No. A-

IN THE

Supreme Court of the United States

CACI PREMIER TECHNOLOGY, INC.,
Applicant,

V.

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

APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Directed To The Honorable John G. Roberts, Jr.,
Chief Justice Of The United States
And Circuit Justice For The Fourth Circuit

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PARTIES TO THE PROCEEDING

The parties listed in the caption were parties to the proceedings below. In the district court, the United States was a third-party defendant adverse to applicant CACI Premier Technology, Inc. The United States participated as an *amicus curiae* but not as a party in the proceedings before the United States Court of Appeals for the Fourth Circuit. Timothy Dugan, CACI International, Inc., and L-3 Services, Inc. were defendants in the district court but were not parties in the proceedings before the court of appeals. Taha Yaseen Arraq Rashid was a plaintiff in the district court but was not a party in the proceedings before the court of appeals. Respondent Asa'ad Hamza Hanfoosh Al-Zuba'e was a party in the proceedings below but, at an earlier point in the proceedings, was listed under the name Sa'ad Hamza Hantoosh Al-Zuba'e.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of this Court, Applicant makes the following disclosures:

CACI Premier Technology, Inc. is a privately held company. CACI Premier Technology, Inc.'s parent company is CACI, Inc. – FEDERAL, a privately held company. CACI Premier Technology, Inc.'s ultimate parent company is CACI International, Inc., a publicly traded company. No other publicly traded company owns 10% or more of CACI Premier Technology, Inc.'s stock.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

CACI Premier Technology, Inc. ("CACI") is a private company that assisted the United States with vital intelligence-gathering in a time of war. CACI now faces claims of conspiring with, and aiding and abetting, the United States in its alleged mistreatment of Respondents, who were detained by the United States military in Iraq. CACI is protected by derivative sovereign immunity for its alleged actions because they were undertaken in accordance with a valid contract with the United States. But the district court held as a matter of law that CACI was not entitled to immunity because the United States has supposedly waived sovereign immunity for claims alleging violations of international norms. And the Fourth Circuit held that it lacked jurisdiction to hear CACI's appeal of that ruling because the order denying derivative sovereign immunity was nonfinal.

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. § 2101(f), CACI respectfully requests that this Court stay the mandate of the Fourth Circuit pending the filing and disposition of a timely petition for a writ of certiorari. Good cause exists for a stay of the mandate because this case presents a question of far-reaching legal and practical significance that has divided the lower courts: whether orders denying derivative sovereign immunity can be immediately appealed under the collateral order doctrine. The Fourth Circuit's holding that orders denying derivative sovereign immunity are not immediately appealable deepens that existing circuit split and creates a substantial probability that this Court will grant review. In addition, there is at least a fair prospect that this Court will reverse the Fourth Circuit's decision. That ruling squarely conflicts with this Court's collateral order precedent, which establishes that orders denying absolute immunity, qualified immunity, and Eleventh Amendment immunity are all immediately appealable because those immunities are designed to insulate defendants not only from liability but also from the burdens of litigation itself. As the Second and Eleventh Circuits have recognized in authorizing immediate appeals from denials of derivative sovereign immunity, the same policies are implicated here.

Moreover, CACI is in need of immediate relief from this Court because, in the absence of a stay, it will be compelled to defend itself at trial—a burden from which derivative sovereign immunity is designed to shield contractors. Proceeding to trial in this case would be particularly inappropriate because it would place the judiciary in a supervisory role over highly sensitive issues of military strategy, operations, and

intelligence that are outside of the judicial purview. Because CACI's rights cannot be restored through post-judgment judicial review—and the unwarranted interference with military affairs cannot be remedied after trial—a stay of the Fourth Circuit's mandate is necessary to preserve the status quo pending the filing and disposition of a petition for a writ of certiorari.

OPINIONS BELOW

The Fourth Circuit's August 23, 2019 decision dismissing CACI's appeal for lack of jurisdiction is unpublished, but is available at 775 F. App'x 758. *See* Attachment A. The Fourth Circuit's October 1, 2019 order denying rehearing en banc is unpublished. *See* Attachment B. The Fourth Circuit's October 11, 2019 order denying the motion to stay the mandate is unpublished. *See* Attachment C. The district court's March 22, 2019 opinion denying CACI's motion to dismiss based on derivative sovereign immunity is published at 368 F. Supp. 3d 935. *See* Attachment D.

STATUTORY PROVISIONS INVOLVED

In relevant part, 28 U.S.C. § 1291 states: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT

1. In 2003, the United States took control of Abu Ghraib, a prison facility located in an active war zone near Baghdad, Iraq. Court of Appeals Joint Appendix ("CA.JA.") 1263–64. The United States used the facility to detain criminals, enemies

of the provisional government, and others thought to possess information regarding Iraqi insurgents. *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 209 (4th Cir. 2012) (en banc) ("*Al Shimari I*").[1] Because of a shortage of trained military interrogators, the United States hired civilian contractors to interrogate detainees. CACI was one of those civilian contractors. CA.JA.1264; *see also* CA.JA.1337–1407.

