [the agent] remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction *of one or the other*." (emphasis added)). It only matters "whether the work which he was doing at the time was *their [the general employer's] work or that of another*"—a binary question—determined by "ascertaining under whose authority and command the work was being done." *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305, 308 (1932) (reversing jury verdict

[11] *See* Pl. Br. 52 (citing *Sharpe v. Bradley Lumber Co.*, 446 F.2d 152 (4th Cir. 1971) (applying North Carolina state law)). Professor DeMott's *amicus* brief mimics Plaintiffs' arguments, only with less legal support, and does not require separate treatment. *See* JA5750 (denying Professor DeMott's motion to appear as *amicus* as unnecessary).

against defendants based on borrowed servant doctrine) (emphasis added); *Estate of Alvarez*, 96 F.4th at 693.

When a borrowing employer exercises authority and command over the employee's performance, it proves that the employee is doing the borrowing employer's work. As a result, that employee is deemed "'*transferred* ... to the service of [the borrowing employer], so that he becomes the servant of that person, with *all* the legal consequences of the new relation.'" *Id.* (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909)) (emphasis added). The terms "transferred" and "all" leave no opportunity for shared responsibility.

The notion, injected by the district court's supplemental instruction, that the U.S. Army and CACI could have shared control over the interrogation work at Abu Ghraib and the implication that shared control would defeat the borrowed servant doctrine, cannot be squared with these precedents. The bottom-line inquiry is whether the interrogation mission was the Army's work or CACI's. By acquiring CACI interrogators and then exercising authority over their interrogation work, the U.S. Army assumed "*all*"—not some—of the legal consequences of that master-servant relationship, including vicarious liability for the interrogators' actions during the performance of that work. *See id.* (quoting *Standard Oil*, 212 U.S. at 225).

When CACI objected to the Supplemental Instruction on the grounds that it was confusing and inaccurate, the district court responded that an "intelligent jury" would understand that "some control [by CACI] would not be enough" to defeat the borrowed servant defense. JA7761-7762. But when CACI responded that the

jury should be so instructed, the district court compounded its error by omitting this clearly-correct statement of law and leaving the jury uninstructed on what to do if the jury found some minor incidents of supervision by CACI's on-site personnel. JA7762.

The only cite from an authoritative opinion that Plaintiffs offer to counter the long-standing standards precluding "dual servant" status is this Court's statement in *Alvarez* that it did not need to consider the plaintiffs' "dual agent" argument. Pl. Br. 53-54. But declining to consider an argument is not remotely the same thing as concluding that the argument has legal merit. Moreover, this Court's precedents have placed beyond doubt that some measure of shared control does not defeat application of the borrowed servant doctrine, as the primary inquiry remains whose work is being performed. *See Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140, 1141-43 (4th Cir. 1980) (authority to pay, fire, equip, and supervise employees did not overcome borrowed servant doctrine because the loaning employer had "no concern with the details of the work being done," which "was entirely [the borrowing employer's] work"); *McLamb v. E. I. Du Pont De Nemours & Co.*, 79 F.2d 966, 968 (4th Cir. 1935) (providing advice, instructing and directing workers insufficient to defeat the doctrine because "the work was the work of the United States" and "control over it was never relinquished by the army engineer in charge").

None of the evidence Plaintiffs cite supporting the jury's verdict supports a finding that the U.S. Army relinquished control over the interrogation mission. Nor does it demonstrate a level of control that surpasses that deemed insufficient

by this Court in *Huff* and *McLamb*. *Compare* Pl. Br. 55-57 *with Huff*, 631 F.2d at 1141-43, *and McLamb*, 79 F.2d at 967-68. Moreover, Plaintiffs ignore the avalanche of dispositive evidence proving the borrowed servant standard was met, CACI Br. 11-14, while relying on inadmissible evidence to support the jury's verdict, which must be excised from this Court's consideration, *id.* at 50-51. When limited to admissible evidence and evaluated under this Court's long-established standard, CACI is entitled to judgment under the borrowed servant doctrine.

