No. 19-648

IN THE

Supreme Court of the United States

CACI PREMIER TECHNOLOGY, INC.,

Petitioner,

—v.—

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The United States agrees with Plaintiffs (Respondents) that the Fourth Circuit correctly held that it lacked jurisdiction to hear private contractor CACI Premier Technology, Inc.'s ("CACI") interlocutory appeal of the district court's denial of CACI's motion to dismiss on "derivative sovereign immunity" grounds. The United States also agrees with Plaintiffs that, contrary to CACI's (Petitioner) position, derivative sovereign immunity is a defense to liability and not an immunity from suit and thus can never be subject to interlocutory appeal under the collateral order doctrine.

But Plaintiffs strongly disagree with the United States' suggestion that the Court grant the petition because of what it characterizes as a "tension" in lower court approaches regarding the appealability of various claims of "derivative immunity" by private contractors. Plaintiffs also vehemently disagree that the Court should defer a decision on this petition until after it decides *Nestlé USA, Inc. v. Doe*, cert. granted, No. 19-416 (July 2, 2020), and *Cargill, Inc. v. Doe*, cert. granted, No. 19-453 (July 2, 2020)—appeals that do not in any way implicate the narrow question presented in this case regarding interlocutory appellate jurisdiction.

For several reasons, the Court should deny certiorari now and send this case back to the district court for further proceedings.

First, the Fourth Circuit correctly held that the district court's order falls outside the collateral order doctrine because any entitlement CACI might have to derivative sovereign immunity turns on disputed factual

questions that are intertwined with the merits regarding the company's compliance with the law and its government contract. The abstract questions that the United States asks this Court to address—whether all denials of government contractors' derivative sovereign immunity motions are categorically barred, as a matter of law, from interlocutory appeal, and how to define the nature of "derivative sovereign immunity"—are not presented by the decision below. Addressing those questions will have no practical effect on further proceedings in this case beyond additional delay. Moreover, because the United States acknowledges that the decision below is only, at most, in "tension" with some decisions of other courts involving other forms of contractors' immunity claims, U.S. Br. 5–6, 18,[1] it does not present the kind of circuit split that warrants this Court's attention. *Id.* at 18 (conceding that these cases "do not present a perfectly square split").

Second, in its petition, CACI argued that the need for review here is "amplified" by a purported circuit split concerning the "antecedent question" of the United States' ability to take interlocutory appeals of denials of sovereign immunity motions. Pet. Br. 15–17. Critically, however, the United States correctly observes that this separate issue was not presented in the appeal below and is not now before the Court in this case. U.S. Br. 13–14 n.3 ("[T]his case would not be an appropriate vehicle in which to address whether the federal government has a right to immediately appeal orders denying motions to dismiss on the ground of federal sovereign immunity."). Because the United

[1] Brief for the United States as Amicus Curiae (Aug. 26, 2020).

States would have a strong interest in resolution of any substantial and properly presented question concerning its own ability to take appeals, its view that this petition is not the proper occasion to address such a question deserves substantial weight.

Finally, because the petition should be denied, the Court should not hold it in abeyance pending decision on cases presenting completely different issues. Doing so would only serve to reward CACI with the further delay it sought by filing this improper appeal on the eve of trial. CACI's improvident interlocutory appeal caused the last-minute cancelation of a trial that had finally been scheduled after more than eleven years of litigation, seventeen unsuccessful dispositive motions by CACI, and a prior improper interlocutory appeal by CACI raising the same issue presented here.[2] This Court should not exacerbate the long delay Plaintiffs—three Iraqi citizens who were detained, tortured, and abused in 2003 at Abu Ghraib at the hands of military police acting under the direction of CACI employees—have faced by implementing a de facto stay of this litigation while it resolves separate appeals that have no bearing on the issues immediately presented by CACI's appeal.

The issues at stake in this litigation—whether CACI can be held liable for conspiring with and aiding and abetting low-level members of the military, some of whom were court-martialed, for conduct the military, the political branches, and the international

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[2] For details on CACI's first improper interlocutory appeal, *see Al Shimari v. CACI Premier Tech., Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*).

community condemned in Abu Ghraib—are weighty. The Court should deny CACI's petition for certiorari and return the case to the district court, which is best positioned to oversee further proceedings in light of the pendency of *Nestlé* and *Cargill* and to consider, in the first instance, what impact (if any) the Court's rulings in those cases would have on this litigation.

ARGUMENT

I. THIS CASE IS AN UNSUITABLE VEHICLE TO ADDRESS THE ISSUES RAISED BY THE UNITED STATES

The United States agrees that CACI is not entitled to the defense of "derivative sovereign immunity" if Plaintiffs prevail on the merits of their claims that CACI violated federal and international law and the Government's explicit instructions. The United States also agrees that CACI's claimed defense is "coterminous with the merits," a fact that necessarily precludes an interlocutory appeal. U.S. Br. 14; *see Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). The United States further agrees that the Fourth Circuit was ultimately correct in holding that it lacked jurisdiction to hear CACI's appeal, though it suggests that the court below should have reached that conclusion on different grounds that it did not consider. U.S. Br. 5.

