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

BRIEF IN OPPOSITION

PETER A. NELSON
MATTHEW FUNK
JARED S. BUSZIN
TERRA HITTSON
JEFFREY C. SKINNER
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

JEENA SHAH
CUNY SCHOOL OF LAW
2 Court Square
Long Island City, New York 11101

BAHER AZMY
Counsel of Record
KATHERINE GALLAGHER
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464
bazmy@ccrjustice.org

SHEREEF HADI AKEEL
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, Michigan 48084-4736

Counsel for Respondents

QUESTION PRESENTED

Under this Court's well-settled precedent, interlocutory orders denying a party's claimed immunity are not immediately appealable under the collateral order doctrine if entitlement to the immunity turns on disputed facts or sufficiency of the evidence. *Johnson* v. *Jones*, 515 U.S. 304, 310–11 (1995). In this case, the Fourth Circuit summarily dismissed Petitioner's interlocutory appeal of the district court's denial of its claim of derivative sovereign immunity because "there remain continuing disputes of material fact with respect to [Petitioner's] derivative sovereign immunity defense" that are "substantially related, if not identical, to" the merits of Plaintiffs' claims, and therefore "this appeal does not turn on an abstract question of law." Pet. App. 4a–5a.

The question presented is whether the denial of a claim of derivative sovereign immunity is immediately appealable under the collateral order doctrine where resolution of the claimed immunity turns on genuinely disputed facts that are intertwined with the merits.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

This case concerns one of the most dishonorable episodes in recent American history—the torture and abuse of detainees at Abu Ghraib prison in Iraq. As multiple U.S. military investigators concluded, employees of Petitioner CACI Premier Technology, Inc. ("CACI") who worked as interrogators at Abu Ghraib directed low-level military police, including several who were later convicted at court martial, to "soften up" and abuse detainees in ways that shocked the world. Plaintiffs are three Iraqi citizens who were detained at Abu Ghraib and suffered torture and abuse at the hands of military police acting under the direction of CACI employees. Plaintiffs sued CACI under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for engaging in a conspiracy to commit, and aiding and abetting acts of, torture, cruel, inhuman, and degrading treatment, and war crimes.

In early 2019, after almost eleven years of litigation, the district court denied CACI's motion for summary judgment, allowing the case to proceed toward a scheduled trial in late April 2019. CACI responded by filing a suggestion of lack of jurisdiction based on a claim of derivative sovereign immunity—its seventeenth dispositive motion in this case—which the district court denied shortly before trial was scheduled to commence. Without seeking leave from the district court, CACI filed an interlocutory appeal—its second such appeal on similar grounds in this case—causing the trial to be canceled at the eleventh hour.

The Fourth Circuit summarily dismissed CACI's appeal for lack of jurisdiction because CACI's enti-

tlement 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 Fourth Circuit did not, as CACI misleadingly suggests, conclude that the appeal presented an abstract question of law or hold that derivative sovereign immunity denials may never be immediately appealed.

The Fourth Circuit correctly held that the district court's order falls squarely outside of the collateral order doctrine and, therefore, that the court of appeals lacked appellate jurisdiction. That holding is consistent with the well-settled precedent of this Court and the decisions of other courts of appeals.

CACI's petition for a writ of certiorari should be denied for the following reasons:

First, the district court's order does not fall within the collateral order doctrine because CACI's asserted immunity turns on resolution of disputed facts that are inextricably intertwined with the merits. *See Johnson* v. *Jones*, 515 U.S. 304, 310–11 (1995). Under this Court's precedent, CACI is not entitled to derivative sovereign immunity if it "violate[d] both federal law and the Government's explicit instructions." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016). As the Fourth Circuit observed, whether CACI violated federal law and the government contract's express prohibitions on detainee abuse is precisely the question to be resolved on the merits at trial. *See* Pet. App. 5a (observing that "material issues of fact that are in dispute" concerning the merits of Plaintiffs' ATS claims are "substantially related, if not identical, to the elements of CACI's derivative

sovereign immunity defense"). Accordingly, it does not meet the first or second factors of the collateral order doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—that resolution of the immunity be "conclusively determined" and "completely separate from the merits." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006). Moreover, as the United States itself expressed in this case and as the circuit courts uniformly recognize, the predicate federal sovereign immunity of the kind at issue here operates as a defense to claims, and not the rare kind of immunity from suit that confers under the collateral order doctrine an absolute right "not to stand trial." *Id.* at 350–51.

Second, this case does not implicate a conflict among the circuits. All of the circuit court cases CACI cites faithfully apply the *Cohen* factors and subsequent Supreme Court precedent. Consistent with the Fourth Circuit's ruling, no other circuit courts have held that denial of a motion seeking immunity was immediately appealable where the decision was based on the existence of disputed issues of fact. Even setting aside the fact-bound nature of CACI's claim to immunity, there is no bona fide circuit split regarding the immediate appealability of an order denying the kind of derivative sovereign immunity at issue here.

Third, this case is a poor vehicle for testing the question that CACI asks this Court to review because, before this Court could decide whether derivative sovereign immunity falls within the narrow collateral order doctrine in this case, it would first have to decide a predicate question that was not decided by the lower court and is not presented here by a

proper party: whether the abstract question of federal sovereign immunity is immediately appealable under *Cohen*. Importantly, although CACI now argues that the United States enjoys sovereign immunity for *jus cogens* violations, CACI took the *opposite* position in the district court. If there was error in the district court's "unprecedented" sovereign immunity ruling, Pet. Br. 8, CACI is the one who invited the error and is thus foreclosed from contesting that ruling. At a minimum, having never argued for the United States' sovereign immunity in the district court, CACI has waived the predicate question that it now asks this Court to review.

Fourth, CACI's imagined parade of horribles, Pet. Br. 25–30, repackages various arguments it has made throughout the litigation under the guise of appellate jurisdiction. Those merits issues are irrelevant to the question of appealability under the collateral order doctrine, which is determined for entire classes of orders and not based on the circumstances of a particular case. *See Johnson*, 515 U.S. at 315. In any event, the denial of CACI's immunity defense does not impede or imperil military operations, as CACI claims. The United States has not intervened or otherwise objected to Plaintiffs' claims against CACI, and the record contains no evidence that the military authorized the abuses that Plaintiffs suffered.

