



derivative sovereign immunity is mandatory and well defined, and a straightforward application of that test demonstrates that CACI PT<sup>1</sup> is entitled to derivative immunity with respect to most or all of Plaintiffs' claims.

CACI PT "is subject to the same immunity as the United States if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014) ("*Burn Pit*") (citing *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940)). Plaintiffs' opposition *does not argue* that the United States would lack immunity from suit for Plaintiffs' claims or that CACI PT's interrogation contracts were not validly conferred. Thus, Plaintiffs' only relevant challenge to immunity is their contention that the United States did not authorize CACI PT's actions. But Plaintiffs' opposition ignores that CACI PT did *exactly* as authorized by the United States in providing interrogation personnel to be operationally directed and supervised by the U.S. military chain of command. Plaintiff's opposition also ignores that many of their allegations of abuse involve treatment that was *specifically authorized* by the United States. Thus, even if CACI PT were not entitled to derivative immunity from Plaintiffs' claims in their entirety, CACI PT is clearly entitled to immunity from suit for those portions of Plaintiffs' claims alleging detainee treatment that the United States authorized.

It is particularly appropriate in this case that the scope of CACI PT's derivative immunity would mirror the United States' sovereign immunity. After a decade of litigation, Plaintiffs abandoned any claim of direct abuse by CACI PT personnel<sup>2</sup> and the Court dismissed Plaintiffs'

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<sup>1</sup> "CACI PT" refers to Defendant/Third-Party Plaintiff CACI Premier Technology, Inc.

<sup>2</sup> See 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); see also Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is

direct counts as unsupported by factual allegations. Accordingly, this case has devolved into one in which Plaintiffs are seeking to hold CACI PT liable for mistreatment they allege was inflicted on them by U.S. soldiers. Therefore, the Court should dismiss Plaintiffs' claims seeking recovery for abuse committed by U.S. soldiers because CACI PT is derivatively immune from suit for such claims.

## II. ANALYSIS

### A. Plaintiffs' Cursory Argument About "Unlawful Conduct" Is Contrary to Binding Precedent

Plaintiffs cite to *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 159 (4th Cir. 2016) ("*Al Shimari IV*"), to argue that "any acts of the CACI employees that were unlawful when committed, irrespective of whether they occurred under actual control of the military, are subject to judicial review." Pl. Opp. at 5. As Plaintiffs well know, however, the snippet they quote from *Al Shimari IV* concerns the limits on courts' Article III powers by virtue of the political question doctrine. *Al Shimari IV* did not involve an immunity challenge, and the Fourth Circuit did not purport to establish or apply a standard for derivative sovereign immunity in *Al Shimari IV*. Indeed, two years after the Fourth Circuit decided *Al Shimari IV*, the same court rejected the premise Plaintiffs suggest here – that lawfulness is a relevant consideration for determining derivative sovereign immunity. As the Fourth Circuit held:

The purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, ***and thus, it cannot be that an alleged violation of law per se precludes Yearsley immunity.***

*Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 648 (4th Cir. 2018) (emphasis added). Indeed, in *Cunningham*, the Fourth Circuit specifically held that a contractor was

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conspiracy and aiding and abetting"); *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability.").

derivatively immune from a suit alleging “unlawful conduct” – violations of the Telephone Consumer Protection Act. *Id.* at 643. Thus, Plaintiffs’ effort to make “lawfulness” a touchstone of derivative sovereign immunity fails under the weight of binding precedent holding to the contrary. Because “lawfulness” is irrelevant, and Plaintiffs have conceded the United States’ immunity from their claims and the validity of CACI PT’s contracts, all that matters for derivative sovereign immunity is whether the United States authorized the conduct for which CACI PT is being sued.

**B. CACI PT Is Immune from Suit for Conduct Authorized by the United States**

Plaintiffs’ opposition ignores that the relevant question is whether *CACI PT* is entitled to derivative sovereign immunity, not whether *CACI PT employees* would have been entitled to derivative sovereign immunity if Plaintiffs had sued them.<sup>3</sup> With respect to CACI PT, its contracts called for it to provide interrogation personnel who would agree to deploy to Iraq, and then for CACI PT to turn such employees over to the operational direction and supervision of the U.S. military chain of command. CACI PT has cited to record evidence showing that this is what was contractually required and what actually occurred. CACI PT Mem. at 11-13. Plaintiffs’ opposition does not confront this point. Rather, they ignore it and argue that their allegations that CACI PT personnel, after coming under the U.S. military’s operational control, engaged in unauthorized actions scuttles *CACI PT’s* derivative sovereign immunity.

But even if the proper lens for evaluating immunity is whether the conduct of CACI PT employees was authorized by the U.S. military, Plaintiffs’ opposition simply ignores that most of the allegations in this case involve detainee treatment specifically authorized by the U.S.

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<sup>3</sup> Plaintiff Al Shimari actually sued one former CACI PT employee in order to establish venue for this case, which originally had been filed in federal court in Ohio. Once the case was transferred to this Court, however, Al Shimari dismissed his claims against the CACI PT employee he originally sued.

military. Indeed, CACI PT's immunity memorandum includes a chart listing allegations of mistreatment by Plaintiffs that the U.S. military specifically approved, facts that Plaintiffs do not address in their opposition. CACI PT Mem. at 14.

