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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Plaintiffs do not seriously dispute the existence of a circuit split. Nor could they. Two circuits have permitted interlocutory appeals of orders denying contractors' claims of derivative sovereign immunity; two other circuits—including the Fourth Circuit in the decision below—have disagreed. The United States even acknowledged the existence of the split earlier in this case. *See* U.S. Amicus Br. 9 & n.2, *Al Shimari* v. *CACI Int'l, Inc.*, No. 09-1335 (4th Cir. Jan. 14, 2012) ("The Second Circuit has disagreed" with courts that "have held that there ordinarily is no right to an interlocutory appeal" of denials of "derivative claims of [sovereign] immunity").

Unable to reconcile these conflicting opinions, Plaintiffs seek to evade the split by rewriting both the district court's rationale for rejecting CACI's immunity claim and the Fourth Circuit's rationale for rejecting appellate jurisdiction. According to Plaintiffs, those rulings rest on the existence of "disputed factual questions that are intertwined with the merits." Opp. 2. But the district court definitively rejected CACI's immunity claim *solely* because "sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms." Pet. App. 340a. That ruling conclusively determined that CACI is not entitled to derivative sovereign immunity and is categorically barred from asserting immunity at trial. The Fourth Circuit refused to exercise appellate jurisdiction over that purely legal ruling because it "ha[s] never held . . . that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable." *Id.* at 4a. The Fourth Circuit's alternative reasoning—that "*even if* a denial of derivative sovereign

immunity may be immediately appealable," jurisdiction would still be lacking due to "disputes of material fact"—does not alter the Fourth Circuit's holding. *Id.* at 4a–5a (emphasis added). In any event, the existence of supposed factual disputes is impossible to square with the district court's actual reasoning, which controls the jurisdictional question, *see Johnson* v. *Jones*, 515 U.S. 304, 318 (1995), and would be no barrier to immediate appellate review, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 528–29 (1985).

Plaintiffs' other purported vehicle problems are equally illusory. As the United States itself acknowledged, CACI never argued below that "'the government has waived sovereign immunity for violations of *jus cogens* norms.'" Opp. 29; *see* U.S. Reply Mem. in Further Support of Mot. to Dismiss 2 (Dkt. 744) ("CACI does not actually argue that the United States can be sued for alleged *jus cogens* violations."). CACI instead made clear that it believed that *both* the United States and CACI were entitled to sovereign immunity, but had impleaded the government in the event that CACI's defenses ultimately failed. *See* CACI Opp. to Mot. to Dismiss 2, 19–20 (Dkt. 713).

Contrary to Plaintiffs' insinuations, *see*, *e.g.*, Opp. 3, the United States has never staked a position on the collateral-order question. *See* Oral Arg. 45:45-45:58 (4th Cir. July 10, 2019). Tellingly, however, the United States has repeatedly pursued interlocutory appeals of orders denying its own immunity claims. *See*, *e.g.*, *Alaska* v. *United States*, 64 F.3d 1352, 1354 (9th Cir. 1995). Because the resolution of the question presented is undeniably important to both the United States and the ever-growing number of private contractors on which the United States is increasingly dependent, *see*, *e.g.*, KBR Amicus Br. 3–4, the Court

should grant review of this "extraordinary case," Pet. App. 169a (Wilkinson, J., dissenting).

I. THE QUESTION OF APPELLATE JURISDICTION IS SQUARELY AND CLEANLY PRESENTED.

Plaintiffs recast the decisions below as "based on material factual disputes" that precluded a conclusive resolution of CACI's immunity claim in the district court and the existence of appellate jurisdiction in the Fourth Circuit. Opp. 20. Plaintiffs' reading of those decisions is incomplete and inaccurate.

The district court determined, as a matter of law, that CACI is not entitled to derivative sovereign immunity. Pet. App. 340a. "Because th[e] Court ha[d] ruled that sovereign immunity does not protect the United States from claims for violations of *jus cogens* norms," the district court explained that "the first prong of the derivative sovereign immunity test"—which asks whether "the United States would be immune from suit"—"is not met, and CACI's Motion to Dismiss based on a theory of derivative sovereign immunity will be denied." *Id.* That was the end of the immunity question in the district court. "[N]o further discussion"—and no further evidentiary presentation from CACI at trial—"would change the outcome" because it rested on the district court's *legal* determination that the United States is not entitled to immunity. *Id.* at 340a n.16.