For these reasons, CACI's petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs are three Iraqi civilians who were among the thousands detained by U.S. Coalition Forces in 2003 as the United States and its allies sought to combat the insurgency that arose in the wake of the Iraq War. JA.1806–08.[1] Plaintiffs were imprisoned in Tier 1A of the "Hard Site" at the Abu Ghraib prison starting in November 2003. JA.353, 380, 394, 599, 635, 773, 820–21. All three Plaintiffs were ultimately released from Abu Ghraib without charges.

At Tier 1A, now infamous acts of torture were committed and captured in photographs—incidents that the political branches have said were unlawful and demand remediation. *See Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) ("*Al Shimari II*") (citing H.R. Res. 627, 108th Cong. (2004) (stating that those acts "contradict[ed] the policies, orders, and laws of the United States and the United States military"); S. Res. 356, 108th Cong. (2004) ("urg[ing] that all individuals responsible for such despicable acts be held accountable")).[2] Military investigators subsequently concluded that Plaintiffs and other detainees in the Hard Site were subjected

---

[1] "JA" refers to the joint appendix in the Fourth Circuit.

[2] *E.g.*, White House, Press Release, President Bush Meets with Al Arabiya Television (May 5, 2004); Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004, *available at* https://www.govinfo.gov/content/pkg/CHRG-108shrg96600/html/CHRG-108shrg96600.htm.

to "sadistic, blatant and wanton criminal abuses" meant to "soften [them] up" for interrogation. JA.1753, 2619–22, 2656–57.

1. CACI Employees Conspired with Soldiers to Abuse Plaintiffs and Others at Abu Ghraib, and Aided and Abetted that Abuse.

In the wake of the Abu Ghraib torture scandal, the Army appointed Major General Antonio Taguba, Major General George Fay, and Lieutenant General Anthony Jones to investigate allegations that military police ("MPs") and interrogators—civilian and military—had participated in detainee abuse at Abu Ghraib. JA.1727–28, 1793. These "comprehensive and exhaustive" investigations uncovered numerous instances of detainee abuse at the Hard Site during the time that Plaintiffs were detained there, JA.1728, 1771–73, 1831, with detainee abuse "defined as treatment of detainees that violated U.S. criminal law or international law or treatment that was inhumane or coercive without lawful justification," JA.1794–95.

The Generals' investigations found that this abuse had flourished because of ineffective military leadership that resulted in a command vacuum at Abu Ghraib, "with little oversight by commanders." JA.1728, 1775. General Taguba found that, "at lower levels," interrogators coordinated with MPs to "soften up" and give "special" treatment to detainees in connection with interrogations. *E.g.*, JA.1506, 1749, 1775, 1785, 2619–22, 2656–57, 3280, 4278–80. CACI interrogators and soldiers understood that "softening up" and "special" treatment equated to serious physi-

cal abuse and mental harm. *E.g.*, JA.1506, 1749, 1775, 1785, 2619–22, 2656–57, 3280, 4278–80.

General Taguba specifically called out CACI employee Steven Stefanowicz, finding that he "[a]llowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by 'setting conditions' which were neither authorized [nor] in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse." JA.1785. Generals Fay and Jones likewise concluded that, among the 27 interrogators who "requested, encouraged, condoned or solicited … [MPs] to abuse detainees," at least three were CACI employees—Stefanowicz, Daniel Johnson, and Timothy Dugan. JA.1795, 1955–59.

CACI interrogators directed MPs Charles Graner and Ivan Frederick to "set the conditions" at the Hard Site and mistreat detainees. JA.2441–42, 2452–55, 2466–67, 2563–77, 2582–84. Graner and Frederick provided testimony in this case implicating CACI interrogators in abuses of precisely the kind Plaintiffs endured in Tier 1A. JA.2460–61, 2470, 2650–51, 2656–57.

2. The U.S. Military Instructed CACI Personnel to Comply with Prohibitions Against Torture and Cruel, Inhuman, and Degrading Treatment, and Never Authorized the Abuses.

CACI contracted with the United States to supply personnel to "function[] as resident experts" for interrogation matters and "to assist, supervise, coordinate, and monitor all aspects of interrogation activities." JA.1342. CACI's contract made it "responsible

for providing supervision for all contractor personnel." JA.1342–43. CACI employees were not in the military chain of command or subject to military discipline. JA.4106–08, 4149–51, 4165–66, 4171, 4172, 4355–56.[3] CACI hired interrogators such as Stefanowicz, Dugan, and Johnson to provide interrogation services even though they had little or no interrogation experience. JA.4041–44.

As the district court found, CACI's contract with the United States required CACI personnel to act "[in accordance with] Department of Defense, U.S. Civil Code, and International Regulations." JA.1342. This duty included complying with laws and regulations prohibiting torture and "[t]he use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind." JA.1618.

The operative rules of engagement directed all interrogation personnel to treat detainees humanely and to abide by the Geneva Conventions, JA.2282, and imposed strict limits on certain interrogation techniques such as stress positions and use of dogs, JA.2283–85. The record contains no evidence that the military instructed CACI employees to carry out illegal acts or knew about the orders that CACI personnel gave to MPs to abuse detainees. Had the military

---

[3] Unlike contractors, soldiers are subject to discipline and punishment under the Uniform Code of Military Justice ("UCMJ"), art. 90, 10 U.S.C. § 890. Eleven soldiers—including several of CACI's co-conspirators who were involved in detainee abuse at Abu Ghraib—were convicted of crimes under the UCMJ. Eric Schmitt & Kate Zernicke, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times, Mar. 22, 2006.

given such illegal instructions, CACI employees were free—and by contract, required—to disregard them. JA.1985, 4146.