Consider Plaintiff Al-Ejaili. Al-Ejaili himself testified that he has no knowledge of CACI PT involvement in his treatment at Abu Ghraib prison. Ex. 16 at 6 (interrogatory response #5); Ex. 17 at 9-10, 66, 73, 194-96, 216 (deposition). The United States has confirmed that he was not subjected to an intelligence interrogation at Abu Ghraib prison, but that he may have been questioned by a former CACI PT employee as part of IP Roundup.<sup>4</sup> Ex. 18 at 16. The sole evidence of this encounter, however, is that “[t]here was nothing violating the [interrogation rules of engagement] in that particular Interrogation.” *Id.* That fact pattern walks directly into the derivative sovereign immunity test mandated by the Fourth Circuit in *Burn Pit*, 744 F.3d at 342. Plaintiffs concede that the United States would be immune from suit for their claims, and concede that CACI PT's contracts were validly conferred. The only evidence of involvement by CACI PT personnel in Al-Ejaili's treatment is that a CACI PT employee conducted an impromptu interrogation that fully complied with the treatment standards authorized by the U.S. military. Under any reading of *Burn Pit* and *Cunningham*, CACI PT is immune from Al-Ejaili's claims because the only record evidence of involvement by a CACI PT employee in Al-Ejaili's treatment is that its employee fully complied with what the U.S. military authorized.

The facts are similar with respect to Plaintiff Al-Zuba'e. Al-Zuba'e seeks to recover from CACI PT for having been placed in isolation in the Abu Ghraib Hard Site. Third Am. Compl. (“TAC”) ¶ 66. [REDACTED]

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<sup>4</sup> “IP Roundup” involved impromptu questioning of detainees and Iraqi police officers to determine the source of a pistol smuggled to a detainee and used to shoot a U.S. soldier, as well as to determine whether other weapons had been smuggled to detainees.

[REDACTED]

[REDACTED] Ex. 18 at 14 (CACI PT employee participated only in the third interrogation of Al-Zuba'e, which occurred on 12/23/03). More important for immunity purposes, isolation was an interrogation approach *that the U.S. military specifically authorized*. Ex. 12 at A-235; Ex. 13; Ex. 14 at 1. Thus, even if a CACI PT employee had been involved in placing Al-Zuba'e into isolation, which the record confirms is not the case, CACI PT is derivatively immune from suit for Al-Zuba'e's placement into isolation because (1) the United States would be immune from such a claim, (2) the United States validly contracted with CACI PT, and (3) the United States authorized isolation for detainees. *Burn Pit*, 744 F.3d at 342. The same is true of Al-Zuba'e's allegations of forced nudity, environmental manipulation, being hooded, and being placed in stress positions. TAC ¶¶ 61-63. Al-Zuba'e admits that he has no facts suggesting CACI PT personnel were involved in any of this alleged mistreatment of him. Ex. 20 at 30-31, 33, 36, 44-45, 56-58, 64, 65, 81. But even if he did, CACI PT would be immune from suit for these allegations of mistreatment because they were all *authorized* by the U.S. military chain of command. Exs. 12-14.

With respect to Al Shimari, he is unaware of any interaction between himself and CACI PT personnel. Ex. 21 at 7-8 (Al Shimari Interrogatory Response #5). United States records show that CACI Interrogator A participated in the only interrogation of Al Shimari. Ex. 18 at 4-5. CACI Interrogator A testified that he never treated a detainee in the ways Al Shimari alleged he was treated. Ex. 22 at 92-106. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CACI PT would like to show the Court the treatment specifically

approved for use in connection with Al Shimari's interrogation, but the Court's state secrets rulings have denied the parties and the Court access to this information. Thus, for the only contested issue bearing on derivative sovereign immunity – what treatment the United States authorized – the state secrets privilege shields all of the relevant information from use in this case. That aside, however, there is no evidence of conduct by CACI Interrogator A that exceeded that authorized by the U.S. military, entitling CACI PT to immunity.

Moreover, like Al-Zuba'e, Al Shimari alleges a number of acts of mistreatment that he does not connect to CACI PT personnel but which were authorized interrogation approaches. See TAC ¶¶ 28-29, 31-32 (dietary management, sleep management, environmental manipulation, forced nudity). Thus, *even if* Al Shimari claimed facts tying CACI PT personnel to these alleged acts of mistreatment, CACI PT would be immune from suit for them because they were all interrogation approaches that the United States authorized.

As CACI PT has explained, the proper derivative sovereign immunity analysis is whether CACI PT complied with the contractual requirement of providing interrogation personnel to be directed and supervised by the U.S. military chain of command. CACI PT clearly complied with this contractual requirement, entitling it to immunity *even if* military and civilian personnel that the U.S. military directed and supervised engaged in misconduct. But even if the Court were to reject this analysis, and focus on whether CACI PT interrogation personnel, once turned over to military control, were authorized in their actions, Plaintiff's opposition offers no response to the undisputable fact that many of the acts for which Plaintiffs seek recovery were specifically authorized by the U.S. military as approved detainee approaches. Thus, *at a bare minimum*, CACI PT is entitled to derivative sovereign immunity for those of Plaintiffs' allegations of mistreatment that were authorized methods of detainee treatment at Abu Ghraib prison.

### III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims as barred by derivative sovereign immunity.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2019, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following. I also will email a copy of the materials filed under seal to the same counsel:

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