To be sure, the district court further stated that "[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." Pet. App. 340a. But the district court never definitively applied the two remaining—and now-entirely-meaningless—prongs of the immunity inquiry,

which look to whether the defendant adhered to the terms of a government contract. *Id.* After devoting several lines to the question, the court abruptly concluded its discussion without reaching an answer and confirmed that its denial of CACI's immunity claim rested exclusively on the first prong of the immunity standard: "*Regardless*, CACI's Motion to Dismiss fails because the United States does not enjoy sovereign immunity." *Id.* at 342a (emphasis added). The United States agrees with this reading of the opinion. *See* U.S. Amicus Br. 6, No. 19-1938 (4th Cir. Apr. 30, 2019) ("[T]he court ultimately did not reach th[e] question" whether CACI met the other requirements for immunity).

CACI's appeal to the Fourth Circuit therefore presented a pure question of law: whether the district court correctly concluded that the United States is not entitled to sovereign immunity for violations of *jus cogens* norms and that CACI therefore is not entitled to derivative sovereign immunity. The Fourth Circuit nevertheless held that it lacked jurisdiction to decide that legal question, a "conclusion [that] follow[ed] from the reasoning of [its] prior en banc decision" in *Al Shimari I*, which "explained that 'fully developed rulings' denying 'sovereign immunity (or derivative claims thereof) may not' be immediately appealable." Pet. App. 4a (quoting *id.* at 96a n.3).

Judge Quattlebaum's "reluctant[ ]" concurrence confirms the majority's categorical rejection of appellate jurisdiction. Pet. App. 6a. "[I]n contrast to the majority's reading of the case," he interpreted *Al Shimari I* as permitting an immediate appeal from the denial of derivative sovereign immunity where it "involves an 'abstract issue of law' or a 'purely legal question.'" *Id.* (quoting *id.* at 117a–18a).

Plaintiffs ignore all of this and instead latch on to the majority's statement that "'there remain continuing disputes of material fact.'" Opp. 16 (emphasis omitted) (quoting Pet. App. 4a–5a). Plaintiffs, however, omit the crucial introductory phrase: "*But even if a denial of sovereign immunity may be immediately appealable*, our review is barred" by factual disputes. Pet. App. 4a (emphasis added); *see also id.* at 5a n.* (similar). This alternative reasoning cannot conceal the reality that the Fourth Circuit—in both this case and *Al Shimari I*—declared an across-the-board prohibition on immediate appeals of denials of derivative sovereign immunity. Nor can this inaccurate dicta insulate the Fourth Circuit's sweeping holding from this Court's review: The district court's rejection of CACI's immunity claim rests on a legal ruling regarding the United States' entitlement to sovereign immunity for *jus cogens* violations, not on the existence of factual disputes, *see supra* pp. 3–4, and it is the district court's reasoning that determines the existence of appellate jurisdiction, *see Johnson*, 515 U.S. at 318.

Accordingly, review would be far from an "exercise in futility." Opp. 28. If this Court reverses the Fourth Circuit's jurisdictional decision, the court of appeals on remand will review the district court's ruling that the United States *impliedly* waived its sovereign immunity for *jus cogens* violations—a ruling that, according to the United States, "disregard[s] ample case law [from] the Supreme Court," carries "staggering implications," and "should be corrected." 2019 Oral Arg. 40:30-41:45.

In any event, even if the district court had identified factual disputes bearing upon CACI's entitlement to derivative sovereign immunity, those supposed dis-

putes would not defeat jurisdiction under the collateral-order doctrine or diminish the pressing need for this Court's review. As this Court has made clear, there is "little basis for drawing . . . a line" that excludes from the collateral-order doctrine rulings that present "difficult factual questions" regarding the relationship between the government and the defendant seeking to invoke the government's immunity. *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

Nothing in *Johnson* v. *Jones*—invoked extensively by Plaintiffs—is to the contrary. The Court held there that the collateral-order doctrine does not extend to "a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,'" 515 U.S. at 313—such as whether there was sufficient evidence to create a triable issue of fact regarding the defendants' presence at the scene of the plaintiff's beating. As this Court subsequently made clear in *Plumhoff* v. *Rickard*, 572 U.S. 765 (2014), the absence of appellate jurisdiction over that type of "purely factual issue[ ]" does not mean that jurisdiction is also lacking where defendants ask a court to decide a question of immunity that is intertwined with factual questions—for example, whether, on the facts as alleged by the plaintiff, "their conduct did not violate the Fourth Amendment" or "clearly established law." *Id.* at 773; *see also Mitchell*, 472 U.S. at 528–29 ("a question of immunity is separate from the merits" "even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue").