3. Plaintiffs Were Tortured and Subjected to Cruel, Inhuman, and Degrading Treatment While Detained at Abu Ghraib.

While imprisoned in the Hard Site, Plaintiffs endured repeated beatings and other forms of physical abuse. JA.423, 444–47, 537, 562, 625, 629–35, 681–83, 708–10, 714, 802–03, 807, 817. They were threatened with and bitten by military working dogs. JA.545–46, 636, 822–23, 825, 836–37. They were sexually assaulted. JA.610–12, 621, 864–67, 884–85. And they experienced an array of other serious physical and psychological harm and mistreatment. JA.405, 408–09, 415, 444–46, 544, 561–62, 629–32, 653–58, 629–32, 669–71, 677–78, 800, 813–15, 826–29, 836, 845–49, 876, 881.

Plaintiffs were also subjected to a variety of abuses intended to humiliate and degrade them based on exploitation of cultural and religious norms associated with their Muslim faith. They were, for example, kept naked, often in the presence of women, for multiple days at a time. JA.413–14, 612, 628, 640, 668, 704, 829, 877. They were forced to wear female underwear. JA.413. They were forcibly shaved. JA.826–29. They were forced to masturbate in front of others while having their picture taken. JA.610–12, 621.

Most of the abuses Plaintiffs suffered took place on the night shift, outside of formal interrogations, usually at the hands of MPs who were directed and encouraged by interrogators, including CACI interro-

gators. *E.g.*, JA.433–34, 445, 649–54, 836; *see also* JA.1794–95, 1814.

As the district court found, the cumulative effect of these abuses exacerbated the severe mental and physical pain the Plaintiffs endured, Dkt. 679, at 30,[4] and the Plaintiffs' undisputed expert testimony shows that they all continue to suffer serious physical and psychological harm from the torture and cruel treatment, Pet. App. 276a–77a.

B. Proceedings Below

Plaintiffs filed their first complaint against CACI on June 30, 2008, alleging that CACI conspired with and aided and abetted low-level U.S. military personnel to commit, inter alia, torture, cruel, inhuman, and degrading treatment, and war crimes against Plaintiffs at the Abu Ghraib Hard Site in 2003 and early 2004.[5]

In 2009, the district court denied CACI's first motion to dismiss on several grounds, including rejecting CACI's argument that it was entitled to derivative absolute official immunity. *See Al Shimari* v. *CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 714 (E.D. Va. 2009). CACI took an immediate interlocutory appeal, asserting that the Fourth Circuit had ap-

---

[4] Unless otherwise specified, "Dkt." citations refer to docket entries in the district court proceeding, *Al Shimari* v. *CACI Premier Technology, Inc.*, No. 1:08-cv-827 (LMB/JFA) (E.D. Va.).

[5] Over eleven years of litigation, Plaintiffs have filed several amended complaints to add factual detail, but their conspiracy and aiding-and-abetting claims and allegations have remained throughout.

pellate jurisdiction under the collateral order doctrine. In a 12–3 *en banc* ruling, the Fourth Circuit dismissed CACI's appeal for lack of jurisdiction because, among other reasons, resolution of CACI's asserted derivative absolute official immunity defense would turn on a factual determination of whether CACI was acting "within the scope of its agreement" with the government and thus did not constitute a "final resolution of the issue" suitable for immediate appeal. *Al Shimari* v. *CACI Premier Tech., Inc.*, 679 F.3d 205, 220 (4th Cir. 2012) (*en banc*) ("*Al Shimari I*").

The Fourth Circuit explained that, while "orders denying dismissal motions, insofar as those motions are based on immunities that are not absolute but conditioned on context, such as qualified immunity in a § 1983 action or the derivative immunities at issue here, are … sometimes immediately appealable," *id.* at 221, "we lack jurisdiction if such an appeal … 'challenges the district court's genuineness ruling—that genuine issues exist concerning material facts.'" *Id.* (quoting *Bazan ex rel. Bazan* v. *Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001)). The Fourth Circuit concluded that CACI's claim to immunity "encompass[ed] fact-based issues of law, with the need for additional development of the record being among those 'matters more within a district court's ken.'" *Id.* (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 674 (2009)).

After the *en banc* decision, CACI filed a motion to stay the mandate, in which it represented that it would file a petition for a writ of certiorari. No. 09-1335, Dkt. 179, at 1. The Fourth Circuit denied CACI's stay motion, *id.*, Dkt. 185, and CACI did not file a certiorari petition.

Following remand in 2012, the parties engaged in six months of fact and expert discovery, including third-party discovery from the United States under the limited *Touhy* discovery regime. The case was dismissed and reinstated by the Fourth Circuit twice over the next several years. *See Al Shimari II*, 758 F.3d at 516; *Al Shimari* v. *CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari III*"). The parties engaged in more discovery after each remand.

On January 17, 2018, almost a decade into this litigation and following the district court's denial of yet another motion to dismiss regarding the sufficiency of Plaintiffs' allegations of conspiracy and aiding and abetting, Dkt. 679, CACI brought the United States into this case by filing a third-party complaint against it for claims of contribution, indemnification, exoneration, and breach of contract. JA.1120–33.

The United States moved to dismiss on sovereign immunity grounds. *See* Pet. App. 279a. CACI opposed the United States' motion, arguing "that the government has waived sovereign immunity for violations of *jus cogens* norms" of the kind asserted in this case. Pet. App. 283a; *see also* Dkt. 731, at 15 (arguing that "the United States explicitly *waived* its status-based immunity" (emphasis in original)). The district court agreed with CACI's invitation to so hold. And, CACI never made the argument it made on appeal and in this petition, *i.e.*, that the United States government *is* entitled to sovereign immunity.

While the government's motion to dismiss was pending, CACI proceeded with months of first-party discovery against the United States, obtaining detailed interrogatory responses regarding Plaintiffs'

documented intelligence interrogations, JA.1241, Plaintiffs' detainee files, and documents related to the military's investigation into detainee abuse at Abu Ghraib, JA.1567, and conducting 13 depositions of interrogators, interpreters, and other military personnel, including General Antonio Taguba, JA.1235, 3833.