H. CACI Is Entitled to Judgment for Failure to Establish Conspiracy

In addressing aiding-and-abetting liability, the Supreme Court recently reinforced the "centuries-old view" of secondary liability: "that a person may be responsible for a crime he has not personally carried out" if he deliberately "helps another to complete its commission." *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1565 (2025) (quoting *Rosemond v. United States*, 572 U.S. 65, 70 (2014). The district court violated this principle in allowing an exotic theory of liability under which CACI, without knowledge that certain interrogators in Iraq supposedly had entered into a vague conspiracy to mistreat detainees, could be held liable not for its employees' torts, but for those employees' personal liability for the torts of soldiers with whom they supposedly, and unbeknownst to CACI, conspired.

This Court has never sanctioned the imposition of co-conspirator liability based on facts remotely similar to those here. Holding an employer liable for the conduct of its employees' alleged co-conspirators, which stacks *respondeat*

superior liability on top of co-conspirator liability, is inappropriate in any context, *Oki Semiconductor*, 298 F.3d at 777, much less the self-consciously narrow jurisdiction provided by the ATS.

The law of conspiracy requires evidence that the defendant joined with another person to accomplish, by concerted action, some tortious or unlawful purpose. *Bhattacharya v. Murray*, 93 F.4th 675, 688 (4th Cir. 2024). The record contains no evidence of a common design involving CACI personnel and military personnel, let alone CACI. There is no evidence that CACI personnel or CACI knew the purpose of the supposed conspiracy—a purpose ill-defined by Plaintiffs—and deliberately joined the conspiracy. Plaintiffs presented no evidence of who joined the conspiracy, when that occurred, or anything else that could establish a conspiracy. None of the supposed co-conspirators from the military testified about a conspiracy. The Court should have rejected Plaintiffs' conspiracy claims as a matter of law rather than allowing the jury to engage in a prohibited "guilt-by-association" exercise after a trial in which CACI was prevented from fairly confronting Plaintiffs' evidence of parallel conduct.[12]

Plaintiffs argue that they proved coordination between CACI interrogators and MPs "to treat detainees 'like shit'" to prime them for interrogations, and that this proof somehow overcomes the law against parallel conduct proving a

[12] *United States v. Barnett*, 660 Fed. App'x 235, 248 (4th Cir. 2016) ("Guilt by association is one of the ever-present dangers in a conspiracy count that covers an extended period.") (quoting *United States v. Izzi*, 613 F.2d 1205, 1210 (1st Cir. 1980)).

conspiracy. Pl. Br. 62 (citing JA5923). But the very citation Plaintiffs rely on disproves their argument. The evidence Plaintiffs cite concerned a *single* CACI interrogator, relates to a different detainee, and the witness specifically denies that the CACI interrogator ever told the witness MP to "hit, punch, or abuse the detainee." JA5923.[13] This evidence is insufficient as a matter of law to prove a conspiracy involving CACI. Indeed, it is, at most, the definition of "mere[] parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557.

Plaintiffs' cites purporting to show the shared purpose between MPs and CACI interrogators fare no better. Pl. Br. 62 (citing JA5897) (MP testimony stating the purpose of putting detainees in stress positions with women's underwear but stating he *did not recall* a CACI interrogator directing him to utilize that tactic); *id.* (citing JA5889) (JA5888-5890, same MP testifying he *did not recall* CACI interrogators even being present when a detainee was held nude, put in women's underwear, or cuffed to his cell).

Regardless, CACI cannot be held vicariously liable for a conspiracy its interrogators purportedly entered. The doctrine of *respondeat superior* renders an employer vicariously liable only for the *tortious acts* of its employees. *See Blair v. Def. Servs., Inc.*, 386 F.3d 623, 628 (4th Cir. 2004). Conspiracy is not, itself, a

[13] The MP testified that the CACI interrogator "wanted us to use the dog on" the non-Plaintiff detainee. *Id.* But use of working dogs was specifically permitted by the IROEs, JA229, and conduct that was lawful at the time is not evidence of a conspiracy. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("lawful parallel conduct fails to bespeak unlawful agreement").

