IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant,

No. 1:08-cv-0827 LMB-JFA

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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I. INTRODUCTION

"The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Nadendla v. WakeMed*, 24 F.4th 299, 304 (4th Cir. 2022). But Plaintiffs' opposition urges this Court to engage in a game of cat-and-mouse with the United States Supreme Court, and to dodge binding precedents based on a flimsy argument that they are distinguishable. The Court should not take the bait. A fair reading of recent Supreme Court case law requires dismissal of Plaintiffs' claims, as "the Supreme Court's approach to implied damages remedies has changed dramatically." *Annappareddy v. Pascale*, 996 F.3d 120, 133 (4th Cir. 2021). These developments in Supreme Court precedent, culminating in *Egbert v. Boule*, 142 S. Ct. 1793 (2022), cannot support an implied damages claim against CACI[1] for injuries allegedly suffered during the U.S. military's prosecution of war.

In moving to dismiss, CACI explained in painstaking detail that *Egbert* requires federal courts to refrain from implying a damages remedy if there is "even a single sound reason to defer to Congress." *Id.* at 1803 (quoting *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (plurality opinion)). Plaintiffs' opposition does not seriously argue that Plaintiffs could meet this test. Rather, Plaintiffs put all of their eggs in a very leaky basket, arguing that the Court can simply ignore *Egbert* because the plaintiff there asked the district court to imply a damages remedy under *Bivens* and Plaintiffs here ask the Court to imply a damages remedy under ATS. But an authority no less than the United States Supreme Court has held that ***the exact same separation-of-powers test applies to both types of claims***. Indeed, the Supreme Court treats ATS and *Bivens* claims interchangeably in analyzing proposed implied damages actions, relying on

[1] "CACI" refers to Defendant CACI Premier Technology, Inc.

Bivens cases to reject ATS claims and *vice versa*.[2] Therefore, the exacting separation-of-powers test applied in *Egbert* applies with full force to this action, and Plaintiffs have offered no argument (much less a credible one) that they can meet this test.

Apart from trying to limit *Egbert* to the *Bivens* context, Plaintiffs' other argument is that the Court should use the "law of the case" doctrine to shield its eyes from Supreme Court precedent issued after this Court denied CACI's motion to dismiss in 2018. But the law of the case doctrine will not bear the weight Plaintiffs place on it. The law of the case doctrine does not apply when the court's prior ruling cannot be squared with intervening binding precedent. That is clearly the case here. Under current precedent, the Court's 2018 analysis of its power to imply a damages action was incomplete, as the Court did not conduct the distinct separation-of-powers inquiry mandated by subsequent Supreme Court decisions. For these reasons, the Court's obligation is to apply *Egbert* and the other intervening Supreme Court decisions on which CACI relies. These decisions establish beyond doubt that the Court lacks jurisdiction to imply the damages actions asserted by Plaintiffs.

II. ANALYSIS

A. Contrary to Plaintiffs' Intimation, *Egbert* Cannot Be Disregarded Because It Involved a *Bivens* Claim

All of Plaintiffs' remaining claims are conspiracy and aiding and abetting claims that Plaintiffs ask this Court to imply under the ATS. *Egbert*, however, was explicit in holding that when courts are faced with a request to recognize an implied cause of action, "even a single

[2] CACI would address how the Supreme Court has treated ATS and *Bivens* precedents in cases *upholding* an implied right of action, but the Supreme Court has not upheld a *Bivens* action since 1980, twenty-four years before it ever decided a case involving ATS, *Annappareddy*, 996 F.3d at 133, and has never upheld an implied damages action brought under ATS. *Nestle*, 141 S. Ct. at 1937.

sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (internal quotations omitted). In establishing this standard, the Court quoted from and cited to the plurality opinion in *Nestle*, 141 S. Ct. at 1937, a case involving application of the ATS. Plaintiffs urge the Court to (1) ignore *Nestle* because this aspect of the lead opinion had only three signatories, and (2) ignore *Egbert* on the theory that *Bivens* cases have no application to ATS claims. Pl. Opp. at 9 n.5. But recent Supreme Court cases establish that the mandatory separation-of-powers test for implying damages remedies is *identical* for *Bivens* and ATS cases. And the Court's majority opinion in *Egbert* quoted with approval and adopted the separation-of-powers test identified by the plurality in *Nestle*. Therefore, contrary to Plaintiffs' intimation, the Court cannot simply ignore inconvenient *Bivens* cases such as *Egbert* in order to allow this case to continue.

