23-1932

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

In re: CACI PREMIER TECHNOLOGY, INC.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NO. 1:08 CV 0827 (THE HONORABLE LEONIE M. BRINKEMA)

ASA'AD HAMZA HANFOOSH AL-ZUBA'E, SUHAIL NAJIM ABDULLAH AL SHIMARI, AND SALAH HASAN NSAIF AL-EJAILI'S ANSWER TO CACI PREMIER TECHNOLOGY, INC.'S PETITION FOR A WRIT OF MANDAMUS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In this, its *second* petition for a writ of mandamus, CACI Premier Technology, Inc. ("CACI") characteristically blusters that a judgment for Plaintiffs at trial "could never survive appeal," and that "the trial of this action would be farcical." Def.'s Pet. at 5. CACI's first prediction makes clear that its hubris has not been shaken by its *four prior losses* in this Court (not even counting this Court's rejection of the similarly desperate mandamus petition CACI filed in 2019 on the eve of the last trial date in this case). CACI's second prediction highlights its disrespect for both the work of this Court—which has consistently rejected CACI's jurisprudential nihilism and given guidance to the District Court regarding the orderly disposition of this case, including to trial—and the judgment of a seasoned trial court judge, Hon. Judge Leonie Brinkema, insofar as she has rejected CACI's overwrought and repackaged arguments, while competently managing the procedural complexities inherent in any trial.[1]

CACI's charges, and its deflective conduct throughout this litigation, have always been designed to distract from its own actions—actions that military

[1] Judge Brinkema has been equally demanding that Plaintiffs proffer evidence to support their allegations. *See, e.g.*, No. 1:08-0827-LMB-JFA ("E.D. Va. Dkt.") No. 1144 (Feb. 28, 2019 dismissal of plaintiff Rashid at summary judgment).

investigators[2] and the federal court[3] concluded support a finding that CACI participated in torture and other serious abuse of detainees at Abu Ghraib[4] —and instead undermine public confidence in the capacity of our courts to dispense justice. Despite its chicken-little protestations, CACI is not a victim here. It is a multi-billion-dollar corporation that has used the court system to vigorously defend itself over 15 years, but now it must face a jury's review of the remaining credible allegations Plaintiffs have lodged against it. The District Court is competent to manage this important case and dispense justice.

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[2] *See Al Shimari v. CACI Premier Tech., Inc*., 758 F.3d 516, 521 (4th Cir. 2014) ("*Al Shimari III*") (citing reports of Maj. Gen. Antonio M. Taguba, Investigating Officer, Article 15-6 Investigation of the 800th Military Police Brigade (U) (2004); Maj. Gen. George R. Fay, Investigating Officer, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (U) (2004)).

[3] *See, e.g.*, E.D. Va. Dkt. No. 1396 (July 31, 2023 Order Denying Motions to Dismiss) ("Op.") at n.4; *Al Shimari v. CACI Premier Tech., Inc*., 324 F. Supp. 3d. 668 (E.D. Va. 2018).

[4] This is conduct for which the political branches have also stated require accountability. *See Al Shimari III*, 758 F.3d at 521 (conduct in Abu Ghraib violated "policies, orders and laws of the United States and the United States military.") (quoting H.R. Res. 627, 108th Cong (2004); *see also* Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004, Testimony of Secretary of Defense Donald H. Rumsfeld, *Review of Department of Defense Detention and Interrogation Operations*, S. Hrg. 108-868, available at: https://www.govinfo.gov/content/pkg/CHRG-108shrg96600/pdf/CHRG-108shrg96600.pdf) (calling for accountability for Abu Ghraib survivors).

In this 2.0 version of mandamus, CACI so distorts the District Court's decision denying its latest motions to dismiss for lack of subject matter jurisdiction as to render it unrecognizable. Far from "ignor[ing]" or "evad[ing]" binding precedent, Def.'s Pet. at 1-2, the District Court expressly invoked and applied all relevant precedent from the Supreme Court and this Court (including *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) ("*Nestlé*")'s "focus" test) in a carefully considered, fact-dependent 41-page opinion. CACI simply disagrees on the merits with the District Court's rejection of its arguments, including both its fact-bound resolution of the "focus test," pursuant to *Nestlé* and its explanation of why *Al Shimari III* and multiple of its own prior decisions preclude dismissal based on purported separation-of-powers concerns.[5]