Plaintiffs—Respondents in this Court—are Iraqi nationals who allege they were detained by the United States military in the Abu Ghraib prison. CA.JA.186 (Third Am. Compl. ¶¶ 4–7 (filed Apr. 4, 2013)). They brought claims against CACI (but not the United States) under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and various common-law theories, seeking damages for injuries they allegedly sustained from abuse during their detention. Plaintiffs initially alleged that CACI employees directly mistreated and abused them and that U.S. military personnel did the same pursuant to a conspiracy with CACI employees. Plaintiffs thereafter dismissed with prejudice a number of their direct liability claims against CACI, CA.JA.271, and the district court dismissed the remaining direct liability claims, CA.JA.1189. Accordingly, Plaintiffs' only remaining claims allege that CACI violated the ATS when its employees purportedly conspired with, or aided and abetted, U.S. military personnel who mistreated Plaintiffs. As Plaintiffs confirmed, "this is a

[1] In the briefing below, CACI referred to the cases as "*Al Shimari I*" through "*Al Shimari V*," as follows: *Al Shimari I*, 658 F.3d 413 (4th Cir. 2011); *Al Shimari II*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Al Shimari III*, 758 F.3d 516 (4th Cir. 2014); *Al Shimari IV*, 840 F.3d 147 (4th Cir. 2016); and *Al Shimari V*, 775 F. App'x 758 (4th Cir. 2019). For ease of reference, this Application uses roman numerals only for the two most relevant Fourth Circuit opinions.

conspiracy and aiding and abetting case" now; they "are not contending that the CACI interrogators laid a hand on the plaintiffs." CA.JA.1060.

2. CACI's first motion to dismiss was premised on multiple grounds, including preemption and derivative absolute official immunity. In 2011, the Fourth Circuit held that federal law preempted Plaintiffs' claims. *Al Shimari* v. *CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011). On rehearing en banc, a divided Fourth Circuit rejected the panel's decision, holding that it lacked appellate jurisdiction. *Al Shimari I*, 679 F.3d at 223. As relevant here, the en banc court concluded that, although "fully developed rulings denying" other kinds of immunity "are immediately appealable, . . . denials based on sovereign immunity (or derivative claims thereof) may not be." *Id*. at 211 n.3; *see also id.* at 220–23. Judges Wilkinson, Niemeyer, and Shedd dissented.

Judge Wilkinson emphasized that the "jurisdictional ruling is wrong" and that "these are not routine appeals that can be quickly dismissed through some rote application of the collateral order doctrine." *Al Shimari I*, 679 F.3d at 225 (Wilkinson, J., dissenting). The "collateral order doctrine," Judge Wilkinson explained, enables an appellate court to "confront in a timely manner issues presenting grave, far-reaching consequences." *Id.* at 244. Underlying that doctrine is the "eminently reasonable conclusion that immunities from suit should be recognized sooner rather than later." *Id.* According to Judge Wilkinson, the majority's "dismissal of these appeals gives individual district courts the green light to subject military operations to the most serious drawbacks of tort litigation," contrary to "decades of Supreme Court admonitions warning federal courts off interference with international

relations." *Id.* at 226. This "extraordinary case presenting issues that touch on the most sensitive aspects of military operations and intelligence," Judge Wilkinson concluded, falls squarely within the collateral order doctrine. *Id.* at 245.

Judge Niemeyer expressed many of the same concerns in his dissent, reasoning that the Fourth Circuit "undoubtedly ha[d] appellate jurisdiction *now* to consider" the "immunity issues" "under the well-established principles" of this Court's collateral order precedent. *Al Shimari I*, 679 F.3d at 249 (Niemeyer, J., dissenting). "If there ever were important, collateral decisions that would qualify under *Cohen* as reviewable final decisions, the district courts' denials of immunity in these cases are such decisions." *Id.* at 250. In Judge Niemeyer's view, "only the Supreme Court can now fix our wayward course." *Id.* at 248.

3. On remand, the district court dismissed Plaintiffs' ATS claims because they involved extraterritorial application, but the Fourth Circuit reversed and directed the district court to address the political question doctrine. *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 533–34 (4th Cir. 2014). The district court then dismissed based on that doctrine, but the Fourth Circuit vacated the ruling and remanded for further discovery. *Al Shimari* v. *CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016).