Against this backdrop, the United States argues that certiorari should nevertheless be granted to declare as an abstract matter of law, and contrary to CACI's position, that "derivative sovereign immunity" is categorically unsuitable for interlocutory appeal under the collateral order doctrine, and to resolve

supposed tensions among lower courts over the "nature of the 'derivative sovereign immunity' doctrine." U.S. Br. 18–19.

The issues raised by the United States provide no basis for review here, for two reasons.

1. Resolving the abstract questions that the United States urges this Court to consider would have no practical effect on this case. Whether or not denials of contractors' derivative sovereign immunity motions can ever be considered collateral orders, and regardless of whether the defense is accurately termed an "immunity," immediate appeal would nonetheless be unavailable here because, as the Fourth Circuit observed, CACI's claimed entitlement to derivate sovereign immunity is intertwined with the merits of Plaintiffs' claims that CACI engaged in unlawful conduct in violation of its government contracts. As such, there is no doubt the district court's denial of CACI's motion to dismiss on derivative sovereign immunity grounds fails a threshold requirement governing interlocutory appeals under the collateral order doctrine. *See Johnson* v. *Jones*, 515 U.S. 304, 310–11 (1995).

The United States nevertheless argues that "the order here did not come within the category of orders that defer resolution of a 'derivative sovereign immunity' defense until disputed facts have been determined at trial" because, in its view, the district court's dismissal decision turned on a pure question of law regarding the United States' own federal sovereign immunity from suit. U.S. Br. 15. This interpretation of the decisions below ignores the Fourth Circuit's independent analysis of the factual record and the alternative, fact-dependent bases for the district court's decision to

deny CACI derivative sovereign immunity. The Fourth Circuit concluded that it lacked jurisdiction to hear CACI's interlocutory appeal because of the existence of disputed material facts going to both CACI's "derivative sovereign immunity" defense and the merits of Plaintiffs' claims. Pet. App. 5a. The United States' interpretation also ignores the fact that the district court's opinion on CACI's derivative sovereign immunity motion came shortly after the district court had denied CACI's motion for summary judgment due to genuine disputes over material facts that underlie both the immunity defense and the merits, and that the district court considered these same fact-based issues in rejecting CACI's derivative sovereign immunity defense. *See* Resp. Br. 21 (quoting Pet. App. 5a); Pet. App. 340a–41a (citing *Campbell-Ewald*).[3]

For an order to fall within the collateral order doctrine it must be "completely separate from the merits." *Will v. Hallock*, 546 U.S. 345, 349 (2006). The United States acknowledges that CACI's assertion of derivative sovereign immunity cannot meet this requirement because determining whether CACI acted lawfully is essential to both CACI's entitlement to derivative sovereign immunity under *Campbell-Ewald* and the merits of Plaintiffs' claims. U.S. Br. 14. (observing that "if [Plaintiffs] were to prove the merits of their liability claims, then CACI would not be entitled to 'derivative sovereign immunity'—and if CACI were to show its

[3] Plaintiffs also disagree with the United States' contention that CACI did not waive its arguments due to invited error, U.S. Br. 21–22, for the reasons set forth in Respondents' Brief in Opposition. Resp. Br. 28–30.

defense was valid, then [Plaintiffs] would necessarily fail to prove the merits").

Accordingly, though the United States quibbles with the Fourth Circuit's holding that CACI's appeal turned on disputed facts rather than an abstract question of law, it is of no consequence. Even if this Court were to review the abstract legal issues raised by the United States, it would not change the Fourth Circuit's correct conclusions regarding the disputed fact issues at the heart of CACI's defense and the merits of Plaintiffs' claims. Ultimately, because there is no dispute that the availability of "derivative sovereign immunity" for CACI is intertwined with the merits, the district court's order denying CACI's derivative sovereign immunity motion cannot be an appealable collateral order.

2. The decision below does not present a circuit split that warrants this Court's review. The United States argues that the Court should grant review to address a number of pre-*Campbell-Ewald* lower court contractor derivative immunity rulings, U.S. Br. 16–20, but those rulings are not in conflict. As the United States concedes, the decision below at most reflects some "tension" with decisions from other circuits regarding other forms of contractor immunity. U.S. Br. 18.

The United States accepts that there is not "a perfectly square split" between the lower courts on the issue of whether an order denying derivative sovereign immunity is immediately appealable under the collateral order doctrine. U.S. Br. 18. Instead of a circuit split, the United States says that these cases display a "substantial tension in the lower courts' approach to

the appealability of orders denying attempts to invoke derivatively, in one form or another, the government's own immunity." *Id.*

In particular, both the United States and CACI point to two contractor cases in which interlocutory appeals were allowed to argue that there is division among the lower courts on this issue: *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007) and *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. 2008). However, as the United States acknowledges, U.S. Br. 18, these cases involved different types of derivative immunity claims than the one CACI has invoked here—derivative *Feres* immunity in *McMahon*, 502 F.3d at 1339, and derivative Stafford Act immunity in *In re World Trade Center Disaster Site Litigation*, 521 F.3d at 192–93. Because these cases involved different kinds of immunity and each entailed application of the *Cohen* factors to the particular facts of the cases, there is no circuit split. *See* Resp. Br. 25–27.