Specifically, the District Court (1) determined, over 21 pages of careful analysis, that Plaintiffs allege (and evidence supports) an appropriate domestic application of the Alien Tort Statute, 28 U.S.C. § 1350, ("ATS"), because the

[5] Remarkably, not only does CACI seek to undermine the relevance of *Al Shimari III* and *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"), it studiously avoids another decision of this Court that squarely rejects CACI's attempted cleavage of the "touch and concern" test from the focus test. *See Roe v. Howard*, 917 F.3d 229, 240 n.6 (4th Cir. 2019) ("*RJR Nabisco* did not overturn *Kiobel* [*v. Royal Dutch Petroleum*, 569 U.S. 108 (2013)] and—in step two—retains a similar emphasis on the relevant claim's connection to U.S. territory"). The extraordinary, emergency remedy of mandamus makes no sense to issue from a court that has itself, in *Howard*, already largely rejected CACI's arguments on the merits.

record reflects substantial U.S.-based conduct relevant to the "focus" of the ATS—meaning the conduct it seeks to regulate and the interests it seeks to protect (Op. at 13 (quoting *Abitron Austria GmbH v. Hetronic International, Inc.*, 143 S. Ct. 2522, 2528 (2023)), namely, "provid[ing] foreign citizens with redress for torts in violation of the law of nations," *see* Op. at 14—and (2) properly concluded that CACI identified no controlling authority—but only cases from different, irrelevant contexts—to support its contention that ATS claims purportedly arising from the prosecution of a war are unavailable.

Even if the District Court and this Court were somehow wrong in rejecting CACI's maximalist and ungrounded interpretation of recent Supreme Court precedent, any such error correction is not the place for exercising the "extraordinary remedy" of mandamus. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted). Congress and the heavy presumption embedded in the "final judgment rule" dictate that such disputes must await the conclusion of the case; if CACI loses at trial, it can appeal this Court's predicate ruling, along with the myriad other rulings CACI has lost in this case, on a full record and in the ordinary course. *See Johnson v. Jones*, 515 U.S. 304, 313–18 (1995) (describing policies against interlocutory appeals, including judicial efficiency from appellate review on full factual record). If, on the other hand, CACI prevails at trial: (i) it can cross-appeal these questions in the event Plaintiffs

seek a direct appeal; or (ii) if Plaintiffs do not appeal, it is hard to imagine what harm would pertain to ATS jurisprudence or to CACI's interests writ large if the District Court's decision were to stand. The District Court's decision is tied to the unique factual analysis presented here—including the distinct status of internationally recognized torts arising out of U.S. government service contracts during the U.S. occupation in Iraq—so much so, that the Court's opinion has limited applicability beyond the specific parties and specialized facts of this case.

CACI's persistent efforts to waste time and delay justice must, at long last, come to an end. It is time for a jury to hear Plaintiffs' case.

CACI'S REPEATED ABUSE OF JUDICIAL PROCESS

It is important at the outset to set forth the context in which CACI makes the instant application. In seeking to evade substantive accountability for its conduct, CACI has, throughout more than 15 years of litigation, proceeded in court as if it had an open-ended exception to basic principles of legal procedure. Before the District Court, CACI has filed twenty dispositive motions (and nearly double the total number of motions) in a seriatim matter that the District Court counseled against. When CACI does not like the result, it has tried (and tried again) improper routes for appellate review before this Court (and a petition for certiorari before the Supreme Court), resulting not only in a delay of trial but also the cancellation of a 2019 trial date. Each time, CACI has largely advanced the same core arguments

under different labels or without intervening precedent justifying that earlier decisions be revisited. This petition for a writ of mandamus is no different.

Abuse of District Court Process

In one revealing and wasteful example of an abuse of process before the District Court, in May 2018, CACI sought dismissal under what it claimed was the 2018 "watershed" decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018)—a case that assessed ATS claims against a foreign corporation in a case that raised significant tensions with a foreign government (while affirming the viability of *Kiobel*). *See* E.D. Va. Dkt. Nos. 811 & 812 (May 21, 2018 Motion to Dismiss). The District Court denied the motion one month later. *See Al Shimari v. CACI Premier Tech.*, 320 F. Supp. 3d 781 (E.D. Va. 2018).