When the case returned again to the district court, Plaintiffs abandoned a number of their claims of direct abuse by CACI as well as their common-law claims, and the district court dismissed the remaining claims of direct abuse, *see* CA.JA.271, 1189, leaving only Plaintiffs' conspiracy and aiding-and-abetting claims against CACI

under the ATS. CACI then filed a third-party complaint against the United States, seeking reimbursement from the government for any damages ultimately awarded against it. CA.JA.1120–33. The United States moved to dismiss CACI's claims based on sovereign immunity, invoking both the foreign-country exception and the combatant-activities exception to the Federal Tort Claims Act. U.S. Mem. in Support of Mot. to Dismiss 6, *Al Shimari*, No. 1:08-cv-00827 (E.D. Va. filed Mar. 14, 2018) (Dkt. 697). The United States later moved for summary judgment on separate grounds. U.S. Mem. in Support of Mot. for Summ. Judgment, *id.* (E.D. Va. filed Feb. 15, 2019) (Dkt. 1130). CACI, in turn, moved to dismiss Plaintiffs' claims on the basis of derivative sovereign immunity. *See* CACI Mem. in Support of Mot. to Dismiss, *id.* (E.D. Va. filed Feb. 28, 2019) (Dkt. 1150).

The district court permitted limited discovery by CACI. But CACI's efforts to build a record supporting its defenses were repeatedly frustrated. The United States, through Secretary of Defense James Mattis, invoked the state secrets privilege to withhold the identities of soldiers and civilians who interrogated Plaintiffs—including CACI's own personnel—and to withhold documents detailing approved interrogation plans and interrogation reports. CA.JA.1235–36, 1267, 1302–03, 1420, 1438–40. The district court upheld these assertions of the state secrets privilege by the United States. *See* CA.JA.1304–05. CACI was also restricted to pseudonymous depositions of the interrogators by telephone, where the permissible questions were strictly limited to avoid revealing the deponents' identities. CA.JA.2846–54, 4486–99.

4. The district court denied the government's motion to dismiss on the basis of sovereign immunity. In an unprecedented ruling, the district court concluded that "the United States does not retain sovereign immunity for violations of *jus cogens* norms of international law," *Al Shimari* v. *CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 968 (E.D. Va. 2019)—*i.e.*, rules of the "highest status" in international law, *id.* at 955. The court rejected the government's argument that any "waiver of immunity must be 'express,'" holding instead that "no such categorical rule exists." *Id.* at 951 n.6. The court reasoned that U.S. law has always incorporated international law and that as international law evolved to recognize *jus cogens* norms, American law evolved with it to include "a federal common law right derived from international law that entitles individuals not to be the victims of *jus cogens* violations." *Id.* at 959. And once the district court found a right, it further held that "there must be a remedy available to the victims." *Id.*

To provide the remedy, the court concluded that the United States had "*impliedly* waived any right to claim sovereign immunity with respect to *jus cogens* violations," 368 F. Supp. 3d at 959 (emphasis added), despite this Court's admonition that any "waiver of the Federal Government's sovereign immunity must be *unequivocally expressed* in statutory text," *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). The court derived that implication from the United States' decision to "join[ ] the community of nations and accept[ ] the law of nations," to ratify the Convention Against Torture, to "participat[e] in the Nuremberg trials and the parallel

development of preemptory norms of international law," and to "hold[ ] itself out as a member of the international community." 368 F. Supp. 3d at 959–66.

After denying the government's motion to dismiss based on sovereign immunity, the district court also denied CACI's motion to dismiss "based on a claim of 'derivative sovereign immunity.'" 368 F. Supp. 3d at 970. The court concluded that, "[b]ecause this Court has ruled that sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms, the first prong of the derivative sovereign immunity test is not met, and CACI's Motion to Dismiss based on a theory of derivative immunity will be denied." *Id.* The court went on to observe that, "[e]ven if" the United States had sovereign immunity, derivative sovereign immunity was "not guaranteed" because contractors do not share the government's immunity in *all* circumstances. *Id.* But it did not actually decide any questions regarding the scope of contractors' derivative sovereign immunity "because the United States does not enjoy sovereign immunity for these kinds of claims," *id.* at 971, which eliminated the need to reach those issues.

Finally, the district court granted the government's motion for summary judgment, concluding that a contract closeout agreement between the government and CACI released CACI's claims against the United States. 368 F. Supp. 3d at 973–74.

5. CACI appealed "the district court's order denying it derivative sovereign immunity," but the Fourth Circuit "dismiss[ed] because [it] lack[ed] jurisdiction." *Al Shimari* v. *CACI Premier Tech., Inc.*, 775 F. App'x 758, 759 (4th Cir. 2019) ("*Al*

Shimari II"). That conclusion, the court explained, "follow[ed] from the reasoning of [its] prior en banc decision" in *Al Shimari I*, where the court had held that "'fully developed rulings' denying 'sovereign immunity (or derivative claims thereof) may not' be immediately appealable." *Id.* at 759–60 (quoting *Al Shimari I*, 679 F.3d at 217 n.3). The court went on to reason, in the alternative, that "even if a denial of derivative sovereign immunity may be immediately appealable, our review is barred here because there remain continuing disputes of material fact with respect to CACI's derivative sovereign immunity defenses." *Id.* at 760.