So, too, here. Even as Plaintiffs reconceive the district court's decision, its consideration of the remaining elements of the immunity inquiry did not

turn on a question of evidentiary sufficiency, such as whether a contract exists between CACI and the government. As in *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663 (2016), the question is instead a legal one: "[C]onstru[ing] the record in a light favorable to [Plaintiffs]," did CACI's alleged conduct violate its contract with the government? *Id.* at 673. Resolving that type of immunity question—even one intertwined with factual issues—is a "core responsibility of appellate courts." *Plumhoff*, 572 U.S. at 773.

Plaintiffs are equally off-base in accusing CACI of "'invit[ing]'" the district court's error regarding the government's purported waiver of immunity. Opp. 29. CACI consistently made clear that it "agree[d]" that immunity "should foreclose Plaintiffs' claims against CACI and the United States, and thus eliminate the need for CACI's third-party claims." CACI Opp. to Mot. to Dismiss 19–20. Because the courts "ha[d] not yet so held," however, CACI was compelled to implead the United States to ensure that it was not left holding the bag for the alleged conduct of U.S. military personnel. *Id.* at 20. Indeed, CACI impleaded the United States only after Plaintiffs confirmed that they were "not contending that the CACI interrogators laid a hand on the [P]laintiffs" but were instead alleging that unidentified CACI employees conspired with and aided and abetted unidentified military personnel who allegedly abused Plaintiffs. C.A.J.A.1060. As CACI emphasized, "[u]nder the circumstances, the correct answer cannot be 'CACI PT can be held liable but the United States is immune.'" CACI Opp. 12.

Plaintiffs also mischaracterize the government's position on appealability. Plaintiffs pluck four words from a brief—that sovereign immunity is a "'jurisdictional defense to claims,'" Opp. 15 (emphasis omitted)

(quoting 2019 U.S. Amicus Br. 2)—as evidence of the government's supposed position that sovereign immunity is not an "immunity from suit," *id.* at 3. But the government also wrote, in the same brief, that it "retains its sovereign immunity *from suit*." 2019 U.S. Amicus Br. 9 (emphasis added). In any event, the competing quotations are ultimately beside the point because the government explicitly stated that it was taking no position on the collateral-order question. *See id*. at 1; 2019 Oral Arg. 45:45-45:58.

The government's prior statements and litigation conduct are nevertheless consistent with the view that the Fourth Circuit possessed jurisdiction over CACI's immunity-based appeal. In *Al Shimari I*, the government agreed that "a conclusive determination of a substantial claim to immunity would be entitled to collateral order review." Oral Arg. 59:41-59:55 (4th Cir. Jan. 27, 2012). And the government has regularly taken immediate appeals of rulings denying its own claims of sovereign immunity. *See*, *e.g.*, *Alaska*, 64 F.3d at 1354; U.S. Br. *22, *SEC* v. *Credit Bancorp, Ltd.*, No. 01-6158, 2001 WL 34366656 (2d Cir. Nov. 1, 2001) ("the denial of sovereign immunity is immediately appealable").

Any lingering uncertainty about the government's position with respect to the appealability of orders denying claims of sovereign immunity and derivative sovereign immunity could be resolved by requesting the views of the Solicitor General.

II. THE DECISION BELOW EXACERBATES A CIRCUIT SPLIT AND CONTRADICTS THIS COURT'S PRECEDENT.

In contrast to the substantial space that Plaintiffs devote to manufacturing illusory vehicle problems,

Plaintiffs devote comparatively little attention to the circuit split squarely implicated by the decision below or to reconciling the Fourth Circuit's treatment of derivative sovereign immunity with this Court's precedent authorizing immediate appeals of rulings rejecting other forms of immunity. What Plaintiffs do have to say is uniformly unpersuasive.