Then, in January 2019, CACI filed yet a nearly-identical motion, pointing this time to what it described as "intervening Supreme Court precedent"—the *pre-Jesner* decision in *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016)—which it claimed established a "dramatically different test": the "focus test" set out in an even *earlier* Supreme Court case, *Morrison v. National Austl. Bank, Ltd.*, 561 U.S. 247 (2010), which was already incorporated in the Supreme Court's construction of the "touch and concern" test in *Kiobel*. *See* E.D. Va. Dkt. No. 1058 at 1, 4 (Jan. 3, 2019 Motion to Dismiss). CACI filed this duplicative motion even though *RJR Nabisco* had been decided *30 months prior* to this

additional motion to dismiss and long before the *Jesner* motion. Yet, nowhere in its *Jesner* motion—or its previously filed motion for summary judgment (E.D. Va. Dkt. 1034)—did CACI mention *RJR Nabisco*'s purportedly dramatic development in the law. By filing that duplicative motion, CACI burdened the District Court and Plaintiffs with time and effort to respond to substantively identical—and repeatedly rejected—arguments.

Abuse of the Appellate Process

CACI's abuse of the appellate process has been equally striking. In 2009, CACI filed an interlocutory appeal of the District Court's denial of its first motion to dismiss, which a divided panel of the Fourth Circuit accepted, suggesting CACI's claim to derivative immunity met the requirements of the collateral order doctrine; a divided panel proceeded to reverse the District Court's decision. *Al Shimari v. CACI Int'l Inc. (Al Shimari I)*, 658 F.3d 413, 417 (4th Cir. 2011). Then, only *after* Plaintiffs successfully petitioned for *en banc* review on the propriety of that interlocutory appeal did CACI attempt to reverse the appellate jurisdiction it had previously itself invoked and *go back to the district court* to seek its certification under 18 U.S.C. §1292(b). E.D. Va. Dkt. No. 127. The District Court rightly rejected this 'Hail Mary' pass. E.D. Va. Dkt. No. 135 (finding CACI's interlocutory appeal divested the district court of jurisdiction). The Fourth Circuit then issued its 12-3 *en banc* decision rejecting CACI's interlocutory appeal and

made clear that such appeals are heavily disfavored and that CACI's claims to immunity were not appropriately appealable under the collateral order doctrine. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012), ("*Al Shimari II*").

Then, after the flurry of CACI's seriatim motions that the District Court denied between 2018 and 2019, CACI in March 2019 first petitioned this Court for mandamus review of the District Court's prior political question decisions (even as those decisions followed directly and correctly from the Fourth Circuit's ruling in *Al Shimari IV*). When the Fourth Circuit denied the petition, *see* 4th Cir. 19-1238, Dkt. No. 13, Mar. 27, 2019, CACI succeeded in halting the scheduled trial by filing *another* interlocutory appeal, which was clearly foreclosed by the Fourth Circuit's *en banc* decision seven years before on the *same* question of derivative sovereign immunity. The Fourth Circuit issued a two-page opinion dismissing CACI's appeal for lack of jurisdiction, *see Al Shimari v. CACI Premier Tech., Inc.* 775 Fed. App'x 758, 759 (4th Cir. 2019) ("*Al Shimari V*") ("This conclusion follows from the reasoning of a prior *en banc* decision in which we dismissed CACI's interlocutory appeal from the district court's denial of similar defenses," citing to *Al Shimari II*), then denied CACI's motion for rehearing *en banc*, 4th Cir. 19-1328 Dkt. No. 83 (Oct. 1, 2019 Order), and its motion to stay its ruling. *CACI Premier Tech., Inc. v. Al Shimari,* No. 19A430, 2019 WL 13415339 (4th Cir. Oct.

23, 2019). CACI then turned to the Supreme Court, which denied its certiorari petition. *CACI Premier Tech. Inc, v. Al Shimari*, 141 S. Ct. 2850 (2021).

Plaintiffs do not object to a defendant presenting a vigorous defense. But by repeatedly advancing unsuccessful arguments without good reason to revisit them, CACI acts as if it refuses to accept the judicial process and this and the District Court's rulings. The cycle must stop. CACI has cried wolf many times—repeatedly exclaiming egregious errors by the District Court and this Court—such that its continuing certitude displayed in its latest filing should cause CACI's petition to be read with additional skepticism.