Judge Quattlebaum "reluctantly" concurred in the judgment. In contrast with the majority's categorical reading of *Al Shimari I*'s jurisdictional holding as foreclosing *all* collateral order appeals of denials of derivative sovereign immunity, Judge Quattlebaum read the decision as permitting an immediate appeal from the denial of derivative sovereign immunity where "the appeal involves an 'abstract issue of law' or a 'purely legal question.'" *Al Shimari II*, 775 F. App'x at 760 (Quattlebaum, J., concurring in judgment) (quoting *Al Shimari I*, 679 F.3d at 221–22). Judge Quattlebaum emphasized that the Fourth Circuit's "narrow interpretation of the collateral order doctrine in this case has taken us down a dangerous road" by "allow[ing] discovery into sensitive military judgments and wartime activities" and by "open[ing] the door to an order that the United States has no sovereign immunity for claims that our military activities violated international norms—whatever those are." *Id.* at 760–61.

6. The Fourth Circuit denied CACI's petition for rehearing or rehearing en banc. Order, No. 19-1328 (4th Cir. Oct. 1, 2019). A divided panel also denied CACI's motion to stay the mandate. Order, No. 19-1328 (4th Cir. Oct. 11, 2019). Judge Quattlebaum voted to grant the motion. *Id.*

JURISDICTION

This Court, or any Justice thereof, has jurisdiction to issue a stay pending the filing and disposition of a petition for a writ of certiorari under 28 U.S.C. § 2101(f), and Rules 22 and 23 of this Court. *See also* 28 U.S.C. § 1651(a).

REASONS TO GRANT THE STAY

To grant a stay, a Justice must find "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., Circuit Justice) (internal quotation marks and alterations omitted). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2012) (per curiam).

A stay is warranted here because the Fourth Circuit's decision exacerbates an existing circuit split about the appealability of rulings denying claims of derivative sovereign immunity, contravenes this Court's collateral order precedent, and would cause irreparable harm by subjecting CACI to the substantial burdens of defending itself at trial and by permitting the judiciary to inject itself into highly sensitive military matters well outside of its constitutional purview.

I. There Is At Least A Reasonable Probability That This Court Will Grant Review Of The Fourth Circuit's Decision.

There is at least a reasonable probability that the Court will grant certiorari to resolve the important issue of appellate jurisdiction presented in this case: whether orders denying claims of derivative sovereign immunity are immediately appealable under the collateral order doctrine. Both that question—and the antecedent question whether orders denying the United States' claims of sovereign immunity are immediately appealable—have divided the circuits. This "extraordinary case presenting issues that touch on the most sensitive aspects of military operations and intelligence" is an ideal opportunity for the Court to bring clarity to this important area. *Al Shimari I*, 679 F.3d at 245 (Wilkinson, J., dissenting).

A. Under 28 U.S.C. § 1291, courts of appeals have jurisdiction over appeals "from all final decisions of the district courts." Certain collateral orders are also "immediately appealable" if they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In the decision below, the Fourth Circuit held that denials of derivative sovereign immunity are not immediately appealable collateral orders. In so doing, the court deepened an existing circuit split.

Both the Second and Eleventh Circuits have held that rulings denying derivative sovereign immunity are immediately appealable under the collateral order

doctrine. In *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), the Eleventh Circuit held that a government contractor's "claim to derivative *Feres* immunity qualifies as a collateral order." *Id.* at 1339. The contractor in that case invoked "a theory of derivative sovereign immunity" that allegedly "entitled [the contractor] to the government's *Feres* immunity," which provides that "the government is immune from claims brought by soldiers for their service-related injuries." *Id.* at 1337, 1339; *see also Feres* v. *United States*, 340 U.S. 135, 146 (1950). The Eleventh Circuit explained that the "government's *Feres* immunity from soldiers' service-related tort claims is justified, in part, by the need to avoid judicial interference with military discipline and sensitive military judgments" and that the contractor therefore had "stated a substantial claim to a true immunity from suit, such that an erroneous denial would be 'effectively unreviewable on appeal from a final judgment.'" *McMahon*, 502 F.3d at 1339–40 (quoting *Sell* v. *United States*, 539 U.S. 166, 176 (2003)).

Similarly, in *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. 2008), the Second Circuit exercised "collateral order jurisdiction to determine" whether sovereign immunity under the Stafford Act—which provides the United States with "immunity from suit" for certain claims related to disaster relief—"may extend derivatively to non-federal entities working in cooperation with federal agencies." *Id.* at 192–93; *see also* 42 U.S.C. § 5148. "To deny an interlocutory appeal in that circumstance," the court reasoned, "would be contrary to the policy concerns first set forth [in this Court's decision] in *Cohen*" because it "could well result 'in a

trial that would imperil a substantial public interest.'" *In re World Trade Ctr.*, 521 F.3d at 192 (quoting *Will* v. *Hallock*, 546 U.S. 345, 353 (2006)).