Plaintiffs try to distinguish *Bivens* cases on the grounds that "[a]n ATS claim is a wholly different construct from a *Bivens* claim." Pl. Opp. at 9. Specifically, Plaintiffs argue that Congress's enactment of ATS reflects Congress's determination that "there should be a cause of action in federal district court for violations of the law of nations." *Id.* (quoting *Al Shimari*, 300 F. Supp. 3d at 787). Apparently, Plaintiffs contend that the existence of a statute creating jurisdiction for international law violations better supports judicial creation of causes of action in the ATS context than the *Bivens* context. But how is the ATS "construct" any different from the *Bivens* construct? ATS "is 'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action for violations of international law." *Jesner*, 138 S. Ct. at 1396. The same is true for a *Bivens* claim, where a statute (28 U.S.C. § 1331) establishes federal court jurisdiction for "civil actions arising under the Constitution, laws, or treaties of the United States," but which itself delineates no substantive causes of action. The question left

unanswered by these statutory grants of jurisdiction is what substantive claims can be brought and "'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Ziglar*, 137 S. Ct. at 1857; *Egbert*, 142 S. Ct. at 1803; *see also Jesner*, 138 S. Ct. at 1402-03.

But the Court need not plumb the "constructs" of *Bivens* and ATS claims in order to determine if the same separation-of-powers test applies to each; the Supreme Court has already done that work. For both *Bivens* and ATS, a two-step test applies in determining whether a federal district court has jurisdiction to imply a damages remedy. For *Bivens* claims, the first step involves determining if the claim arises in a "new context," *Egbert*, 142 S. Ct. at 1803, while the first step in ATS cases is determining whether the plaintiff has alleged violation of a "specific, universal, and obligatory" international norm, *Sosa*, 542 U.S. 692, 732 (2004). The second step for determining whether to imply a damages remedy (and the one that matters for this motion) is identical for *Bivens* and ATS claims and focuses on separations-of-powers issues. As the Supreme Court has explained:

> When a party seeks to assert an implied cause of action under the Constitution itself, ***just as when a party seeks to assert an implied cause of action under a federal statute***, separation-of-powers principles are or should be central to the analysis.

Ziglar, 137 S. Ct. at 1857 (emphasis added); *see also Tun-Cos v. Perrotte*, 922 F.3d 514, 522 (4th Cir. 2019) (same quote)

In blithely asking the Court to simply ignore *Bivens* precedents as inapposite to ATS cases, Plaintiffs offer no response to CACI's point that the Supreme Court has applied the ***exact same separation-of-powers test to both types of claims***:

***Ziglar v. Abbasi*, 137 S. Ct. 1858 (2017)**	***Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386. 1402 (2018)**
"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . . courts must refrain from creating the remedy in order to respect the role of Congress . . . ."	"[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." (omission in original) (quoting *Ziglar*, 137 S. Ct. at 1858)

And it is not just that the Supreme Court has used the same *words* to describe the required separation-of-powers test; the Supreme Court has repeatedly treated *Bivens* and ATS decisions interchangeably in applying that test. In *Jesner*, an ATS case, the Court relied on three *Bivens* cases in holding that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" because "the Legislature is in the better position to consider if the public interest would be better served by imposing a new substantive legal liability."[3] In *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), a *Bivens* case, the Court quoted and relied on *Jesner* for the propositions that (1) caution is required before implying damages actions "[i]n both statutory and constitutional cases," (2) "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," and (3) looking for legislative guidance is particularly important in deciding whether to imply a damages action in cases where foreign relations are implicated. *Id.* at 742, 744, 747.

One year later, the plurality opinion in *Nestle*, an ATS case, cited *Hernandez* for the proposition that "our precedents since *Sosa* have clarified that courts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress." *Nestle*, 141 S. Ct. at 1937 (citing *Hernandez*, 140 S. Ct. at 735). And *Egbert*, a *Bivens* case, completed the

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[3] *Jesner*, 138 S. Ct. at 1402 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), and *Ziglar*, 137 S. Ct. at 1857).

circle, with the Court's majority opinion quoting the *Nestle* plurality's discussion of implied remedies in holding that "'even a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (quoting *Nestle*, 141 S. Ct. at 1937). Thus, Supreme Court precedent over five cases running from *Ziglar* to *Egbert* makes clear that there is a single separation-of-powers test applicable to *Bivens* and ATS claims, and the Court has used both types of claims to develop and refine that test.

B. Plaintiffs Cannot Meet the Test Required for Implying a Damages Remedy

As CACI explained in its motion papers, "creating a cause of action is a legislative endeavor," and "the Judiciary's authority to do so is, at best, uncertain." *Egbert*, 142 S. Ct. at 1802; *see also Jesner*, 138 S. Ct. at 1402 ("The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" (quoting *Sosa*, 542 U.S. at 727)). Indeed, "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS." *Jesner*, 138 S. Ct. at 1403. As *Egbert* explained, "even a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (quoting *Nestle*, 141 S. Ct. at 1937 (plurality opinion)).