ARGUMENT

CACI seeks mandamus because it claims that the District Court "refuses to give effect to intervening binding precedents on extraterritoriality and implied causes of action" that it declares "deprive the court of subject matter jurisdiction." Def.'s Pet. at 2. Indeed, to CACI's eyes the deprivation is "clear[] and unambiguous[]." *Id.* Because the District Court fully considered and faithfully applied Supreme Court and Fourth Circuit precedents on each issue in dismissing CACI's motions to dismiss, CACI's petition lacks merit.

I. Standard of Review

A writ of mandamus is a "drastic remedy to be used only in extraordinary circumstances." *In re Crawford*, 724 Fed. App'x 213, 214 (4th Cir. 2018)

(citations omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *United States v. Moussaoui*, 333 F.3d 509, 516 (4th Cir. 2003) (internal quotations omitted). A party seeking the writ must show, among other factors, "a clear and indisputable right to reversal of the order" such that there are "no other adequate means to attain the relief" sought. *See id.* at 517 (denying mandamus where the issues were "complex and difficult, and the answer [was] not easily discerned"); *see also Holub Indus. Inc. v. Wyche*, 290 F.2d 852, 855 (4th Cir. 1961) ("If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error.").

A writ will not issue when an order may be reviewed on appeal from a final judgment. *See In re Braxton*, 258 F.3d 250, 261 (4th Cir. 2001) (collecting cases). The Court of Appeals "must be reluctant indeed to permit" a petitioner "to accomplish by mandamus" what the law "so clearly prohibits by way of interlocutory appeal not certified under" 28 U.S.C. § 1292(b). *In re Catawba Indian Tribe*, 973 F.2d 1133, 1137 (4th Cir. 1992). Nor is a party's claim that the district court erred in exercising subject matter jurisdiction or adjudicating questions thereof—a routine matter for courts—sufficient for a grant of mandamus. Indeed, CACI acknowledges this reality while continuing to press its case for an

exception to the rule so that it can avoid trial. *See* Def.'s Pet. at 29-30. As this Court has advised, the availability of the writ of mandamus must "be limited to narrow circumstances lest it quickly become a shortcut by which disappointed litigants might circumvent the requirements of appellate procedure mandated by Congress." *In re Catawba Indian Tribe*, 973 F.2d at 1135.

Finally, a writ must be "appropriate under the circumstances," such as in high-stakes cases threating substantial intrusions into Presidential operations or delicate federal-state relations, *Cheney*, 542 U.S. at 380-81, or to avert "severe consequences" and irreparable injuries, like those that flow from impermissible gag orders that violate First Amendment rights. *In re Murphy-Brown, LLC*, 907 F.3d 788, 801 (4th Cir. 2018).

When its hyperbole and mischaracterizations are stripped away, CACI cannot come close to meeting this emergency standard. CACI's abstract disagreement with the District Court's principled judgment is no different from the frustration of any litigant who loses motions in the district court. CACI is thus entitled to no special appellate vehicle to address its every objection. It must await a final judgment like other litigants do. *See In re Braxton*, 258 F.3d at 261 (raising the "potential danger in permitting a party to use a petition for a writ of mandamus as an end-run around our appellate rules").

II. The District Court Faithfully Complied with Binding Precedent in Finding this Case to be a Permissible Domestic Application of the ATS

CACI's petition rests on the false premise that the District Court did not comply with binding Supreme Court and Fourth Circuit precedent when it denied CACI's motions to dismiss and determined that this case establishes an appropriate domestic application of the ATS. *See* Def.'s Pet. at 18-23.

To the contrary, the District Court did in fact (in this decision and the serial ones it issued when CACI raised the same issues in numerous prior filings) fully consider and comply with all binding Supreme Court decisions examining the ATS, from *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004) to *Kiobel* and *Jesner,* up to and including *Nestlé*, in order to apply the two-step extraterritoriality analysis (explicated by the court at length) in the Supreme Court's opinions in *RJR Nabisco*, *WesternGeco LLC v. ION Geophysical Corporation*, 138 S. Ct. 2129 (2018), and *Abitron*, 143 S. Ct. 2522. The Opinion identified the "focus" of the ATS, as required by these decisions, and carefully assessed over 20 pages the voluminous record evidence of conduct relevant to that focus. *See* Op. at 11-32. Likewise, the District Court faithfully applied the instructions of this Court—and the rationales underlying them—for adjudicating ATS claims and assessing the "focus" of statutes in cases that include an extraterritorial dimension, including (but not limited to) in *Al Shimari III*.