The Fourth and Fifth Circuits have reached the exact opposite conclusion about the appealability of rulings denying derivative sovereign immunity. In *Martin* v. *Halliburton*, 618 F.3d 476 (5th Cir. 2010), the Fifth Circuit held that it "lack[ed] jurisdiction to review the district court's denial of Defendants' claim of derivative sovereign immunity" in a case arising out of government contractors' provision of "logistical support to the United States Army in Iraq." *Id.* at 478, 485; *see also Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 281 (5th Cir. 2007) (holding that a ruling denying a private insurer's claim of derivative sovereign immunity was not an immediately appealable collateral order).

The Fourth Circuit exacerbated that existing conflict in the decision below when it dismissed CACI's appeal of the district court's ruling denying its claim of derivative sovereign immunity because, in its view, even "'fully developed rulings' denying 'sovereign immunity (or derivative claims thereof) may not' be immediately appealable." *Al Shimari II*, 775 F. App'x at 760 (quoting *Al Shimari I*, 679 F.3d at 217 n.3). If CACI's appeal had been brought in the Second Circuit or Eleventh Circuit, there would have been jurisdiction to review the district court's ruling. But the Fourth Circuit dismissed the appeal because it "ha[s] never held" that "a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal." *Id.*

This circuit split on a frequently recurring and immensely important question of federal appellate jurisdiction is more than sufficient to create a reasonable probability of this Court's review. *See Maryland*, 133 S. Ct. at 2 (granting stay where the decision below "conflict[ed] with" decisions of other courts); *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., Circuit Justice) (same); *Sumner* v. *Mata*, 446 U.S. 1302, 1306 (1980) (Rehnquist, J., Circuit Justice) (same).

B. Moreover, the likelihood of this Court's granting review is amplified by a split in the circuits on the antecedent question whether rulings denying the *United States'* invocation of sovereign immunity are immediately appealable.

The Seventh and Ninth Circuits have held that denials of the United States' sovereign-immunity claims are not immediately appealable. In *Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166 (7th Cir. 1994), the Seventh Circuit dismissed the United States' interlocutory appeal because, "[f]ar from asserting a right not to be a litigant, the United States [was] asserting a defense to the payment of money," which is insufficient to give rise to an immediately appealable collateral order. *Id.* at 1169. The Ninth Circuit explicitly endorsed that position in *Alaska* v. *United States*, 64 F.3d 1352 (9th Cir. 1995), where it dismissed the United States' interlocutory appeal because "federal sovereign immunity is not best characterized as a right not to stand trial altogether." *Id.* at 1355 (internal quotation marks omitted).

The Second Circuit, in contrast, has expressly rejected that reasoning, explaining that it was "not convinced that *Pullman* or its progeny counsel us to

disregard the statements of the Supreme Court that sovereign immunity encompasses a right not to be sued." *In re World Trade Ctr.*, 521 F.3d at 191 (citing *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994)). Similarly, the D.C. Circuit has held that "federal sovereign immunity is an immunity from suit" and that the denial of federal sovereign immunity in a criminal contempt proceeding was immediately appealable. *In re Sealed Case*, 192 F.3d 995, 999 (D.C. Cir. 1999).

The "apparent split in the circuits over whether denials of claims of federal sovereign immunity may ever qualify for interlocutory review," *Oscarson* v. *Office of Senate Sergeant at Arms*, 550 F.3d 1, 2–3 (D.C. Cir. 2008), compounds the reasons for granting certiorari in this case, which provides the Court with the opportunity to resolve *both* whether rulings denying derivative claims of sovereign immunity are immediately appealable collateral orders and the antecedent question whether rulings denying the government's own invocations of immunity are immediately appealable. There is at least a reasonable probability that the Court will grant review to resolve these important questions. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 519 (1985) (review granted to resolve a circuit split on whether orders denying qualified immunity are appealable collateral orders); *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141, 147 (1993) (review granted to resolve a circuit split on "whether a district court order denying" a State's claim to "immunity from suit in federal court may be appealed under the collateral order doctrine").

II. There Is At Least A Fair Prospect That This Court Will Reverse.

This Court has repeatedly concluded that orders denying various forms of immunity are immediately appealable under the collateral order doctrine. The Fourth Circuit's decision contravened the principles established in this Court's collateral order jurisprudence by relegating claims of derivative sovereign immunity by federal contractors (and sovereign immunity by the United States) to an unwarranted second-class status in which erroneous denials of immunity can only be remedied *after* a final judgment on the merits. At the very least, "given the considered analysis of courts on the other side of the split"—the Second and Eleventh Circuits' decisions that orders denying derivative sovereign immunity are immediately appealable—"there is a fair prospect that this Court will reverse the decision below." *Maryland*, 133 S. Ct. at 3.