On February 27, 2019, the district court denied CACI's motion for summary judgment as to the three Plaintiffs,[6] finding that sufficient evidence existed regarding Plaintiffs' claims of conspiracy and aiding-and-abetting torture, cruel, inhuman, and degrading treatment, and war crimes to go to trial, including evidence that CACI employees directed and participated in Plaintiffs' abuse. JA.2238–40.

The next day, CACI filed a "Suggestion of Lack of Subject Matter Jurisdiction Based on Derivative Immunity"—its seventeenth dispositive motion in the case. CACI argued that it was entitled to derivative sovereign immunity because it had "performed services for the United States under a validly-awarded contract" and "performed the contract in accordance with its terms and express direction of the United States military," Dkt. 1153, 1149, even though those factual assertions were disputed by Plaintiffs. Plaintiffs argued that the district court, when it denied CACI's motion for summary judgment, had already found that there are genuine issues of material fact regarding CACI's compliance with its contract and

---

[6] The district court granted summary judgment as to a fourth Plaintiff, Taha Rashid, because it concluded that some of the abuses he suffered occurred before CACI arrived at Abu Ghraib. Pet. App. 275a n.1.

federal law, each of which prohibited detainee abuse and, as such, were inextricably intertwined with the merits. JA.2238–40.

The district court denied CACI's derivative sovereign immunity "suggestion" on two grounds. First, having agreed with CACI's argument, it held that because "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." Pet. App. 340a. Second,

> [e]ven if the Court had concluded that sovereign immunity protected the United States from suit, it is not at all clear that CACI would be extended the same immunity.... [T]he Supreme Court has held that derivative immunity is not guaranteed to government contractors and is not awarded to government contractors who violate the law or the contract. *Campbell-Ewald*, 136 S. Ct. at 672–74. The task orders under which CACI provided interrogators to the United States Army required that CACI employees conduct themselves "[in accordance with] Department of Defense, U.S. Code, and International Regulations." To the extent that plaintiffs have alleged that CACI conspired with and aided and abetted military personnel in committing acts of torture, [cruel, inhuman, and degrading treatment], and war crimes, CACI would not have acted in accordance with the U.S. Code and international regulations. When a contractor breaches the terms of its contract with the government or violates the law, sovereign immunity will not protect it.

Pet. App. 340a–41a.

Following the district court's decision—three weeks from the start of trial and more than a decade since its first interlocutory appeal of the district court's denial of its derivative immunity motion—CACI filed another interlocutory appeal.

In its opening appellate brief, CACI did not meaningfully address the law of the case—the Fourth Circuit's collateral order ruling in *Al Shimari I*—or offer any explanation as to how this appeal satisfied the stringent requirements of the collateral order doctrine. Nor did CACI acknowledge that its motion for summary judgment, which the district court had just denied on a robust evidentiary record, raised many of the same fact issues relevant to its derivative sovereign immunity defense.

The United States filed an amicus brief in CACI's appeal, in which it referred to sovereign immunity as a "jurisdictional *defense to claims*," not a wholesale immunity from suit. Br. for the United States as Amicus Curiae, No. 19-1938, Dkt. 25, at 2 (Apr. 30, 2019) ("U.S. 2019 Amicus Brief") (emphasis added).[7] At oral argument before the Fourth Circuit, the gov-

[7] In *Al Shimari I*, the United States also argued that the appellate court lacked jurisdiction over CACI's asserted derivative immunity, noting that "courts have held that there ordinarily is no right to an interlocutory appeal from the denial of a defense based on federal sovereign immunity or derivative claims of such immunity." Br. of the United States as Amicus Curiae, *Al Shimari I*, No. 09-1335, Dkt. 146, at 9 (4th Cir. Jan. 14, 2012) ("U.S. 2012 Amicus Brief"). In *Al Shimari I*, the Fourth Circuit recognized that near-consensus. 679 F.3d at 211 n.3 (citing cases).

ernment conceded "that the practice of the United States is pretty clear, that we have not sought to appeal similar orders on an interlocutory basis." Oral Argument at 44:50–45:00, *Al Shimari* v. *CACI Premier Tech., Inc.*, (4th Cir. July 10, 2019) (No. 19-1938), https://www.ca4.uscourts.gov/OAarchive/mp3/19-1328-20190710.mp3 ("Oral Argument").

In a brief, unpublished decision, the Fourth Circuit observed that "we have never held, and the United States government does not argue, that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal." Pet. App. 4a. The Fourth Circuit explained that it did not need to determine whether an order denying a contractor's claim to derivative sovereign immunity can ever be immediately appealable because the specific circumstances of this case preclude an immediate appeal:

> [O]ur review is barred here *because there remain continuing disputes of material fact with respect to CACI's derivative sovereign immunity defenses*. *See* [*Al Shimari I*] at 221 (distinguishing between the interlocutory appealability of immunity denials premised on "fact-based" versus "abstract" issues of law and noting that only the latter supply a proper foundation for immediate appeal). Below, the district court concluded that even if the United States were entitled to sovereign immunity, "it is not at all clear that CACI would be extended the same immunity" due to continuing factual disputes regarding whether CACI violated the law or its contract. The district court also denied CACI's motion for summary judgment on

> plaintiffs' ATS claims based on evidence showing "material issues of fact that are in dispute," and *these factual disputes are substantially related, if not identical,* to the elements of CACI's derivative sovereign immunity defense. *Given these continuing factual disputes, this appeal does not turn on an abstract question of law and is not properly before us.*

Pet. App. 4a–5a (citations omitted; emphases added).

In a concurring opinion, Judge Quattlebaum rejected CACI's "insist[ence]" that this appeal "involves an abstract issue of law" and its argument that "plaintiffs present no evidence [that] representatives of CACI engaged in any of the alleged improper conduct as to these plaintiffs." Pet. App. 6a. Based on his review of the record, he agreed with the majority that "the requirements for us to exercise appellate jurisdiction for an interlocutory appeal are lacking." *Id.*

CACI subsequently filed a petition for rehearing *en banc*. No judge voted for rehearing, and the petition was denied.