In so doing, the District Court properly identified the framework set forth by the Supreme Court in *Nestlé*, as drawn from the 2016 decision in *RJR Nabisco*: "plaintiffs must establish that the conduct relevant to the statute's focus occurred in the United States … even if other conduct occurred abroad.'" Op. at 12 (citing *Nestlé*, 141 S. Ct. at 1936 (quoting *RJR Nabisco*, 579 U.S. at 337)). Notably, the District Court further referenced Fourth Circuit precedent for the test, citing *United States v. Elbaz*, 52 F.4th 593, 602 (4th Cir. 2022), *docketing petition for cert.* The District Court was not "grant[ing] itself leeway," as CACI claims (Def.'s Pet. at 20), but instead drew from the Supreme Court's findings in *Sosa*, *Kiobel*, and *Jesner* in identifying the "focus" of the ATS as "provid[ing] foreign citizens with redress for torts in violation of the law of nations." *See* Op. at 14.

In applying the Supreme Court's standards, the District Court next considered the voluminous record in the case and recognized that *the facts* here far exceed those deemed insufficient in *Nestlé* or *Kiobel* to support a domestic application of the ATS. Those facts—which also undergirded briefing on CACI's summary judgment motion challenging the factual sufficiency of Plaintiffs claims that it aided and abetted and conspired in subjecting them to torture, war crimes and cruel, inhuman, and degrading treatment ("CIDT")—include: the domestic the procurement of the contract, domestic hiring decisions, headquarters' supervision and promotions, regular reporting to headquarters, and failure to act on or

otherwise disregarding notice that CACI employees could be engaged in unlawful conduct at Abu Ghraib. Op. at 20-32; *see also id.* at 19-20 (explaining the myriad distinctions of this case from *Kiobel*, *Jesner*, and *Nestlé* in "the types of connections between plaintiffs' claims and the United States").

CACI nevertheless argues that mandamus is warranted because the District Court purportedly exceeded its prescribed jurisdiction "by continuing to apply the multi-factor extraterritoriality approach used in *Al Shimari III* rather than the mechanical 'focus' test mandated by the Supreme Court and this Court." Def.'s Pet. at 6. But CACI mischaracterizes the Opinion. In doing so, CACI appears to mean two somewhat different things: *first*, that the District Court failed to acknowledge that the "focus" test—rather than the "touch and concern" test employed in *Al Shimari III*, 758 F.3d at 520, consistent with the Supreme Court's decision in *Kiobel*—is the appropriate test for analyzing whether an ATS suit is permissibly domestic; and, *second*, that the District Court inappropriately relied on "the same multi-factor balancing" used in *Al Shimari III*. Def.'s Pet. at 13-14.

The first point is baffling. CACI spends almost half of its section on extraterritoriality by simply citing Supreme Court and Fourth Circuit cases adopting the "focus test" for the extraterritoriality and its application to the ATS, including *Nestlé*. Yet as CACI grudgingly acknowledges, the District Court in fact did apply the focus test; CACI essentially confesses that its true quibble is

ultimately with the results the District Court reached when applying the focus test. *See* Def.'s Pet. at 21 ("[T]he 'focus' test, when faithfully applied, plainly renders Plaintiffs' claims extraterritorial"). Indeed, while the District Court (correctly) observed that CACI "overstates *Nestlé*'s impact on [the] 'touch and concern' standard,'" Op. at 12, it expressly concluded that "*Nestlé* warrants a reassessment of extraterritoriality," given that "the Supreme Court and the Fourth Circuit's recent extraterritoriality decisions appear to privilege consideration of the statute's 'focus' over the ['touch and concern'] inquiry articulated in *Kiobel*." *Id.* at 13 (quotation marks and alterations omitted). The Court proceeded, over 21 carefully reasoned pages, to conduct that reassessment under the framework CACI claims the Court somehow "evades." *Id.* at 11-32; Def.'s Pet. at 20.

