13-1937(L), 13-2162

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SALAH HASAN NUSAIF AL-EJAILI, ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellants,

—v.—

CACI PREMIER TECHNOLOGY, INC., CACI INTERNATIONAL, INC.,

Defendants-Appellees,

—and—

TIMOTHY DUGAN, L-3 SERVICES, INC.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Abu Ghraib retains its notorious and disgraceful status as a torture prison nearly ten years after images taken there of naked, bloodied and contorted Iraqi bodies and terrified, humiliated and anguished Iraqi faces – alongside U.S. civilian and military tormentors – spread quickly around the world, prompting considerable shock and anger towards the United States. These images also produced universal condemnation among U.S. political and military leaders. Former President Bush consistently affirmed that the acts of torture at issue in this case violated U.S. law and policy and our international obligations, and called for "justice to be served."[1] The then-Secretary of Defense likewise condemned the abuse of detainees, testifying that such brutality was "inconsistent with the values of our nation," and calling for accountability on behalf of the victims.[2]

Plaintiffs are among Abu Ghraib's victims. They seek accountability in the form of civil damages for atrocities perpetrated against them by a private military contractor whose employees directed the torture and abuse at Abu Ghraib, as U.S. military investigators have already concluded and as witnesses in this case have testified.

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[1] White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004).

[2] Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, May 7, 2004, *available at* armed-services.senate.gov/statement/2004/May/Rumsfeld.pdf.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1350 (Alien Tort Statute); and 28 U.S.C. § 1367 (supplemental jurisdiction). This appeal is taken from a final judgment dismissing all claims entered on June 25, 2013, A1804-33, for which a separate order was entered on August 23, 2013, A1962. Plaintiff-Appellants ("Plaintiffs") timely filed a Notice of Appeal on July 24, 2013. (Dkt. 461.) This appeal is also taken from the taxation of costs against Plaintiffs entered on August 30, 2013. A1963-64. Plaintiffs timely filed a supplemental notice of appeal of the taxation of costs on September 12, 2013. A1965-67. The clerk of the Court subsequently consolidated both appeals. This Court has jurisdiction pursuant to 29 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the District Court err in applying the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ____, 133 S. Ct. 1659 (2013), in dismissing Plaintiffs' claims brought under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), for war crimes, torture, and cruel, inhuman or degrading treatment? Specifically, where Plaintiffs' claims are against a U.S.-domiciled corporation; whose U.S.-citizen employees conspired with U.S. soldiers in one of the most notorious and internationally-condemned episodes of torture in U.S.

history; which occurred in the U.S.-controlled Abu Ghraib prison situated in territory subject to the plenary legal and political control of the U.S. government; which led to U.S. courts martial of the corporation's U.S. military co-conspirators; and where the U.S. corporation's tortious conduct at that detention facility was overseen and facilitated by conduct within the United States, did the District Court err in declining to apply the test set forth in *Kiobel* to determine whether Plaintiffs' claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application"?

2. Did the District Court err in concluding that three Plaintiffs' common law claims were time-barred based on a new ruling that changed Virginia tolling rules?

3. Did the District Court err in concluding that choice-of-law principles mandate blanket immunity for private contractors that committed torture and war crimes in U.S.-occupied Iraq?

4. Did the District Court err in permitting costs to be assessed against Plaintiffs, indigent torture victims, in favor of a multi-billion dollar corporate entity, when dismissal was based on a new and unforeseeable Supreme Court ruling issued years after Plaintiffs filed suit?

STATEMENT OF THE CASE

Plaintiffs are four Iraqi civilians who were tortured and abused while detained by the U.S. military at Abu Ghraib prison, before their eventual release without charge. They sued a U.S. government contractor, Defendant-Appellee CACI Premier Technology, Inc. ("CACI-PT"), under the ATS and common law tort for conspiring with certain U.S. military personnel to torture and seriously mistreat detainees at the Abu Ghraib "Hard Site" in 2003-2004. Plaintiffs take this appeal from the decision of the District Court (Honorable Gerald Bruce Lee) to dismiss Plaintiffs' ATS claims for lack of subject-matter jurisdiction and Plaintiff Al Shimari's common law tort claims for failure to state a claim, A1804-33, as well as the District Court's dismissal of Plaintiffs Rashid, Al-Zuba'e and Al-Ejaili's (the "Rashid Plaintiffs") common law tort claims as untimely, *Al Shimari v. CACI Int'l, Inc.*, 933 F. Supp. 2d 793 (E.D. Va. March 19, 2013).