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit's decision is consistent with this Court's narrow collateral order precedent.

The collateral order doctrine confers appellate jurisdiction over a "small class" of rulings that do not end the litigation, but are appropriately deemed "final." *Cohen*, 337 U.S. at 546. The doctrine must be interpreted with "utmost strictness," *Midland As-*

phalt Corp. v. *United States*, 489 U.S. 794, 799 (1989), and should "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equip. Corp.* v. *Desktop Direct*, 511 U.S. 863, 868 (1994) (citations and quotation marks omitted). To be immediately appealable as a collateral order, an interlocutory order must satisfy all three *Cohen* factors: the order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349.

The order at issue in this case does not satisfy any of the *Cohen* factors. The court of appeals correctly held that CACI's appeal is "barred … because there remain continuing disputes of material fact" regarding "whether CACI violated the law or its contract," *see* Pet. App. 4a–5a—a factual dispute that is neither "conclusively determine[d]" nor "completely separate from the merits," *Will*, 546 U.S. at 349. In addition, CACI is unable to satisfy the third *Cohen* factor because the derivative sovereign immunity at issue is properly viewed—as the United States explained in its amicus brief in the Fourth Circuit—as a "defense to claims" and does not implicate the kinds of irreparable harms giving rise to a "right not to be tried" under this Court's narrow precedent. The denial of CACI's derivative sovereign immunity motion is therefore not "effectively unreviewable" under *Cohen*—an alternate reason why the Fourth Circuit's decision was correct (and why this Court's review is unwarranted).

A. Not Conclusively Determined

This Court has "contrasted two kinds of nonfinal orders: 'those that are inherently tentative,' and those … 'made with the expectation that they will be the final word on the subject addressed.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983)). Only the latter can satisfy the first *Cohen* factor.

The order on appeal here was not the "final word on the subject." After concluding that CACI cannot avail itself of a sovereign immunity the United States does not possess, the court observed that, in any event, "it is not at all clear that CACI would be extended the same immunity" under *Campbell-Ewald* given Plaintiffs' plausible allegations that CACI participated in torture, cruel, inhuman, and degrading treatment, and war crimes that would violate the law and CACI's contract with the government. Pet. App. 340a. This alternative basis for denial of CACI's motion means that the issue of CACI's entitlement to derivative sovereign immunity is not conclusively determined and thus does not satisfy the first *Cohen* factor.

In *Johnson*, this Court unanimously held that an order denying a qualified immunity defense that raises "'genuine' issues of fact for trial" is not immediately appealable. 515 U.S. at 319–20. While *Johnson* concerned a claim of qualified immunity, the logic of *Johnson* applies equally to CACI's derivative sovereign immunity defense in this case. Even for qualified immunity—where the general rule is that a denial can be immediately appealed on the abstract

legal question whether the right at issue was "clearly established" at the time of the violation, which is "completely separate from the merits"—*Johnson* held that a defendant may not take an interlocutory appeal where the district court's decision denying qualified immunity was based on material issues of fact, such as the sufficiency of evidence regarding a defendant's conduct. *Id.* In this case, regardless of whether an immediate appeal would otherwise be available, there is no right to an interlocutory appeal because the denial of CACI's derivative sovereign immunity claim was based on material factual disputes.

CACI's citation to dicta from *Puerto Rico Aqueduct* concerning whether the existence of "factual complexities whose resolution requires trial" precludes an order from being immediately appealable, Pet. Br. 23, does not save CACI's petition. There—unlike CACI's purported entitlement to derivative sovereign immunity in this case—the petitioner's status under the Eleventh Amendment did not "implicate[] any extraordinary factual difficulty." *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Moreover, in *Johnson*, this Court explicitly limited *Puerto Rico Aqueduct* to cases "with respect to the particular kind of order at hand." 515 U.S. at 317.

B. Not Completely Separate From The Merits

If the appealed order presents a question of evidence sufficiency, "*i.e.*, which facts a party may, or may not be able to prove at trial," then "it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-

related legal issues that likely underlie the plaintiff's claim on the merits." *Johnson*, 515 U.S. at 313–14. Such an order is not immediately appealable. *Id.* at 314; *see also Al Shimari I*, 679 F.3d at 223 (no appellate jurisdiction over immunity ruling turning on "facts that may have been tentatively designated as outcome-determinative [which] are yet subject to genuine dispute").

As the Fourth Circuit held, CACI's entitlement to derivative sovereign immunity is not completely separate from the merits. Noting that "[t]he district court also denied CACI's motion for summary judgment on plaintiffs' ATS claims based on evidence showing 'material issues of fact that are in dispute,'" the majority observed that those factual disputes "are *substantially related, if not identical*, to the elements of CACI's derivative sovereign immunity defense." Pet. App. 5a (emphasis added) (quoting JA.2238–50).

In addition, resolving the factual disputes in this case would require the appellate court to review a 4,500-page record and would "consume inordinate amounts of appellate time." *Johnson*, 515 U.S. at 316. The "close connection between" CACI's derivative sovereign immunity defense and the "factual matter that will likely surface at trial means that the appellate court … may well be faced with approximately the same factual issue again, after trial, with just enough change … to require it, once again, to canvass the record." *Id.* at 317. It would make little sense to have the appellate court expend all that time deciding CACI's derivative sovereign immunity defense when it would have to decide the same issue a few months later, after trial, "on a record that will permit a better decision." *Id.*

C. Not Effectively Unreviewable

The "critical question" in determining whether an order is effectively unreviewable is "whether the essence of the claimed right is a right not to stand trial." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988). The appealed order must "involve[] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt*, 489 U.S. at 799. Such a right must be one that "rests upon an explicit statutory or constitutional guarantee that trial will not occur." *Id.* at 801.