There is no error or evading of precedent in the District Court recognition of the interrelatedness of the "touch and concern" and the "focus" tests, *see* Op. at 12, which has been evident since *Kiobel* was decided, and which this Court—in a passage CACI has studiously ignored—has expressly confirmed.[6] *See Roe v. Howard*, 917 F.3d 229, 240 n.6 (4th Cir. 2019) ("In delineating the two-step

[6] The interrelatedness of the tests is both unsurprising and logical, as *RJR Nabisco* and *Kiobel* effectively draw upon and apply the same principles for "touch and concern" and "focus," as both cite *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010) as the underlying source for their extraterritoriality analysis. *See Kiobel*, 569 U.S. at 125; *RJR Nabisco,* 579 U.S. at 336.

framework in *RJR Nabisco*, the Supreme Court drew on two of its key precedents addressing extraterritoriality: *Morrison* and *Kiobel*."); *id*. ("*RJR Nabisco* did not overturn *Kiobel* and—in step two—retains a similar emphasis on the relevant claim's connection to U.S. territory.").

As to the second point, CACI merely disagrees with the Court's *application* of the focus test to the facts, but such disagreement does not meet the high standard of mandamus. *See Al Shimari II*, 679 F.3d at 221 (distinguishing between the interlocutory appealability of decisions premised on "fact-based" versus "abstract" issues of law and noting that only the latter provided a proper foundation for immediate appeal). CACI apparently takes issue with the Court's discussion of certain factors—like CACI's citizenship, the domestic issuance of CACI's contract to perform interrogation services in Iraq, and Iraq's status as a territory under U.S. control—in conducting its analysis. Def.'s Pet. at 13-14 (citing Op. at 20). As Plaintiffs had argued in opposing the motion to dismiss, the District Court's analysis is undoubtedly correct insofar as these factors show *additional* connections to U.S. territory that make this case an appropriate one to be brought under the ATS in light of its "focus." Importantly, none of these factors were individually dispositive to its ultimate determination.[7] CACI's response to the

[7] The Court separately analyzed the "substantial domestic conduct … relevant to the alleged law of nations violations," and its lengthy discussion of the evidence

District Court's detailed 21 page analysis of relevant conduct is a half-hearted and conclusory assertion that "[t]he domestic conduct" described in the Opinion "is general corporate activity that is not actionable under the ATS." Def.'s Pet. at 23, n.17.

But the District Court addressed this argument at length in the Opinion, *see* Op. at 23-32, explaining that the "significant domestic conduct … directly related to plaintiffs' claims" differed in kind and specificity from the sort of "generic" and "attenuated" corporate conduct insufficient in itself to establish a domestic application of the ATS, *id.* at 24-25. To the extent that CACI disputes the evidence in the record, it is wrong but, more relevant here, it is a merits issue for the jury to decide. *See also Al Shimari V*, 775 Fed. App'x at 760 & n* (explaining, in dismissing appeal for lack of jurisdiction where "there remain continuing disputes of material fact" with respect to sovereign immunity defense, that "we would not, and do not, have jurisdiction over a claim that plaintiffs have not presented enough evidence to prove their version of events").

CACI then argues that at the second step of the "focus" test, which asks whether "conduct relevant to the statute's focus occurred in the United States," Op. at 12 (quoting *Nestlé*, 141 S. Ct. at 1936), "the conduct relevant" can only be the

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of such conduct did not hinge on—indeed, mentioned hardly any of—the factors that CACI complains about in its instant motion. *See* Op. at 20-31.

"primary violation" or what it describes as the "*actus reus*"—i.e., "torture, war crimes, CIDT" that occurred in Iraq—rather than the conduct of aiding and abetting and conspiracy for which CACI actually is sued. Def.'s Pet. at 21-23.[8] This asserted error only reflects a wish by CACI that the law be different; it does not demonstrate that the District Court was "so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions" of law. Def.'s Pet. at 17, citing *Holub*, 290 F.2d at 855-56.[9]

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[8] CACI has argued this same position again and again since 2013, and it has been rejected at every turn, including by this Court. *See Al Shimari III*, 758 F.3d at 527 (rejecting the position that "courts could consider only the domestic tortious conduct of the defendants" because it "is far more circumscribed than the majority opinion's requirement" that "the claims touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality).