A. The Initial Filing and Venue Transfer

On June 30, 2008, Plaintiff Al Shimari commenced this action against CACI-PT, along with its parent company CACI International Inc., former CACI employee Timothy Dugan, and another U.S. government contractor, L-3 Services, Inc., in the Southern District of Ohio where defendant Dugan resided. A60-90. The complaint alleged claims of war crimes, torture, and cruel, inhuman or degrading treatment under the ATS and common law claims of assault and battery, sexual assault and battery, intentional and negligent infliction of emotional

distress, and negligent hiring and training, against CACI-PT and CACI International Inc. (together the "CACI Defendants"). *Id.*

In August 2008, the defendants obtained a transfer of venue to the Eastern District of Virginia under 28 U.S.C. § 1404(a), citing the convenience of the parties; the CACI Defendants are headquartered in the Eastern District of Virginia. On September 15, 2008, before the defendants had filed a responsive pleading, Plaintiff Al Shimari amended his complaint to add the three Rashid Plaintiffs, who were also Abu Ghraib victims with claims against the same defendants for the same conduct at the same time. A96-121. Plaintiffs had originally been part of a putative class action raising similar claims against the CACI Defendants in *Saleh v. Titan Corp.*, No. 04-cv-1143 (S.D. Cal. Jun. 9, 2004), where class certification was ultimately denied. *See Saleh v. Titan Corp.*, No. 05-cv-1165, dkt. 146 (D.D.C. Dec. 6, 2007).

B. Denial of the Initial Motion to Dismiss

On October 2, 2008, the CACI Defendants moved to dismiss the Amended Complaint on the grounds of nonjusticiable political question, immunity from suit and preemption; failure to state a plausible claim under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); failure to allege facts sufficient to create *respondeat superior* liability; and failure to establish subject-matter jurisdiction over the ATS claims under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). (Dkt. 34, 35.) On March 18,

2009, the District Court rejected all of those arguments and denied the motion to dismiss Plaintiffs' common law claims, A126-96, *reported at* 657 F. Supp. 2d 700 (E.D. Va. 2009). The court, however, declined to exercise jurisdiction over the Plaintiffs' ATS claims, reasoning that, "tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa* requirements for ATS jurisdiction." A128, *id*. at 705.

Separately, on October 10, 2008, the CACI Defendants sought dismissal of the Rashid Plaintiffs' common law claims, asserting they were untimely. On November 25, 2008 the District Court denied that motion, holding that the Rashid Plaintiffs' limitations period was tolled under Virginia law during the pendency of the *Saleh* class action. A122-25.

The CACI Defendants then delayed the proceedings for three and a half years by prematurely appealing the District Court's denial of their motion to dismiss Plaintiffs' common law claims. In May 2012, the Court of Appeals sitting *en banc* held that the Court lacked jurisdiction over their appeal. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (*en banc*), *vacating* 658 F.3d 413 (4th Cir. 2011).

C. Proceedings on Remand

Once the case returned to the District Court in June 2012, (dkt. 141), the court eventually came to reverse nearly every one of its prior rulings:

1. Initial Reinstatement of ATS Claims

In October 2012, Plaintiffs moved the District Court to reconsider its dismissal of their ATS claims based on subsequent decisions demonstrating that torture and war crimes are viable claims under the ATS, regardless of the status of the defendants as corporate government contractors. (Dkt. 144, 145.) The court granted Plaintiffs' motion and reinstated the ATS claims. A197.

2. Dismissal of Rashid Plaintiffs' State Law Claims

During the pendency of CACI's improper appeal to this Court, the Virginia Supreme Court held that Virginia law does not permit equitable tolling of a statute of limitations due to the pendency of a putative class action in another jurisdiction. *Casey v. Merck & Co.*, 722 S.E.2d 842, 846 (Va. 2012). The CACI Defendants sought reconsideration of the District Court's 2008 decision that had tolled the Rashid Plaintiffs' common law claims during the pendency of the *Saleh* class action. (Dkt. 161, 162.) The court below declined to apply the law of the court from which the case was transferred under 28 U.S.C. § 1404(a) (Ohio), as was required under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), which would have permitted tolling; the court also rejected the argument that *Casey* should not be given retroactive effect under Virginia law. It dismissed the Rashid Plaintiffs' state law claims with prejudice. *See Al Shimari*, 933 F. Supp. 2d 793 (E.D. Va. 2013).