Plaintiffs' opposition does not meaningfully attempt to meet this test. CACI's motion to dismiss identified a multitude of reasons why the normal rule should apply, that creating causes of action should be left to Congress. Plaintiffs did not even try to rebut most of them. As CACI explained:

- Plaintiffs' claims arise in the national security and foreign affairs context. CACI Mem. at 16. In *Egbert*, the claim involved a border patrol agent roughing up an American smuggling suspect, entirely in the United States, and the Court found

enough of a national security context to require courts to refrain from implying a damages remedy. 142 S. Ct. at 1804-05. Surely, the foreign affairs and national security nexus is much closer here, where Plaintiffs were captured and detained by the U.S. military and held at a war-zone interrogation facility in Iraq, where CACI personnel acted under the supervision and control of the U.S. Army chain of command. CACI Mem. at 14. Nowhere in Plaintiffs' opposition is there an explanation why the judiciary is better suited than Congress to decide which causes of action to imply in a wartime context.

- Plaintiffs' claims involve application of international law to regulate the conduct of U.S. military operations in a war zone, when the Constitutional design gives the federal government exclusive control over such matters. CACI Mem. at 17-20. Plaintiffs' sole response is to say that "[u]nlike concerns regarding federal supremacy over the states, here Congress has specifically authorized the federal judiciary to enforce the ATS, in a manner that 'represents the constitutional exercise of Congress's inherent powers to regulate the conduct of war.'" Pl. Opp. at 11 (quoting *Al Shimari*, 300 F. Supp. at 787). But *Sosa* itself holds that Congress's mere enactment of ATS does not give federal courts a blank check to create implied causes of action. *Sosa*, 542 U.S. at 729. And since *Sosa*, and culminating in *Egbert*, the Supreme Court has made clear that this "vigilant doorkeeping" for implied damages claims requires application of a separation-of-powers test under which the result in most cases will be rejection of an implied damages remedy. *Egbert*, 142 S. Ct. at 1802-03.

- Congress has provided an alternative remedial structure, through statutory causes of action in which Congress has not elected to include claims such as Plaintiffs' and through an administrative claims process Plaintiffs refused to engage. CACI Mem. at 19-22. Plaintiffs' only response is that Congress enacted ATS, and that this means that administrative remedies and ATS "are intended to operate in parallel, as applicable." Pl. Opp. at 10. *Egbert* forecloses that argument, as the Court there specifically held that the existence of an alternative remedial scheme, by itself, forecloses an implied cause of action. 142 S. Ct. at 1806-07. Indeed, *Egbert* holds that a court may not even consider whether the alternative remedial structure created by Congress is adequate. The fact that it exists is enough to prevent a judge-made cause of action. *Id.*

- CACI pointed out that the sensitive nature of the facts involved in this action, involving battlefield intelligence and three invocations of the state secrets doctrine, is another reason to defer to Congress and not create a judge-made cause of action. CACI Mem. at 22-23. Plaintiffs did not respond to this point.

- Finally, CACI explained that creating an implied cause of action, and defining its scope, puts the Court in the position of making the policy decision as to which of the innumerable persons injured or killed in war would be eligible for recompense through a tort action, a policy decision better left to Congress. CACI Mem. at 23. Plaintiffs did not respond to this point.

As *Egbert* makes clear, any single reason to defer to Congress is enough to preclude recognition of Plaintiffs' claims. The wartime context, the imposition of tort regulation on the federal war powers, the existence of alternative remedies, the centrality of state secrets to the trial of this action, and the involvement of this Court in wartime compensation policy decisions all are reasons why this is not the rare case in which judge-made damages claims are appropriate.

C. The Law of the Case Doctrine Does Not Permit the Court to Refuse to Apply Intervening Binding Precedent

With little to say on the merits, Plaintiffs urge the Court to avoid the merits altogether based on the "law of the case" doctrine. That doctrine has no application here. The law of the case doctrine does not shield prior court orders from reexamination when "controlling authority has since made a contrary decision of law applicable to the issue." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003); *see also U.S. Tobacco Coop. Inc. v. Big South Wholesale of Va., LLC*, 899 F.3d 236, 257 (4th Cir. 2018). A district court's discretion to invoke the law of the case doctrine is particularly limited "in the context of motions to reconsider issues going to the court's Article III subject matter jurisdiction." *Am. Canoe Assoc.*, 326 F.3d at 515. Upon Judge Lee's recusal from this case, the Court espoused the virtues of reaching the right decision over slavish adherence to prior decisions, advising that all prior trial court decisions were subject to revision.[4]

In identifying the "law of the case" that this Court supposedly should follow, Plaintiffs principally point to the Court's 2017 and 2018 rulings defining Plaintiffs' ATS claims and then