Plaintiffs vaguely suggest that the decisions of the Second and Eleventh Circuits authorizing collateral-order appeals of rulings denying derivative sovereign immunity involved different "kind[s] of immunity." Opp. 27. They never explain, however, why the collateral-order doctrine should apply differently to CACI's claim of derivative sovereign immunity for actions taken in a war zone under the direction of the U.S. military than to the claim in *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), of derivative *Feres* immunity (a residual immunity that protects the government from soldiers' claims for service-related injuries) and the claim in *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. 2008), of derivative Stafford Act immunity (a statutory immunity that protects the government from certain claims related to disaster relief). All three cases involved appeals by private parties seeking to challenge a district court's ruling rejecting their derivative claim to the federal government's immunity. The Second and Eleventh Circuits held that the collateral-order doctrine authorized the appeals; the Fourth Circuit, like the Fifth (*see* Pet. 14–15), reached the exact opposite outcome.

Plaintiffs offer a similarly ineffectual response to the circuit split on the antecedent question of the collateral-order doctrine's application to rulings denying

the federal government's claims of sovereign immunity. *See* Pet. 15–17. Indeed, they entirely fail to acknowledge that the Second Circuit expressly declined to follow the Seventh Circuit's reasoning in *Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1169 (7th Cir. 1994), which held that the collateral-order doctrine does not authorize immunity-based appeals by the government. *See In re World Trade Ctr.*, 521 F.3d at 191.

Nor can Plaintiffs explain why this Court's decisions authorizing collateral-order appeals of rulings denying claims of absolute, qualified, and state sovereign immunity should not apply with equal force to federal sovereign immunity (and contractors' derivative claims to that immunity). *See* Pet. 18–19. It is clear from this Court's precedent that, like those other types of immunity, federal sovereign immunity "shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Plaintiffs ignore that precedent, instead asserting that "CACI cannot identify . . . a value of a high order that would be 'irretrievably lost' were it" required to stand trial. Opp. 22. But the "consequences" that would accompany subjecting government officials to suit and that justify immediate appeals of denials of absolute and qualified immunity—"distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," *Mitchell*, 472 U.S. at 526—are of equally high value in the context of government contractors, whose provision of indispensable support to the U.S. military and other government agencies will be impaired if they are required to operate under the omnipresent threat of tort litigation. *See Filarsky* v. *Delia*, 566 U.S. 377, 390–91 (2012).

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Plaintiffs wave away the grave interests at stake, Opp. 31–35, but they are wrong on all counts.

First, Plaintiffs assert that "the United States has failed to validate" that this case implicates important national-security interests. Opp. 32. But the United States has repeatedly expressed serious separation-of-powers concerns about similar suits against military contractors, *see* DRI Amicus Br. 5, 16–18, and has acknowledged that "this case presents matters of substantial and important federal interests." 2012 Oral Arg. 59:00-59:25; *see also* 2019 U.S. Amicus Br. 1 (similar).

Second, Plaintiffs contend that the "only consequence" of subjecting CACI to the "burdens of litigation" will be CACI's "'replacement by other firms,'" Opp. 32, but they ignore the profound consequences of this litigation for both the broader contracting community and the U.S. military. Exposing private contractors to the substantial costs of litigation—without the right to seek immediate appellate review of adverse immunity rulings—will inevitably "chill[ ] the vital working relationships between the military and its support contractors," DRI Amicus Br. 5–6, impose "massive burdens on U.S. military personnel," and facilitate "unchecked intrusion into military and foreign affairs," KBR Amicus Br. 4.

Finally, Plaintiffs emphasize that "[t]he United States has already . . . produced extensive documentation regarding Plaintiffs' interrogations and detention." Opp. 34. But that simply underscores the grave problems with permitting this suit to proceed and the

compelling need for affording CACI a right to immediate appeal. By opening the door to discovery into sensitive military matters and permitting the judiciary to superintend war-zone operations, the Fourth Circuit's decision "allow[s] civil tort suits to invade theatres of armed conflict heretofore the province of th[e] [political] branches." Pet. App. 126a (Wilkinson, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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