3. Dismissal of Conspiracy Claims in Second Amended Complaint

Plaintiffs filed a Second Amended Complaint on December 26, 2012, preserving the allegations the District Court deemed sufficient in 2009, and maintaining the same theories for the CACI Defendants' conspiracy liability, but adding numerous detailed factual allegations supporting their conspiratorial liability. A198-227. Nevertheless, on March 8, 2013, the District Court dismissed the Plaintiffs' conspiracy claims finding that these even more robust factual allegations were insufficient or implausible, (dkt. 215) – despite having previously found that the First Amended Complaint met the pleading standards under *Twombly*.[3] On March 19, 2013, the District Court *sua sponte* granted Plaintiffs leave to file a Third Amended Complaint, permitting only "amendments related to conspiracy allegations between CACI Premier Technology, Inc. and the United States Military." A379. On March 28, 2013, Plaintiffs filed their Third Amended Complaint ("TAC") against CACI-PT only, containing further detailed factual

[3] Plaintiffs' Second Amended Complaint, like its First Amended Complaint, also contained specific allegations of how CACI International and CACI-PT acted as a single entity, and how CACI-PT served as an agent or alter ego of CACI International Inc. A198-227. Nonetheless, the District Court dismissed all claims against CACI International with prejudice, (dkt. 215), even though it later implicitly affirmed Plaintiffs' theory in its final order, describing both entities as "corporations that contractually provided interrogation services for the United States military at Abu Ghraib during the period in question," A1807. *See also CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 284 (4th Cir. 2008) ("[Abu Ghraib] is the place where plaintiffs, CACI Premier Technology, Inc. *and CACI International Inc.* (together, CACI), interrogated Iraqi detainees for the U.S. military." (emphasis added)).

allegations supporting the theories of CACI-PT's liability for a conspiracy that Plaintiffs had asserted throughout this litigation. A381 and A436. The additional factual allegations were largely based on depositions recently taken in this case after remand, in which former military personnel, including those who had been court-martialed, confirmed under oath that they were acting under direction from CACI-PT personnel at Abu Ghraib. *See* A381, A436.

D. Final Disposition on the Merits and Bill of Costs

Having already dismissed the Rashid Plaintiffs' state law claims on statute of limitations grounds, on June 25, 2013, the District Court issued a memorandum opinion and order dismissing all of Plaintiffs' remaining claims against CACI-PT. A1804-33. First, the court held that, in light of the recent decision in *Kiobel*, it "lacked ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign." A1804. The court rejected Plaintiffs' argument that the *Kiobel* presumption can be displaced if particular claims "touch and concern" U.S. territory with "sufficient force," dismissing this part of the Supreme Court's holding as "textually curious." A1821. Second, the court held that Iraqi law governs Al Shimari's common law claims and that the governing Iraqi law at the time, a U.S.-drafted Coalition Provisional Authority Order, "precludes both liability under Iraqi law and the application of law from a jurisdiction within the United States to CACI-PT's actions." A1805.

On August 2, 2013, the CACI Defendants filed a bill of costs against Plaintiffs for $15,580.01. A1834-83. Plaintiffs opposed the bill A1884-98, but the defendants were awarded $13,731.61 in costs against Plaintiffs. A1963-64.

STATEMENT OF FACTS

A. Background

In March 2003, the United States and certain allies invaded Iraq and dispatched the regime of Saddam Hussein. A438 ¶11. In an attempt to control the subsequent insurgency, numerous Iraqis were apprehended in wide sweeps and detained, often with little or no reason to suspect their involvement in hostile activity. *Id*. Plaintiffs are among those Iraqi civilians held and interrogated at the Abu Ghraib "Hard Site" [4] and later released without charge. A438-47 ¶¶11, 38, 58, 67, 77.

The United States government engaged private military contractors to assist at various prisons across Iraq. A439 ¶13. CACI-PT was the only private contractor engaged to provide interrogation services to the U.S. military at the Abu Ghraib Hard Site during the period of Plaintiffs' detention – from fall 2003 to spring 2004. A439 ¶14. The terms of the contract required CACI-PT to hire and supervise qualified interrogators, A439-40 ¶15, and, as a U.S. government contractor, CACI-

[4] The Hard Site is a building in the Abu Ghraib prison complex consisting of four tiers. Tier 1A of the Hard Site, which consisted of cells and interrogation rooms, is where the worst of the Abu Ghraib atrocities occurred. *See* A438-39 ¶12.