[9] CACI leans heavily on one case, *United States v. Elbaz*, which describes what conduct is relevant to the focus of 18 U.S.C. § 1349—an entirely different statute that prohibits conspiracy to commit mail or wire fraud, for its hyper-narrow reading of conduct relevant to the focus of the ATS. *See* 52 F.4th 593, 604 (4th Cir. 2022). As the District Court explained in the Opinion, *Elbaz* "did not establish [a] bright-line rule" that CACI seeks and cannot be read "to establish a general rule that a conspiracy is domestic only if the underlying substantive offense is domestic." Op. at 23 n.15.

Moreover, *Elbaz* does not compel this Court to turn a blind eye towards overt acts and omissions that furthered the conspiracy and aided detainee abuse because that relevant conduct did not occur within the Abu Ghraib prison where Plaintiffs were tortured; nor does *Nestlé*, which considered domestic aiding and abetting conduct in its extraterritoriality analysis, albeit finding it insufficient because (unlike this case) it consisted only of generic corporate activity. *See Nestlé*, 141 S. Ct. at 1935-37.

The Opinion recites case after case in which other circuits have performed the same analysis as the District Court's: "look[ing] to the location of all conduct that constitutes secondary liability for the international law violation, not just the location of conduct that directly inflicts injury, to determine whether an aiding and abetting or conspiracy claim involves an extraterritorial application of the ATS." Op. at 21 (citing *Doe I v. Cisco Systems, Inc*., No. 15-16909, 2023 WL 4386005, at *26 (9th Cir. 2023); *Jara v. Nunez*, 878 F.3d 1268, 1273 (11th Cir. 2018); *Mastafa v. Chevron Corp*., 770 F.3d 170, 185 (2d Cir. 2014); *Doe v. Drummond*, 782 F.3d 576, 592, 597-98 (11th Cir. 2015)). CACI fails to acknowledge any of this authority, which runs contrary to its position on the merits.

Accordingly, CACI has identified no basis to provide it a "clear and indisputable" right of mandamus.

III. The District Court Correctly Applied Relevant Binding Precedent to Find that a Private Cause of Action Is Available to Plaintiffs under the ATS

Seemingly undeterred by the high standard for mandamus, CACI asserts that there must be an emergency adjudication of an argument it has made and lost—multiple times in this Court and the District Court—namely, that no ATS claim can lie in a context with purported "national security implications" that allegedly triggers "separation-of-powers" concerns. Def.'s Pet. at 4, 24-29. On an orderly appeal of a final judgment, this Court squarely rejected this argument in *Al Shimari*

IV, which the District Court has faithfully applied in several decisions rejecting similar assertions by CACI in the District Court.

CACI goes so far as to, in its solipsistic way, to fault the District Court for relying on the law-of-case doctrine to reject the argument that the District Court had actually *twice* previously rejected.[10] In CACI's view, the District Court "excused" itself from addressing arguments it had already previously took substantial time to consider and that this otherwise routine invocation of the law-of-case doctrine—at least when applied to CACI—represents a "judicial usurpation of power" warranting mandamus. Def.'s Pet. at 1.

CACI has not pointed to any intervening precedent that is contrary to the prior rulings of this Court or the District Court, instead relying on wholly unrelated subjects, like the availability of a *Bivens* claim (*Egbert v. Boule*, 142 S. Ct. 1793 (2022)),[11] which the District Court nevertheless addressed. *See* Op. at 36-41; Def.'s Pet. at 24-28. In any event, CACI used the Supreme Court's decision in

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[10] If there were a "law of the case, squared" doctrine, it would apply here.

[11] It is indeed notable that CACI has abandoned two of the three cases that triggered the underlying motion to dismiss in its petition, E.D. Va. Dkt. 1367, apparently acknowledging only after requiring the Plaintiffs to brief and the District Court to adjudicate its weak argument that decisions involving sovereign immunity (*Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022)) and the Administrative Procedure Act (*Biden v. Texas*, 142 S. Ct. 2528 (2022)) have no bearing on the justiciability of Plaintiffs' ATS claims.