CACI cannot identify an express statutory or constitutional provision in play, nor a value of a high order that would be "irretrievably lost" were it to wait a few months for a final judgment.[8] There is no public benefit from CACI avoiding trial—as a private company that profited handsomely from its provision of interrogation services to the United States, CACI has already obtained the benefit of its contractual bargain. And while "there is value … in triumphing before trial, rather than after it," *Van Cauwenberghe*, 486 U.S. at 524, that preference is not enough to dislodge the congressionally-mandated final judgment rule. The Supreme Court has denied collateral order review for interests far weightier and more irretrievable than CACI's. *See Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 109 (2009) (citing cases).

---

[8] In seeking a judicially declared right to immediate appeal, CACI disregards separation of powers principles and invites the Court to grant it appellate rights that Congress has intentionally limited.

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. *See* Pet. Br. 20–21. As this Court explained in *Campbell-Ewald*, there is "no authority for the notion that private persons performing Government work acquire the Government's embracive immunity." 136 S. Ct. at 672 (2016). And, as the Seventh Circuit first explained in *Pullman Construction Industries* v. *United States*, federal sovereign immunity is not an immunity from trial in the *Cohen* sense because, unlike claims of Eleventh Amendment immunity and foreign sovereign immunity which are constitutionally grounded in "a governmental body's right to avoid litigation in another sovereign's courts," the United States "is no stranger to litigation in its own courts," and the "United States Code is riddled with statutes authorizing relief against the United States and its agencies." 23 F.3d 1166, 1168 (7th Cir. 1994). All subsequent circuit court decisions are in accord. *See Houston Cmty. Hosp.* v. *Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 279 (5th Cir. 2007); *CSX Transp. Inc.* v. *Kissimmee Util. Auth.*, 153 F.3d 1283, 1286 (11th Cir. 1998); *Alaska* v. *United States*, 64 F.3d 1352, 1356 (9th Cir. 1995).

Twice in this litigation the United States has also recognized that courts "ordinarily" hold that federal sovereign or derivative sovereign immunity are not immediately appealable. U.S. 2012 Amicus Brief at 9; *see also* U.S. 2019 Amicus Brief at 2 (characterizing federal sovereign immunity as a "defense to claims"); Oral Argument at 44:50–45:00 (explaining "that the practice of the United States is pretty clear, that we

have not sought to appeal similar orders on an interlocutory basis").

II. There is no circuit split warranting review.

In this case, the Fourth Circuit held that CACI's interlocutory appeal was impermissible in light of the "continuing factual disputes regarding whether CACI violated the law or its contract"—an issue relevant to the merits of Plaintiffs' ATS claims and "substantially related, if not identical, to the elements of CACI's derivative sovereign immunity defense." Pet. App. 5a. Therefore, the question stated in CACI's petition—whether *any* order denying a derivative sovereign immunity (or the government's predicate sovereign immunity) defense is immediately appealable—is not presented here. Rather, the Fourth Circuit's holding addresses only the narrower question whether an order denying a derivative sovereign immunity defense based on the existence of continuing factual disputes that are not "completely separate from the merits of the action" is immediately appealable.

On this issue, there is no circuit split. Even assuming that orders denying sovereign immunity were immediately appealable under the collateral order doctrine (an issue not decided below), and even assuming that federal contractors seeking to piggyback on that immunity could immediately appeal orders denying derivative sovereign immunity based on an abstract question of law (an issue not decided below), the Fourth Circuit's order that the district court's decision is not immediately appealable in this case would not implicate any conflict among the circuits. To the contrary, even in the context of qualified immunity, this Court has already held that "a defend-

ant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319–20. Here, the Fourth Circuit, relying on *Al Shimari I*, applied the same reasoning that guided this Court in *Johnson* to conclude that, where the denial of an alleged derivative immunity turns on "continuing factual disputes," there is no appellate jurisdiction over such an order.

Likewise, no court of appeals has held that an order denying an immunity defense because of the existence of factual disputes is immediately appealable. *See Martin* v. *Halliburton*, 618 F.3d 476, 481–87 (5th Cir. 2010) (applying *Cohen* and holding denial of defendants' claim to derivative immunity not immediately appealable); *Houston Cmty. Hosp.*, 481 F.3d at 268 (holding order denying federal sovereign immunity to United States not immediately appealable under collateral order doctrine); *Alaska*, 64 F.3d at 1355 (same); *Pullman*, 23 F.3d at 1169 (same); *McCue* v. *City of New York (In re World Trade Ctr. Disaster Site, Litig.)*, 521 F.3d 169, 193 (2d Cir. 2008) (denial of derivative Stafford Act immunity "satisf[ied] [all three] prongs of the *Cohen* collateral order rule"); *McMahon* v. *Presidential Airway, Inc.*, 502 F.3d 1331, 1340 (11th Cir. 2007) (denial of derivative *Feres* immunity was immediately appealable, in part, because the decision "does not significantly overlap with the merits"); *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 999 (D.C. Cir. 1999) (per curiam) (denial of a federal agency's immunity from criminal contempt charges immediately appealable, in part, because

"[t]hat determination resolves an important issue separate from the merits of the contempt charge").

Although some cases cited by CACI reach different outcomes based on their particular facts and circumstances, all apply the same legal test and none conflict with the decision below. This Court's own cases illustrate the point. *Compare Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985), *with Johnson*, 515 U.S. at 319–20. Both *Mitchell* and *Johnson* applied the *Cohen* factors. In *Mitchell*, the Court held that an order denying qualified immunity was immediately appealable because it involved a purely legal question: whether the law at issue was "clearly established," which is completely separate from the merits of the underlying dispute. 472 U.S. at 528. In *Johnson*, the Court held that the order denying qualified immunity was not immediately appealable because it turned on disputes about the sufficiency of the evidence regarding the defendants' conduct. 515 U.S. at 320. Taking the same approach as this Court and other courts of appeals, the Fourth Circuit found that the order denying CACI's asserted immunity was not immediately appealable because it turned on disputed factual issues that are almost completely intertwined with the merits.