PT employees were required to conduct themselves in accordance with relevant U.S. and international laws, which strictly prohibit the use of torture and cruel, inhuman or degrading treatment, A473 ¶192.

B. The Conspiracy Between CACI-PT Interrogators and Court-Martialed U.S. Military Personnel

As documented by military investigations, a leadership vacuum existed at the Abu Ghraib Hard Site, particularly on the night shift, which permitted CACI-PT interrogators to exercise significant authority and *de facto* command over military personnel on duty. A440-41¶18; A447-48 ¶78. The result was a conspiracy entered into between CACI-PT employees and certain Military Police ("MP") around October 2003, to abuse detainees in order to obtain intelligence, devolving into acts of "sadistic, blatant, and wanton criminal" abuse, as described in Major General Antonio Taguba's Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Investigation") – an investigation that implicated CACI-PT in wrongdoing. A447-48 ¶78.

Then-Staff Sergeant Ivan Frederick, who was later sentenced by court martial to eight years imprisonment for his participation in the torture conspiracy at Abu Ghraib, was the officer in charge of the MPs that guarded the detainees at the Hard Site. A440-41 ¶18. According to his sworn testimony, CACI-PT interrogators expressly instructed Frederick to "soften up" detainees for interrogation. *Id*. Sometimes, the CACI-PT interrogators bypassed Frederick's

command authority and directly instructed Frederick's subordinate soldiers to set specific conditions to rough up and humiliate detainees, including conditions Plaintiffs were subjected to, such as painful stress positions, beatings and use of unmuzzled dogs, among others. A440-41, A443, ¶¶18, 23; A455-56 ¶116; A401-03 ¶¶119-125.

The Taguba Investigation, along with Major General George R. Fay's later AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, both commissioned by the U.S. government, identified CACI-PT employees Steven Stefanowicz (known by co-conspirators as "Big Steve," A453 ¶103), Daniel Johnson, and Timothy Dugan as among those responsible for the atrocities at Abu Ghraib and for directing MPs to abuse detainees. A448-50 ¶¶ 81-83, 87-88. CACI-PT interrogators' encouragement, facilitation and direction of the torture and abuse of detainees was undertaken with the hope of creating "conditions" in which they could extract more information from detainees to please their paying client, the United States government. A464-65 ¶156.

C. CACI-PT's Corporate Role

In the absence of proper training and supervision of interrogators, it was foreseeable, and indeed likely, that abusive treatment of detainees would occur. A441-42 ¶19. Yet, CACI-PT neither hired experienced interrogators nor exercised

oversight of its employees' compliance with applicable law concerning the proper treatment of detainees. A442 ¶20. CACI-PT ignored reports of abuse and praised or promoted employees implicated in the abuse, thereby providing incentives to its interrogators to engage in further misconduct. A407-08 ¶146; A463 ¶148. CACI-PT attempted to cover up and mislead government officials about its employees' misconduct, which thereby perpetuated the conspiracy, in order to continue earning millions of dollars from its contract with the United States government. A463-65 ¶¶149, 152, 157.

SUMMARY OF ARGUMENT

The District Court methodically withdrew the application of *any* law to the conduct of CACI-PT, in contravention of Supreme Court precedent, this country's international law obligations and its commitment to the rule of law – all of which call out for a remedy for violations of well-established norms against torture and war crimes.

First, the District Court incorrectly read the Supreme Court's decision in *Kiobel* – which held that the Alien Tort Statute is subject to a presumption against extraterritorial application – to impose a categorical rule prohibiting recognition of any claim arising out of conduct abroad, subject only to congressional override. To the contrary, the *Kiobel* Court held that the presumption is "displaced" and an ATS claim may proceed where such "claims touch and concern the territory of the

United States . . . with sufficient force." 133 S. Ct. at 1669. The District Court's failure to apply this test is reversible error. *See* Section I(B).

The *Kiobel* Court concluded that "on [its] facts" – involving Nigerian plaintiffs, Nigerian, British and Dutch defendants, torts occurring in Nigeria and implicating the Nigerian government – the presumption should not be "displaced." 133 S. Ct. at 1669. The *Kiobel* decision and the Court's prior ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) explain how lower courts should apply the presumption to particular claims that have extraterritorial features. As lower courts have done with *Morrison* in evaluating claims brought under Section 10(b) of the Securities Exchange Act, this Court should consider the "focus" of the statute, *Morrison*, 130 S. Ct. at 2884, and the "principles underlying the presumption," *Kiobel*, 133 S. Ct. 1664. A core focus of the ATS is to ensure accountability for grave international law violations committed by U.S. subjects against aliens, and the "principles underlying the presumption" strive to avoid adjudicating claims that would cause "international discord." *Id*. *See* Section I(C).