The Court has held that rulings denying claims of a number of forms of immunity are immediately appealable under the collateral order doctrine. In *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), for example, the Court held that denials of government officials' claims of absolute immunity "are appealable under the *Cohen* criteria." *Id*. at 742. The decision did not break new ground, but instead built upon previous decisions holding that denials of claims of immunity under the Speech and Debate Clause and the Double Jeopardy Clause are immediately appealable. *Id.* (citing *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977)).

The Court has continued to build on that line of precedent in subsequent cases considering the appealability of orders denying immunity. In *Mitchell* v. *Forsyth*, the Court held that a "district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law," is immediately appealable because, absent immediate appeal, the "essential attribute" of qualified immunity—an "entitlement not to stand trial under certain circumstances"—would be lost. 472 U.S. at 525, 530. The "consequences" of an absence of appellate review, the Court emphasized, were "not limited to liability for money damages," but extended to the costs of trial, distraction from duties, inhibition of action, and deterrence from public service—none of which could be remedied by a post-judgment appeal. *Id.* at 526.

The Court subsequently applied the principles of *Nixon* and *Mitchell* in *Puerto Rico Aqueduct*, where it held that "the same rationale ought to apply to claims of Eleventh Amendment immunity." 506 U.S. at 144. The Court explained that the Constitution's "withdrawal of jurisdiction effectively confers [on States] an immunity from suit" in federal court and that, "[o]nce it is established that a State and its 'arms' are, in effect, immune from suit, . . . it follows that the elements of the *Cohen* collateral order doctrine are satisfied." *Id.*

There is at least a fair prospect that this Court will apply these well-established principles to conclude that denials of derivative sovereign immunity are immediately appealable under the collateral order doctrine. Indeed, as explained below, each of the collateral order elements are met in this case. *See Mitchell*, 472 U.S. at 527 (interlocutory orders are immediately appealable if they are "effectively

unreviewable on appeal from a final judgment," "conclusively determine the disputed question," and involve a claim "separable from . . . rights asserted in the action").

A. Effectively Unreviewable

A denial of derivative sovereign immunity is effectively unreviewable on appeal from a final judgment because derivative sovereign immunity, like other forms of immunity, is an immunity from suit.

This Court has made clear that "sovereign immunity shields the Federal Government and its agencies from suit." *Meyer*, 510 U.S. at 475; *see also United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic" under the principle of sovereign immunity "that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Thus, like state sovereign immunity (as well as absolute and qualified immunity), federal sovereign immunity is "jurisdictional," *Meyer*, 510 U.S. at 475, not a "mere defense to liability," *Mitchell*, 472 U.S. at 526. It is immunity from all of the extensive burdens that accompany litigation. And, as with those other forms of immunity, the only way to vindicate the United States' immunity from suit in the face of an erroneous order denying immunity is to afford the government an immediate right to appeal. *See In re World Trade Ctr.*, 521 F.3d at 191. A post-judgment appellate decision reversing the denial of sovereign immunity comes too late.

Federal contractors possess this same immunity when they perform services pursuant to a contract with the United States. This Court has repeatedly recognized the importance of "[a]ffording immunity not only to public employees but also to

others acting on behalf of the government." *Filarsky* v. *Delia*, 566 U.S. 377, 390 (2012); *see also Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940) (if the government "validly conferred" authority on a private contractor, "there is no liability on the part of the contractor for executing [the government's] will"). Accordingly, sovereign immunity protects both the United States and private contractors acting on its behalf from the burdens of litigation—a right that would be lost if adverse immunity rulings could not be reviewed until after trial.

The importance of immediate review is elevated here because Plaintiffs' claims directly challenge conduct by the United States military during an ongoing military campaign. "If there ever were important, collateral decisions that would qualify under *Cohen* as reviewable final decisions, the district courts' denials of immunity in these cases are such decisions." *Al Shimari I*, 679 F.3d at 250 (Niemeyer, J., dissenting).

Plaintiffs allege that CACI aided and abetted military personnel in committing violations of international norms. Pressing and defending against those claims will require inquiries into sensitive aspects of military operations and intelligence-gathering. Military personnel and CACI employees will likely be required to discuss the interrogation procedures that existed at Abu Ghraib, who devised them, and how they were implemented. And military documents will need to be introduced to show what written interrogation policies existed and whether they were followed. "Even putting aside the risk of erroneous judicial conclusions (which would becloud military

decisionmaking), the *mere process of arriving at* correct conclusions would disrupt the military regime." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (emphasis added).

Yet, under the Fourth Circuit's decision, all of this would occur without any appellate court ever weighing in on whether the United States "impliedly" waived its sovereign immunity for violations of *jus cogens* norms, as the district court ruled. *Al Shimari*, 368 F. Supp. 3d at 965. *But see Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be *unequivocally expressed* in statutory text, and *will not be implied*.") (citations omitted; emphases added). And all of this would likewise occur without an appellate court weighing in on whether CACI is entitled to share in any immunity possessed by the United States. "These were precisely the sort of concerns that animated th[is] Court's extension of the collateral order doctrine to appeals pertaining to qualified immunity." *Al Shimari*, 679 F.3d at 246 (Wilkinson, J., dissenting). The immunity is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526–27.