Egbert to reprise arguments it had made regarding a purported *Ziglar v. Abbasi,* 137 S. Ct. 1858 (2017)/*Jesner* test, that it asserts requires dismissal of ATS claims if there is "even a single sound reason [for the judiciary] to defer to Congress" in creating a private remedy. Def.'s Pet. at 26-28. *Egbert* does no such thing. As the District Court rightly concluded, "CACI makes too much of this single quote," because of the "significant differences" between ATS and *Bivens* actions. Op. at 37 n.18. And indeed, as the District Court explained, *Sosa* already provides the "caution" that federal courts must take in considering "the practical consequences" of "making a private cause of action available" under the ATS. Op. at 5 (citing *Sosa*, 542 U.S. at 720).

CACI has not offered any meaningful response to the District Court's explanation (set forth both in the Opinion and in prior Fourth Circuit and district court decisions) that "the ATS is itself 'an exercise of congressional power' and reflects 'Congress's determination, in accordance with its war powers, that victims of violations of international law should have a remedy in federal district courts,'" Op. at 38 (quoting *Al Shimari*, 324 F. Supp. 2d at 698); *see also Al Shimari III*, 758 F.3d at 525, much less demonstrated that its arguments regarding the availability of ATS claims in this context are "clear[ly] and indisputabl[y]" correct, as is (among

other requirements) necessary to warrant mandamus.[12] *See Moussaoui*, 333 F.3d at 517.

While conveniently ignoring this Court's prior rejection of the political question doctrine, *see Al Shimari IV*—and the line of Supreme Court cases since *Sosa*—CACI has not pointed to a single ATS case disputing the availability of the ATS in "a national security context," Def.'s Pet. at 28. Its attempt to extrapolate irrelevant cases to the ATS rests on its stubborn refusal to acknowledge that the ATS is not a judicially created doctrine like *Bivens*, but rather an "exercise of congressional power." Op. at 38.

* * *

The questions in this case are no doubt complex and important. Under the system of review contemplated in the federal judiciary, district courts are

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[12] Moreover, CACI's reliance on an isolated quotation from *Nestlé* in *Dyer v. Smith*, 56 F.4th 271, 281 (4th Cir. 2022) is equally misplaced. *See* Def.'s Pet. at 28. That quote was never adopted as precedent in the ATS context, given that the corresponding section of Justice Thomas' *Nestlé* opinion was joined by only two other Justices (Justices Gorsuch and Kavanaugh). Moreover, this line from *Nestlé* cited to *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), which—like the other cases upon which CACI relies—is another *Bivens* case (Def.'s Pet. at 27); the citation was meant merely to be descriptive of *Bivens* claims, not prescriptive about how to adjudicate ATS claims. As the District Court rightly found—and had previously determined when considering CACI's argument about *Bivens* cases after *Jesner*, see *Al Shimari*, 320 F. Supp. 3d at 786—nothing in *Dyer* suggests *Bivens* claims, which are judicially implied causes of action, are analyzed in the same way as ATS claims, which are derived from a congressional statute. *See* Op. at 36-37, 40-41.

empowered to resolve them in the first instance, even if it means a litigant must face a trial it would prefer to avoid, and the Courts of Appeal are authorized to review only after a final judgment. As it has explicitly stated, CACI seeks this Court's intervention to avoid a trial that will put into the public eye the serious allegations of its involvement of torture at Abu Ghraib. Br. at 5, 31. Notably, CACI has had no issue putting its case before the public when it is on its terms – like in the 800-page book by its former CEO, J. Phillip London *Our Good Name: A Company's Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib* (Regnery Publishing: 2010). It is time for the evidence to be put before a jury and tested. A grant of mandamus on the issues CACI now raises (again) would prolong this litigation and unduly prejudice Plaintiffs, who have been waiting more than 15 years for their day in court.

There is no emergency here or "exceptional circumstances amounting to a judicial usurpation of power [that] will justify the invocation of this extraordinary remedy." *Moussaoui*, 333 F.3d at 516. The Court need not devote substantial resources to address legal conclusions CACI would have preferred to win. The extraordinary remedy of mandamus is not available, so CACI's petition should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because the brief (as indicated by the word processing program, Microsoft Word) contains 5,838 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

September 25, 2023

/s/ Baher Azmy
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on September 25, 2023, in the manner indicated below, on the following:

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