Unlike the wholly foreign claims in *Kiobel*, Plaintiffs' claims lie at the core of the ATS' concerns and present no risk of international discord. First, unlike in *Kiobel*, Plaintiffs' claims arise out of territory over which the U.S. exercised plenary legal and political control at the time the torts were committed. Under longstanding Supreme Court precedent, this means the presumption has "no

application" to ATS claims, *see, e.g.*, *Rasul v. Bush*, 542 U.S. 466, 480 (2004), and adjudicating claims in this context would present no risk of a conflict with foreign law or with a foreign government. *See infra* Section I(C)(1). Second, unlike in *Kiobel*, Plaintiffs assert claims of universally recognized norms against a United States defendant. As *Kiobel* reconfirmed, the core function of the ATS is to ensure U.S. accountability to the community of nations for gross human rights violations committed by its own citizens and to prevent those who commit such grave crimes from obtaining "safe haven" in the United States. *See infra* Section I(C)(2). Adjudicating claims against U.S.-domiciled CACI-PT for its leading role in the notorious atrocities at Abu Ghraib would *advance* U.S. international obligations and interests, not impede them, and the claims thus "touch and concern" U.S. territory with sufficient force to displace the *Kiobel* presumption.

The District Court also erroneously dismissed all of Plaintiffs' common law claims, effectively immunizing CACI-PT from liability. It dismissed the claims of the Rashid Plaintiffs based solely on a recent Virginia decision prohibiting the tolling of statute-of-limitations law pending class action proceedings. *Al Shimari*, 933 F. Supp. 2d 793. Yet, the clear rule set forth in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), required the application of Ohio law, as the place from which transfer under 28 U.S.C. § 1404(a) occurred in this case, and under Ohio law the claims were timely. *See* Section II(A)(1). Even if Virginia law were to apply, the

District Court failed to properly undertake the inquiry required by Virginia law as to whether the recent Virginia decision should be applied retroactively. *See* Section II(A)(2).

The District Court dismissed the remaining common law claims under a novel and erroneous choice of law analysis that resulted in the application of *no* law. A1823-32. If Iraqi (rather than U.S. law) were to apply, that law – in the form of the Coalition Provisional Authority Orders issued by the U.S. government – was not designed to create blanket immunity for contractors operating in Iraq. Instead, the relevant Order directs that, while contractors are free from the jurisdiction of Iraqi tribunals, they are nonetheless subject to the laws of their "Parent State." *See* Section II(B). The District Court's further conclusion that CACI-PT's alleged torture of defenseless civilian detainees in the Abu Ghraib Hard Site constituted "combat activities," contradicts its earlier conclusion on this question as well as U.S. law and military regulations that draw clear distinctions between *bona fide* combat actions and the supporting, non-combat role of civilians such as CACI-PT employees. *See* Section II(B)(3).

Finally, the award of costs against indigent Iraqi torture victims was an abuse of discretion. Dismissal was based on an intervening and unforeseeable Supreme Court pronouncement issued many years into this litigation and awarding

costs against Plaintiffs risks deterring plaintiffs from bringing claims against powerful entities for human rights violations. *See* Section III.

STANDARD OF REVIEW

The Court "review[s] the district court's grant of a motion to dismiss *de novo*." *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 554 (4th Cir. 2013). The District Court's dismissal of the Rashid Plaintiffs' common law claims as untimely is a pure question of law, which the Court also reviews *de novo*. *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). The award of costs is reviewed for abuse of discretion. *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' ATS CLAIMS UNDER *KIOBEL*

The Supreme Court's opinion in *Kiobel* recognizes that, despite the presumption against extraterritorial application of statutes, ATS claims may in proper circumstances arise from conduct occurring outside United States territory. 133 S. Ct. at 1669. The Court set forth a fact-sensitive standard that ATS claims properly "displace the presumption against extraterritorial application" if those claims "touch and concern the territory of the United States . . . with sufficient force." *Id*. The District Court refused to apply the Supreme Court's test,

incorrectly holding that *Kiobel* creates a bright-line rule proscribing any claims involving egregious human rights abuses if they occur outside U.S. territory. A1817.