The Fourth Circuit's decision means that denials of derivative sovereign immunity are never appealable before final judgment. Thus, while an officer denied qualified immunity for a wrongful arrest would be entitled to an immediate appeal of that decision, a government contractor denied derivative sovereign immunity for actions taken in a war zone under the direction of the United States military must wait for the end of trial to appeal. That discrepancy has no basis in common sense or in this Court's precedent.

B. Conclusively Determined

The decision below "conclusively determine[d] the disputed question" whether CACI is entitled to derivative sovereign immunity. *Mitchell*, 472 U.S. at 527.

"The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets th[is] requirement[]." *Mitchell*, 472 U.S. at 527. The denial of CACI's motion to dismiss on the ground of derivative sovereign immunity does so just as easily. The district court decided as a matter of law that the United States waived its sovereign immunity for *jus cogens* violations and that CACI therefore could not be derivatively immune from suit. 368 F. Supp. 3d at 970. That ruling "finally and conclusively determine[d] the defendant's claim of right not to stand trial on the plaintiff[s'] allegations." *Mitchell*, 472 U.S. at 527 (emphasis omitted); *see also P.R. Aqueduct*, 506 U.S. at 145 ("Denials of . . . claims to Eleventh Amendment immunity purport to be conclusive determinations that [States] have no right not to be sued in federal court.").

This conclusion is not altered by the Fourth Circuit's suggestion that there may be factual disputes bearing on the immunity question. In assessing the existence of an immediately appealable collateral order, appellate courts must review the particular "determination" made by the district court. *Johnson* v. *Jones*, 515 U.S. 304, 318 (1995). Here, the district court denied CACI's motion to dismiss on immunity grounds *as a matter of law* "[b]ecause th[e] Court ha[d] ruled that sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms," 368 F. Supp. 3d at 970, not based on factual disputes as to whether

CACI met the standard for invoking the United States' immunity. Thus, this Court can grant review and reverse the Fourth Circuit's jurisdictional ruling without the need to undertake any assessment into the existence of factual issues because the district court's denial of immunity rests on a legal ruling—that the United States had waived its sovereign immunity. The Fourth Circuit's decision dismissing the appeal for lack of jurisdiction therefore squarely presents the question whether rulings denying claims of derivative sovereign immunity are ever appealable (even when they rest on purely legal grounds).[2]

In any event, this Court has already held that factual disputes are not a barrier to reviewing denials of state sovereign immunity as collateral orders. *See P.R. Aqueduct*, 506 U.S. at 147 (rejecting the plaintiff's position that "a distinction should be drawn between cases in which the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not"). There is no reason for erecting that already-rejected barrier to review in the context of federal sovereign immunity and contractors' derivative claims to that immunity.

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[2] Moreover, the Fourth Circuit's reference to supposed factual disputes was plainly alternative reasoning. The Fourth Circuit's actual holding rested on the categorical proposition that rulings denying claims of derivative sovereign immunity are never subject to immediate appeal as collateral orders. *See Al Shimari II*, 775 F. App'x at 760 n.* ("*Even if we assumed* that our jurisdiction would permit us to determine whether CACI would be entitled to derivative sovereign immunity if the plaintiffs succeed in proving their factual allegations, we would not, and do not, have jurisdiction over a claim that the plaintiffs have not presented enough evidence to prove their version of events.") (emphasis added).

C. Separate From The Merits

CACI's "claim of immunity is conceptually distinct from the merits of the plaintiff[s'] claim that [their] rights have been violated." *Mitchell*, 472 U.S. at 528. In deciding whether the district court correctly denied CACI's claim of derivative sovereign immunity, the Fourth Circuit "need not consider the correctness of" Plaintiffs' "version of the facts, nor even determine whether" the allegations state a plausible claim for relief. *Id.* at 528. Instead, all the Fourth Circuit would have to address is whether the United States waived its sovereign immunity for *jus cogens* violations. If it did not, then the district court's denial of CACI's claim of derivative sovereign immunity must be vacated because that ruling rested exclusively on the United States' supposed waiver of sovereign immunity. *See* 368 F. Supp. 3d at 970. And, to the extent that the Fourth Circuit rejects the district court's legal reasoning and goes on to address whether CACI meets the requirements for invoking the United States' immunity, that inquiry would still be separate from the merits of the case. *See Mitchell*, 472 U.S. at 528–29 (a "question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the [plaintiffs'] factual allegations in resolving the immunity issue").

III. There Is An Overwhelming Likelihood Of Irreparable Harm Absent A Stay.

If the Court does not stay the Fourth Circuit's mandate, the resumption of the district court proceedings will cause irreparable harm to CACI and gravely undermine the national-security interests of the United States.