tort, but "only the mechanism for subjecting co-conspirators to liability when one of their member[s] committed a tortious act." *Beck v. Prupis*, 529 U.S. 494, 503 (2000). It is certainly not "hornbook law," as Plaintiffs claim (Pl. Br. 63), that *respondeat superior* subjects an employer to liability for the legal mechanism of vicarious liability based on conspiracy. That is because *respondeat superior* renders an employer liable only for the torts of its employees, and not for the torts of others for which its employees might be personally liable. *Oki Semiconductor*, 298 F.3d at 777; *see also Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, 691 F. App'x 416, 417 (9th Cir. 2017). Plaintiffs established no connection whatsoever between their mistreatment and tortious conduct by any CACI interrogator, *see* CACI Br. 53, and, thus, their conspiracy claims fail.

In addition, participating in a conspiracy to commit torture was far outside CACI interrogators' scope of employment. Plaintiffs' distortion of the record, claiming that "at trial CACI did not contest that its interrogators were acting in the scope of their employment during the relevant events," reveals the weakness of their position. Pl. Br. 63.[14] CACI has never disputed that performing interrogations was within the scope of its interrogator employees' employment, but

[14] The district court was concerned the scope of employment instruction was confusing in a case in which the employees were operating under employment contracts with CACI to work on a government contract, under which they reported to the chain of command. JA7634-7635. CACI agreed not to include the scope of employment instruction, but also agreed that if the jury asked questions implicating the scope of employment, the Court should provide its drafted instruction. JA7637-7638. CACI did not "concede" anything on the scope of employment.

entering into illegal conspiracies in violation of *jus cogens* norms surely was not. CACI's business was providing personnel to supplement military intelligence capabilities and operate under the military's command. CACI Br. § IV.B.1. CACI was not in the business of performing, directing, or supervising the U.S. Army's interrogation mission. *Id.* Moreover, CACI made crystal clear to all its employees, including those the U.S. Army staffed as interrogators, that compliance with the law and personal accountability for meeting CACI and government standards were nonnegotiable requirements. *See, e.g.*, JA8093, JA8099, JA8102. As CACI explained, CACI Br. 55, there was no evidence showing any corporate purpose or benefit that could be gained from having its employees enter a conspiracy to torture people. A torture conspiracy represents "so great a deviation from [CACI's] business that" CACI is entitled to "judgment on the *respondeat superior* liability claim as a matter of law." *See Blair*, 386 F.3d at 628 (sexual assault outside scope of employment as not within the ordinary course of staffing agency's business).

I. The District Court Erred in Failing to Grant a New Trial or Remittitur on Damages

On compensatory damages, Plaintiffs create a straw-man to avoid confronting their real problem. CACI does not assert that compensatory damages are *unavailable* when supported only by a plaintiff's self-diagnosis. Pl. Br. 65. What CACI argued is that "[a] plaintiff's testimony, without supporting expert diagnosis, is 'insufficient to support a sizeable award for emotional distress.'" CACI Br. 58 (quoting *Hetzel v. Cnty. of Prince William*, 89 F.3d 169, 171.72 (4th

Cir. 1996)). Plaintiffs contend that CACI's expert diagnosed Plaintiffs' *physical* injuries, which is not even true because he testified only that marks on their bodies could have been caused by abuse or by other unrelated events, but even Plaintiffs do not contend that there was *any* diagnosis of emotional injury.

On punitive damages, Plaintiffs did not establish managerial participation in their alleged abuse. There was no evidence Mr. Porvaznik was involved in detainee abuse. Mr. Stefanowicz testified without contradiction that he neither was assigned to interrogate Plaintiffs nor involved in their treatment. JA6134; JA6153-6154. Moreover, the site lead duties Messrs. Porvaznik and Stefanowicz undertook were purely administrative, not operational. JA6255-6256.

Plaintiffs also repeat an objectively-verifiable error from their Rule 50 opposition, where they argued that the district court in *Yousuf v. Samantar*, No. 1:04-cv-1360, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), awarded punitive damages exceeding $350,000, purportedly showing that Virginia's punitive damages cap did not apply. CACI pointed out in its reply that the conduct at issue in *Yousuf* predated July 1, 1988, the effective date of the cap. Dist. Ct. Dkt. #1852 at 20. Plaintiffs elected to repeat the argument to this Court anyway. Pl. Br. 68 n.26. It was facially reversible error for the district court to ignore the punitive damages cap. *See Sines v. Hill*, 106 F.4th 341, 352 (4th Cir. 2024).