The Supreme Court repeatedly stressed that the "principles underlying the presumption" against extraterritoriality most relevant to causes of action raised under the ATS relate to international comity, *i.e*. the possibility that adjudicating a claim or entering a judgment would cause "diplomatic strife," *Kiobel*, 133 S. Ct. at 1669, or "international discord." *id.* at 1664. All nine justices believed the "entirely foreign" claims asserted in *Kiobel* – involving conduct in Nigeria, asserted by Nigerian citizens against foreign defendants neither citizens of nor domiciled in the U.S., who allegedly aided and abetted the Nigerian government – could negatively affect foreign relations and thus there could be no claim under the ATS. The claims in this case, in stark contrast, do not run afoul of the principles underlying the *Kiobel* presumption; indeed, they advance the very "object" of the ATS' "solicitude." *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010). The claims here do "touch and concern the territory of the United States with sufficient force" to displace the application of the presumption in this case.

First, the alleged torts of torture and war crimes occurred at the Abu Ghraib prison in a territory occupied by the United States and over which the U.S.

government exercised plenary legal and political authority – and thus, unlike in *Kiobel*, has responsibility for conduct occurring there. Under such circumstances, the principles underlying the presumption against extraterritoriality have "no application" to claims brought under the ATS. *See Rasul v. Bush*, 542 U.S. 466, 480-81 (2004). Second, unlike in *Kiobel*, the claims involve a U.S.-domiciled defendant and its U.S.-citizen employees conspiring with U.S. military personnel (not a foreign government) to engage in an internationally condemned pattern of torture and serious mistreatment of detainees in U.S. custody; unlike in *Kiobel*, the U.S. government has prosecuted in U.S. courts-martial the alleged U.S. co-conspirators in this case; unlike in *Kiobel* there is no other venue available to Plaintiffs; unlike in *Kiobel* adjudication of their claims would not risk a conflict of laws or offend a foreign sovereign. To the contrary, Plaintiffs' claims implicate the core historical – and still vital – focus of the ATS: to ensure accountability for gross human rights abuses committed by U.S. subjects and prevent individuals from seeking safe haven in the U.S. for such violations committed abroad. *See Filártiga v. Peña–Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

A. Whether Claims Displace the Presumption Against Extraterritoriality Is a Merits – Not a Jurisdictional – Question.

The District Court's initial error was to analyze the viability of Plaintiffs' ATS claims as a question of the court's subject matter jurisdiction, under Fed. R.

Civ. P. 12(b)(1), A1816, contrary to *Kiobel* and *Morrison*.[5] This predicate error contributed to a broader misunderstanding of the *Kiobel* presumption, as the court found it "unclear…how to apply a 'touch and concern' inquiry to a purely jurisdictional statute," A1821, and thus ignored the inquiry altogether.[6]

The District Court had already correctly determined that there is subject matter jurisdiction under the ATS to hear Plaintiffs' claims of torture, war crimes and cruel, inhuman or degrading treatment, as those claims are sufficiently "specific, universal and obligatory" international law norms, *Sosa*, 542 U.S. at 732, to satisfy the jurisdictional predicate of the ATS. A197. Extraterritoriality, by contrast, is a merits question. *See Kiobel*¸133 S. Ct. at 1664. *Kiobel* confirmed the finding set forth in *Sosa* that the ATS is a "strictly jurisdictional" statute and, as such, "does not directly regulate conduct or afford relief." *Id*. Because the common law cause of action is what regulates conduct, *id.* at 1664, the

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[5] Indeed, the District Court already has diversity jurisdiction to hear the claims asserted in this case based on 28 U.S.C. § 1332. *See, e.g., Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 169 n.4 (D.D.C. 2006) (finding that the court could rely on diversity jurisdiction over the claims asserted by U.S. plaintiffs against alien defendants).

[6] Yet even treating this as a jurisdictional question would not foreclose a fact-sensitive inquiry, as there other jurisdictional standards requiring assessment of particular facts. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (arising under jurisdiction); *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (corporate citizenship); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (maritime jurisdiction).

"presumption against extraterritoriality applies to *claims under* the ATS"; it does not apply to the ATS itself, *id*. at 1669 (emphasis added). *See also id*. at 1665 ("[T]he question is whether *a cause of action under the ATS* reaches conduct within the territory of another sovereign.") (emphasis added).