The United States nonetheless argues that the "tension" between these cases warrants review—"at least in conjunction with the related disagreement among the courts of appeals" concerning whether "derivative sovereign immunity" is a defense to liability or immunity from suit. U.S. Br. 18–19. While Plaintiffs agree with the United States that derivative sovereign immunity should always be viewed only as a defense to liability, that was not the basis for the Fourth Circuit's opinion in this case and is not at issue in this appeal. Instead, the panel concluded that, even if derivative sovereign immunity was among the narrow class of orders so significant that it could be immediately appealable, in this case "our review is barred

here because there remain continuing disputes of material fact with respect to CACI's derivative sovereign immunity defenses." Pet. App. 4a–5a. Moreover, the United States identifies no decisions manifesting "tension" over the "nature" of derivative sovereign immunity post-dating this Court's opinion in *Campbell-Ewald,* which, as the United States explains, offers considerable clarification of that issue. U.S. Br. 9–10. Unless a genuine conflict breaks out over the issue in the wake of *Campbell-Ewald*, there is no urgency in addressing it, and especially not in a case where the lower court had no occasion to address the issue.

If the Court wishes to address the abstract legal question on which the United States focuses—whether so-called derivative sovereign immunity is a defense or an immunity—it should wait for a case that actually presents that question or creates an actual circuit split on that issue.

II. THE UNITED STATES RECOGNIZES THIS APPEAL DOES NOT IMPLICATE THE UNITED STATES' ABILITY TO APPEAL SOVEREIGN IMMUNITY DENIALS

In its petition, CACI repeatedly attempts to tie, if not conflate, the district court's denial of its motion to dismiss on "derivative sovereign immunity" grounds with the separate question of whether denial of a motion to dismiss by the United States on sovereign immunity grounds can ever be treated as a collateral order. On pages 15–17 of its petition, CACI describes what it characterizes as a circuit split on the interlocutory appealability of federal sovereign immunity denials. CACI then argues that "[t]here should be a nationally uniform rule governing the appealability of

rulings denying claims of sovereign immunity and derivative sovereign immunity." *Id.* at 17. Its petition is based in part on this argument: that the Court "should grant review to ensure that the availability of an immediate appeal for government contractors—*and for the government itself*—does not turn on the plaintiff's strategic selection of the litigation forum." *Id.* (emphasis added); *see* Pet. Reply Br. 9 (referring to the United States' entitlement to immediate appeal of a sovereign immunity denial as an "antecedent question" to the availability of immediate appeal for CACI).

The United States rejects this ground for review, making clear in its response that "this case *would not be an appropriate vehicle* in which to address whether the federal government has a right to immediately appeal orders denying motions to dismiss on the ground of federal sovereign immunity." U.S. Br. 13–14 n.3 (emphasis added). Plaintiffs agree. *See* Resp. Br. 23 ("CACI's citations to cases that concern federal sovereign immunity are inapposite as they have no bearing on the derivative sovereign immunity defense at issue in this case.").

If anyone has an interest in resolving a case that genuinely presented an important, unresolved issue over appeals by the United States, it would be the United States itself. Given that the United States sees no basis for review of that issue in this case, it is apparent that any urgency or importance that CACI ascribes to the question of federal sovereign immunity from suit is not raised or implicated in this petition.

III. THERE IS NO REASON TO DEFER DECISION ON THIS PETITION

Finally, there is no reason to defer decision on this petition until after the Court decides *Nestlé* and *Cargill*. Those cases involve issues relating to the Alien Torts Statute, 28 U.S.C. § 1350, that are outside the scope of the narrow question regarding appellate jurisdiction presented by this petition, even if the outcomes of those cases might have some bearing on proceedings in this case.

In any event, the district court is the appropriate venue for determining whether and how this case should proceed in light of the pendency of *Nestlé* and *Cargill*. And if this Court decides *Nestlé* and *Cargill* before this case goes to trial, the district court would be well-positioned to apply those decisions to this case in the first instance, to the extent necessary. Particularly because this case is in an interlocutory posture, there is no need for this Court to address matters that the district court can and should handle in the first instance.

Furthermore, because deferring decision on the petition would only serve to further delay resolution of this litigation, it would impose a considerable burden on Plaintiffs. The torture and abuse suffered by Plaintiffs occurred more than 16 years ago, and this case has been pending for more than 12 years. CACI's (second) improvident appeal denied Plaintiffs the opportunity to have the legality of CACI's conduct at Abu Ghraib finally resolved. That time is long past due, and the Court should not exacerbate the prejudice to Plaintiffs wrought by this appeal by delaying its decision on CACI's petition for certiorari any longer.

Indeed, holding the petition when even the United States agrees there is no appellate jurisdiction unfairly rewards CACI by providing it the relief—further delay of proceedings in the district court—to which it was never entitled.

CONCLUSION

For the reasons above and set forth in Respondents' Brief in Opposition, CACI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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