J. The District Court Erred in Granting the United States Summary Judgment on CACI's Third-Party Claims

CACI agrees that the United States is entitled to sovereign immunity and submits that it is entitled to coextensive derivative sovereign immunity. CACI Br.

31-35. In the event the United States lacks sovereign immunity, however, the district court erred in holding that CACI's 2007 agreement with the Interior Department released, *sub silentio*, CACI's third-party claims against the United States.

"When an agency obtains a release, it ordinarily applies only to claims against the agency." CACI Br. 56 (citing *Holland v. United States*, 621 F.3d 1366, 1384 (Fed. Cir. 2010)). This is no longer a matter of advocacy, but is an established fact. On May 6, 2025, the Armed Services Board of Contract Appeals ("ASBCA") specifically held that the release in the 2007 close-out agreement between CACI and the Interior Department applies only to claims against the Interior Department and not to claims against the Defense Department or the United States generally. *Appeal of CACI International Inc*, No. 63663, at 17-19 (ASBCA May 6, 2025).[15] While ASBCA's construction of a government contract is not technically binding on federal courts, "its interpretation is given careful consideration and great respect" because "the board has considerable experience and expertise interpreting government contracts." *United Pac. Ins. Co. v. Roche*, 401 F.3d 1362, 1365 (Fed. Cir. 2005) (cleaned up).

The United States argues that CACI forfeited this argument, but CACI's summary judgment opposition shows otherwise. CACI noted that the settlement resolved "all claims and disputes by DOI and CACI," the parties to the agreement,

[15] The Board's decision is currently undergoing redactions. CACI will file the decision under Rule 28(j) once it is public. Fed. R. App. P. 28(j).

settling a dispute between CACI and the Interior Department pending before the Civilian Board of Contract Appeals, an entity that "has no authority over the Department of Defense and its constituent agencies." Dist. Ct. Dkt. #1161 at 6, 10. Thus, CACI argued, it was "irrational" to construe the agreement as releasing claims against the United States. Rather, the only reasonable construction was that the agreement released claims based on "the contractual relationship between ***the parties***." *Id.* (emphasis added). Accordingly, CACI preserved its argument that the agreement does not release non-parties.

That the 2007 agreement applies only to claims by or against the Interior Department ends the inquiry and requires no examination of the scope of the release. But the United States is wrong in arguing that the release, if it applied to the United States, would extend to CACI's third-party claims. In *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006), this Court held that a claim is not "related to" a contract unless the claim requires inquiry into the contract's terms. The United States argues that this Court should limit *Wachovia* to arbitration agreements and apply "related to" language more broadly in other contexts. But arbitration clauses are given a broad construction based on the federal policy in favor of arbitration, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-24 (1983), so it makes little sense that arbitration clauses would be given a *narrower* construction than other agreements using the same language.

III. CONCLUSION

The Court should vacate the final judgment and remand with instructions to dismiss for lack of subject-matter jurisdiction.

Respectfully submitted,

/s/ John F. O'Connor
John F. O'Connor
Linda C. Bailey
Joseph T. McClure
STEPTOE LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
joconnor@steptoe.com
lbailey@steptoe.com
jmcclure@steptoe.com

Nina J. Ginsberg
GREENSPUN SHAPIRO
GINSBERG & YANG, P.C.
3955 Chain Bridge Road, 2nd Floor
Fairfax, Virginia 22030
(703) 352-0100 – telephone
njg@greenspunlaw.com

Counsel for Appellant CACI Premier Technology, Inc.

July 23, 2025

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

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

1. I am an attorney representing Appellant CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the cover page, table of contents, table of authorities, certificates of compliance and service, and signature block) contains 9,978 words.

/s/ John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2025, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, which automatically serves a true copy of the foregoing on all counsel of record.

/s/ John F. O'Connor