In addition, and contrary to CACI's contention, the courts of appeals are not divided regarding the immediate appealability of the kind of derivative sovereign immunity at issue in this case. In *Martin* and *Houston Community Hospital*, the Fifth Circuit held that the immunities raised by defendants—official immunity, derivative federal sovereign immunity, and Defense Production Act immunity—did not meet the third *Cohen* factor because the relevant

immunity defense was not an immunity from suit or the appellant did not have a "substantial claim" to official immunity, as required by *Mitchell*. *See Martin*, 618 F.3d at 483–85; *Houston Cmty. Hosp.*, 481 F.3d at 268. In *McMahon* and *McCue*, on the other hand, the Eleventh and Second Circuits, respectively, held that the particular forms of immunity at issue were immunities to suit and therefore could satisfy the third *Cohen* factor. *See McMahon*, 502 F.3d at 1339 (holding denial of derivative *Feres* immunity defense immediately appealable); *McCue*, 521 F.3d at 192–93 (same, with respect to derivative Stafford Act immunity).

Put simply, CACI has identified no circuit in which an order denying immunity because of the existence of disputed factual issues is immediately appealable. And it has cited no circuit court decision holding that denial of the kind of immunity at issue in this case is immediately appealable.

Finally, with respect to the predicate question whether federal sovereign immunity is an immunity from suit or a defense to liability, CACI claims that a conflict exists between *Pullman* and *In re Sealed Case*. Pet. Br. 16–17. As the Fifth Circuit has stated, however, although *In re Sealed Case* "reached the opposite conclusion" from *Pullman* on whether a denial of sovereign immunity is immediately appealable, it did so "under circumstances too distinguishable to create a circuit split" with *Pullman*. *Houston Cmty. Hosp.*, 481 F.3d at 279. More importantly, that issue is not presented here. The Fourth Circuit did not consider or decide whether derivative sovereign immunity (or the predicate sovereign immunity, for that

matter) is an immunity from suit or immunity from liability.

III. This case presents a poor vehicle for resolving the appellate jurisdiction question.

Several factors make this case a particularly poor vehicle to review the questions concerning the immediate appealability of orders denying derivative sovereign immunity claims.

First, even if the Court granted certiorari and reversed the Fourth Circuit's decision, the courts below would still have to decide if CACI's claim to immunity satisfied the elements of *Campbell-Ewald*. Specifically, CACI would have to show that there are no genuine disputes of material fact concerning whether CACI violated its contract and the law. As the district court held when it denied CACI's summary judgment motion on facts that the Fourth Circuit recognized are "substantially related, if not identical, to the elements of CACI's derivative sovereign immunity defense," Pet. App. 5a, CACI will not be able to make that showing. Granting certiorari in this case would therefore be an exercise in futility and a waste of judicial resources, as this Court recognized in *Johnson*, 515 U.S. at 316–17.

Second, to reach the question of the appealability of CACI's claim to derivative sovereign immunity, the Court would first have to resolve the *predicate* question whether an order denying the United States federal sovereign immunity is immediately appealable. But CACI has waived that issue. CACI never advocated in favor of the United States' sovereign immunity in the district court. Indeed, after impleading the

United States as a third-party defendant, CACI opposed the United States' motion to dismiss by arguing precisely the *opposite*: "that the government has waived sovereign immunity for violations of *jus cogens* norms." Pet. App. 283a. The district court agreed with CACI and denied the United States' motion.[9] Thus, CACI is precluded from raising the issue since it "invited" the error it now asks this Court to review. *See United States* v. *Jackson*, 124 F.3d 607, 617 (4th Cir. 1997) ("a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request").

The reason for CACI's gamesmanship provides an additional basis to deny certiorari. CACI filed its third-party action against the United States and opposed the government's invocation of sovereign immunity so as to maximize its discovery rights against the government, which would have otherwise been constrained under the limited *Touhy* non-party discovery procedures. *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 69 (4th Cir. 1989). Despite CACI's protestations now about the burdens of litigation and resulting harms from subjecting it to legal process, CACI had no concerns about such harms when the shoe was on

---

[9] In later seeking to dismiss Plaintiffs' claims on derivative sovereign immunity grounds, CACI made a perfunctory observation about the state of the law regarding federal sovereign immunity. Dkt. 1150, at 9 (citations omitted) ("CACI PT is unaware of any judicial decision holding that the United States lacks sovereign immunity with respect to" *jus cogens* violations). This statement does not defeat waiver. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (observing the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

the other foot: it pursued extensive first-party discovery from the United States for more than a year. Only after CACI lost its summary judgment motion, which it brought after having benefited from discovery against the United States, did it move to dismiss on grounds of derivative sovereign immunity—an asserted immunity that it could have invoked far earlier in the litigation. Because CACI failed to invoke any asserted right to avoid trial for years (and until the very eve of trial) and at the same time subjected the bona fide sovereign to first-party discovery, its inconsistent litigation tactics should not be rewarded by this Court. *See New Hampshire* v. *Maine*, 532 U.S. 742, 749–50 (2001) (judicial estoppel "prevents parties from 'playing fast and loose with the courts'" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment").

Third, in addition to CACI's invited "error" and waiver, this case is not an appropriate vehicle for deciding the predicate question—whether orders denying the United States federal sovereign immunity are immediately appealable—for an additional reason: the government itself has not sought to appeal that ruling. In this case, the district court denied the United States' motion to dismiss on the basis of sovereign immunity. The United States not only did not seek to appeal the district court's denial of federal sovereign immunity; it also declined after CACI's appeal to argue that such orders are appealable under the collateral order doctrine. *See* Pet. App. 4a ("we have never held, and the *United States government does not argue*, that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal" (emphasis added)).

There is thus no court of appeals decision—or analysis—on the predicate question for this Court to consider and review.

Finally, all of the purported harms CACI asserts will occur if it is denied an immediate right to appeal would have been equally present eight years ago when CACI first unsuccessfully appealed a denial of derivative immunity. At the time, CACI represented to the Fourth Circuit in a motion to stay that it would seek certiorari in order to preserve those interests. No. 09-1335, Dkt. 179, at 1. That CACI did not file a petition for certiorari then and eight years of litigation has ensued undermines CACI's request for review.