[4] 4/28/17 Tr. at 10 ("The other thing I would ask you-all to do, you're with a new judge now, and with all due respect to my colleague, I mean, I'm treating this case pretty much as it's starting with me, all right? I mean, I'm certainly going to follow what the Fourth Circuit has done, but just because certain things were done or not done previously, don't assume that will be the case with me, all right?").

rejecting CACI's motion to dismiss Plaintiffs' conspiracy and aiding and abetting claims.[5] In both decisions, the Court concluded that the "proper standard" under *Sosa* for determining whether a damages remedy could be implied was whether the claim alleges a violation "of a norm that is specific, universal, and obligatory." *Al Shimari v. CACI Prem. Tech., Inc.*, 263 F. Supp. 3d 595, 599 (E.D. Va. 2017); *see also Al Shimari*, 300 F. Supp. 3d at 777-78 ("Plaintiffs' claims are only cognizable under the ATS to the extent that they represent violations of international law norms that are specific, universal, and obligatory.").

More recent Supreme Court decisions make clear that the Court's 2017 and 2018 analysis was incomplete. And that is understandable. *Sosa* held that a claim under ATS must be "specific, universal, and obligatory." *Sosa*, 542 U.S. at 732. *Sosa* also emphasized the importance of "vigilant doorkeeping," but offered virtually no guidance on how that doorkeeping should proceed. *Id.* at 729. This appears to have left this Court with the understandable, but mistaken, impression that proper doorkeeping occurred by ensuring that the proposed claims "represent 'violations of international law' norms that are 'specific, universal, and obligatory.'" *Al Shimari*, 300 F. Supp. 3d at 777 (quoting *Al Shimari*, 263 F. Supp. 3d at 599).

Jesner emphasized that it was not enough to show that a proposed ATS claim involved a specific, universal, and obligatory violation of international norms; the claim also must satisfy a separation-of-powers analysis. 138 S. Ct. at 1399 ("And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion . . . ."). And, as detailed in Section II.A, the Court applied the separation-of-powers test by adopting the rule announced in *Ziglar*: "[I]f there are sound reasons to think Congress might doubt the

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[5] The Court granted CACI's motion to dismiss to the extent it sought dismissal of Plaintiffs' direct claims of abuse, leaving only claims asserting accessorial liability.

efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar*, 137 S. Ct. at 1858).

Thus, "law of the case" cannot apply to the Court's 2017 and 2018 decisions because the Court, based on its understanding at the time, applied only half of the required test. *Al Shimari*, 300 F. Supp. 3d at 777. Therefore, CACI is entitled to rely on intervening Supreme Court precedent to seek dismissal on the grounds that Plaintiffs cannot meet the separation-of-powers test established in *Jesner* and further developed in *Egbert*.

Plaintiffs similarly try to invoke "law of the case" based on the Fourth Circuit's pleading-stage rejection of CACI's political question challenge to jurisdiction. Pl. Opp. at 6. But the political question doctrine, applied here, is fundamentally different from the separation-of-powers test required by *Egbert*. The Fourth Circuit framed the political question test as depending on the degree of military control over CACI employees, and concluded that "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity." Pl. Opp. at 6 (quoting *Al Shimari v. CACI Prem. Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016)).

For two reasons, the Fourth Circuit's pleading-stage political question decision is not a bar to considering the entirely different question of whether this is the extraordinary case in which courts should create a substantive cause of action rather than leaving that decision to Congress. First, the passage from the Fourth Circuit's political question decision focuses on whether the U.S. military directed CACI personnel to engage in unlawful conduct. With discovery closed, and Plaintiffs having taken all of the discovery they desired, the record is bereft of evidence of any such instructions. Second, the separation-of-powers inquiry required

here has nothing to do with the exercise of command and control. Rather, it has to do with the recognition that "creating a cause of action is a legislative endeavor" and "the Judiciary's authority to do so at all is, at best, uncertain," *Egbert*, 142 S. Ct. at 1802-03, as well as the practical consideration that Congress has a superior ability to "consider if the public interest would be served by imposing a new substantive legal liability," *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar*, 137 S. Ct. at 1857).

Equally important, the Fourth Circuit rejected CACI's pleadings-stage political question argument by holding that the doctrine could not apply to unlawful activity, *Al Shimari*, 840 F.3d at 157. As *Jesner* makes clear, however, separation-of-powers concerns can preclude an implied damages action even where the conduct alleged violates a specific, universal, and obligatory requirement of international law. 138 S. Ct. at 1399. Thus, neither this Court's nor the Fourth Circuit's political question decisions applied the tests required by *Jesner*, *Egbert*, and other recent Supreme Court cases in evaluating requests for judicial recognition of an implied damages remedy. Accordingly, the "law of the case" doctrine cannot shield Plaintiffs from the impact of recent Supreme Court case law concerning implied rights of action.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss this action for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2022, 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 counsel:

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