In the absence of a stay, CACI will be compelled to incur the immense burdens of litigating this case through trial—the very type of harm that contractors' derivative sovereign immunity is intended to prevent. In preparing for and defending itself at trial, the serious "consequences" that this Court has sought to guard against when recognizing other forms of immunity—the "costs" of trial, "distraction" from duties, and "deterrence of able people from public service"—will be inflicted on CACI. *Mitchell*, 472 U.S. at 526. There is no way to vindicate these interests through a post-judgment appeal reversing the district court's immunity ruling because CACI is entitled to immunity *from suit*, not simply immunity from liability.

Moreover, to determine CACI's liability at trial, the district court and jury will be required to exercise supervisory powers over the military's intelligence-gathering procedures, interrogation techniques, and covert strategies for identifying terrorists. But the "power of oversight and control of military force" is granted to "elected representatives and officials," not the "Judicial Branch." *Gilligan* v. *Morgan*, 413 U.S. 1, 11 (1973); *see also Kiyemba* v. *Obama*, 561 F.3d 509, 520 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (emphasizing that the "detention" of "combatants" is an issue dedicated to the "political branches" and that the "Judiciary is not suited to second-guess" those decisions) (internal quotation marks omitted). Judicial interference with military operations here infringes on two branches of government: First, Congress's right to decide, through express statutory commands, when the federal government (and federal government contractors) will be subject to suit for military actions in a war zone, and second, the Executive's right to control wartime

operations. The "danger[s]" posed by this judicial interference with military affairs "is precisely that which the collateral order doctrine is meant to forestall, namely the expenditure of years of litigation involving a succession of national security concerns in cases that plainly should be dismissed at the very outset." *Al Shimari I*, 679 F.3d at 247 (Wilkinson, J., dissenting).

The national-security setting in which this case arises will also significantly impair CACI's ability to defend itself at trial—increasing the likelihood of a substantial damages award and attendant pressure on CACI to settle before it can pursue a post-judgment appeal of the district court's immunity ruling. For example, the United States has not permitted any of the Plaintiffs to enter the country, which means that CACI may not be able to cross-examine its accusers in front of the jury. And the identities of both CACI's own and the United States' interrogation personnel at Abu Ghraib are classified state secrets, which means that the interrogators' identities were withheld from the parties in discovery and will be unavailable to the jury at trial. CA.JA.1235–36, 1267, 1302–03. The state secrets pervading this litigation will severely hamper the development of CACI's defense and its examination of the individuals who actually participated in Plaintiffs' interrogations.

A stay is warranted to prevent this far-reaching irreparable harm to CACI, the Nation's security interests, and the integrity and fundamental fairness of our judicial system.

IV. The Balance Of Equities Decisively Favors A Stay.

The balance of equities also overwhelmingly favors a stay. Denying a stay will "visit an irreversible harm on" CACI, whereas "granting [a stay] will . . . do no permanent injury to" Plaintiffs. *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., Circuit Justice).

Absent a stay, the district court will move forward with a trial that will impose immense burdens on CACI and permit the judiciary to exercise control over the military operations of the United States—without an appellate court ever considering CACI's claim to derivative sovereign immunity. Both the Fourth Circuit and this Court would be powerless to remedy those harms in a post-judgment appeal because it would be impossible to restore CACI's immunity from suit or the confidentiality of the military's intelligence-gathering practices and counterterrorism strategies.

In contrast, Plaintiffs would suffer no material harm from a stay. At most, their claims would be modestly delayed while this Court considers CACI's forthcoming petition for a writ of certiorari. "Compared to the irreparable harm" of proceeding without a stay, "the harm in a brief delay" while this Court considers the case "seems slight"; the equities therefore "support preserving the status quo" as this appeal proceeds. *San Diegans for Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., Circuit Justice).

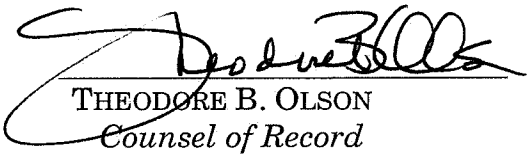
CONCLUSION

The Fourth Circuit's "narrow interpretation of the collateral order doctrine in this case . . . allow[s] discovery into sensitive military judgments," "open[s] the door"

to imposing liability on the United States for violations of international norms, and denies a contractor that assisted the United States in a time of war a meaningful opportunity to vindicate its right to derivative sovereign immunity. *Al Shimari II*, 775 F. App'x at 760–61 (Quattlebaum, J., concurring in judgment). Because there is a strong likelihood that the Court will grant certiorari and reject the Fourth Circuit's dangerous ruling, the Court should stay the mandate pending the filing and disposition of a petition for a writ of certiorari.

Dated: October 17, 2019

Respectfully submitted,



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