IV. The Fourth Circuit's decision does not impair military operations or present separation-of-powers concerns.

CACI's laundry list of concerns, Pet. Br. 2–3, 25–30, regarding the implications of the Fourth Circuit's decision is unsupported by the extensive record below and cannot justify a one-off rule of *Cohen* appealability for derivative sovereign immunity claims that happen to implicate military contracts. The Court "decide[s] appealability for categories of orders" and does not "in each individual case engage in ad hoc balancing to decide issues of appealability." *Johnson*, 515 U.S. at 315.

First, neither the denial of CACI's petition nor continued litigation of an eleven-year-old case concerning events that happened sixteen years ago will harm the U.S. military by diverting "finite" contractor resources or by deterring contractors from work-

ing with the military in the future. The law has been clear for decades that private contractors such as CACI (i) do not share the sovereign's absolute immunity, and (ii) may face litigation and potential liability in connection with any unlawful or otherwise unauthorized conduct they engage in while providing services pursuant to a government contract. *Campbell-Ewald*, 136 S. Ct. at 673–74; *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *see also* 73 Fed. Reg. 10,943, 10,947 (Feb. 28, 2008) (advising military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation"). In this case, the United States has failed to validate CACI's claims of potential military harm and declined to argue below that either the United States or private contractors should have a right to immediate appellate review of the denial of derivative sovereign immunity (or sovereign immunity). *See* U.S. 2019 Amicus Brief at 1.

In any event, the risks and burdens of litigation are undoubtedly considered by large profit-seeking corporations such as CACI when they seek lucrative work from the United States. In the unlikely event that CACI is unable to fulfill its contractual duties to the United States because of the ordinary burdens of litigation, the only consequence will be that it "will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job." *Richardson* v. *McKnight*, 521 U.S. 399, 409 (1997) (denying qualified immunity for private prison corporation in part because "competitive pressures" mean the corporation could be re-

placed by better competitors). Indeed, given the "grim, continuing story of just how bad oversight and accountability are in the world of private military contracting," David Isenberg, *Private Contractors Still Lack Adequate Oversight*, Cato Institute, June 29, 2009, https://bit.ly/2HeWGxR, CACI should not be afforded special consideration that would reward its misconduct in this case.[10]

Second, neither the court nor the jury is tasked with evaluating sensitive military judgments in this case. Rather, Plaintiffs' claims turn on CACI's participation in a conspiracy to torture and subject detainees to cruel, inhuman, and degrading treatment, and its aiding and abetting those abuses—conduct that is unambiguously prohibited under U.S. law and which was universally condemned by the Executive Branch and Congress. Contrary to CACI's repeated assertion that its employees were acting "under military direction" while at Abu Ghraib, CACI has not been able to marshal evidence in support of that conclusory assertion; no evidence in the record suggests that the U.S. military authorized the litany of abuses Plaintiffs endured, such as repeated beatings, sexual assaults, and dog bites. As the military's own investigations found, there was "little oversight by commanders" at Abu Ghraib during the time of Plaintiffs' detention and the sorts of abuses they and other detainees en-

---

[10] CACI's reliance on this Court's narrow ruling in *Filarsky* v. *Delia*, 566 U.S. 377, 391 (2012), *see* Pet. Br. 3, 21, does not advance its argument, given that this Court in *Campbell-Ewald* concluded that the possibility of *qualified* immunity, which can be overcome by a showing that a defendant violated clearly established law, does not support the form of absolute immunity CACI seeks here. 136 S.Ct. at 673.

dured in Tier 1A "violated U.S. criminal law," "international law," or were otherwise "inhumane or coercive without lawful justification." JA.1775, 1795.

CACI made the same separation-of-powers arguments it makes in its petition in connection with separate motions and appeals it filed regarding its assertion that the case presents nonjusticiable political questions, which the Fourth Circuit and the district court have both rejected. *See Al Shimari III*, 840 F.3d at 160–62; *Al Shimari* v. *CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 687–93 (E.D. Va. 2018). Those issues should not be subject to re-litigation in this interlocutory appeal concerning the wholly-unrelated question of appellate jurisdiction.

Third, denial of CACI's petition will not result in a trial that threatens military operations through the disclosure of purportedly sensitive documents and testimony concerning military operations and events that took place sixteen years ago. The United States has already made available for deposition the personnel who allegedly participated in Plaintiffs' interrogations, and it has also produced extensive documentation regarding Plaintiffs' interrogations and detention as well as materials relied upon by the military officials who investigated the abuses that occurred at Abu Ghraib. The disclosure at trial of information that has already been revealed through discovery does not imperil military operations, nor has the United States argued that it would.

Any concern that adjudication of Plaintiffs' claims may result in the disclosure of sensitive information regarding military operations has already been adequately addressed through the United States' narrow

invocation of the state secrets privilege.[11] Significantly, the United States did not seek dismissal of Plaintiffs' or CACI's claims when it invoked the privilege as it has in other cases when it believed litigation might imperil state secrets. *See El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007).

Accordingly, this appeal does not actually implicate any of the policy considerations CACI identifies in its petition.

CONCLUSION

For the reasons above, CACI's petition for a writ of certiorari should be denied.

[11] After evaluating an extensive record, the district court also considered and rejected CACI's complaint that the government's invocation of the privilege unfairly impairs its defense. JA.2229–30. The district court correctly found that the government's assertion of the privilege did not unfairly prejudice CACI, and impacted Plaintiffs just as much. *Id.*

Respectfully submitted,

BAHER AZMY
Counsel of Record
KATHERINE GALLAGHER
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464
bazmy@ccrjustice.org

PETER A. NELSON
MATTHEW FUNK
JARED S. BUSZIN
TERRA HITTSON
JEFFREY C. SKINNER
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Ave. of the Americas
New York, NY 10036
(212) 336-2000

JEENA SHAH
CUNY SCHOOL OF LAW
2 Court Square
Long Island City, NY 11101

SHEREEF HADI AKEEL
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Counsel for Respondents

December 19, 2019