Likewise, in *Morrison*, the Supreme Court explained that asking whether the presumption against extraterritoriality applies implicates "what conduct [a statute] prohibits," which is "a merits question"; it does not relate to the court's "power to hear [the] case." *Morrison*, 130 S. Ct. at 2877. In *Morrison*, the Court found it had jurisdiction under Section 78aa of the Securities Exchange Act, *id*. n.3, but read the presumption against extraterritoriality into Section 10(b) to determine "whether the *allegations* the plaintiff makes entitle him to relief," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012) (quoting *Morrison*, 130 S. Ct. at 2877) (emphasis added).

When the question of whether torts occurring abroad state a claim is properly understood as a merits question, the obligation to apply *Kiobel*'s "touch and concern" test to facts supporting an ATS cause of action becomes apparent.

B. The District Court's Failure to Apply the Supreme Court's "Touch and Concern" Test is Reversible Error.

The District Court incorrectly concluded that the presumption against extraterritoriality, once applied to the ATS, imposes a categorical rule barring any ATS claims involving torts that occur abroad, A1817, and that this prohibition

cannot be altered except by congressional action, A1819-20. This confuses a canon of statutory interpretation (whether the presumption even applies to the ATS) with the *application* of the statute-specific presumption to particular claims once the presumption is adopted.

For example, in *Morrison*, the Court concluded as a threshold matter that the presumption against extraterritoriality applies to claims brought under Section 10(b), but left it to lower courts to determine whether, in light of the "focus" of the Exchange Act, certain conduct that occurred abroad would nevertheless displace the presumption. Specifically, *Morrison* explained that deceptive conduct occurring abroad may be actionable under Section 10(b) where it related to either a foreign transaction involving domestic securities or a domestic transaction (*e.g.*, the passing of title) in foreign securities. 130 S. Ct. at 2884. *See also Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 2013 U.S. Dist. LEXIS 80331, at *21-22 (S.D.N.Y. June 6, 2013) (offering examples of factual allegations that would displace the *Morrison* presumption including those "concerning the formation of the contracts, the placements of purchase orders, the passing of title, or the exchange of money…") (internal quotations omitted).[7]

[7] This two-step process reflects how the Supreme Court has understood congressional presumptions more broadly. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court elaborated upon the presumption against the retroactive application of legislation, explaining that even though the presumption applies when Congress has not expressly indicated a statute's

Kiobel incorporates this two-step process to the ATS. Plaintiffs do not dispute that the presumption applies to the ATS at the threshold. *See Kiobel*, 133 S. Ct. at 1669 (ATS lacks "clear indication of extraterritoriality"). Yet what *Kiobel* makes equally plain is that the presumption can be "displaced" in a particular case if the claim has sufficient ties to the United States, even if the relevant conduct occurred abroad. *See id*. (articulating the "touch and concern" test).[8] The District

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temporal reach, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id*. at 268. Thus, despite the strong presumption against retroactivity, lower courts must determine whether a specific statute would in fact operate retroactively in *the particular litigation before it* by asking "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280. If the application of a statute to the circumstances of a pending litigation would do none of those things, its application is in effect not retroactive and thus the presumption against retroactivity would be displaced. *See, e.g., Baldwin v. City of Greensboro*, 714 F.3d 828 (4th Cir. 2013).

[8] The Supreme Court essentially adopted the U.S. government's position in *Kiobel*:

> There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country. In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. [citing *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) as example of extraterritorial torts that would displace presumption]….*Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise*.

Supplemental Brief For The United States As Amicus Curiae In Partial Support Of Affirmance, at 4-5, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (filed June 13, 2012) (emphasis added).

Court declined to apply the test set forth in *Kiobel*, dismissing Part IV of the Supreme Court's opinion and its "touch and concern" test as "textually curious." A1821. This was reversible error.

All nine justices in *Kiobel* understood that ATS claims should be evaluated on a claim-by-claim basis; even if several disagreed on what standard should govern extraterritorial ATS claims, all agreed that the existence of a presumption does not end the judicial inquiry. *See Kiobel*, 133 S. Ct. at 1669 (articulating the "touch and concern" standard); *id*. at 1669 (Kennedy, J., concurring) ("The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."); *id*. at 1669 (Alito, J., concurring) (the Court's "['touch and concern'] formulation obviously leaves much unanswered"); *id.* at 1673 (Breyer, J., concurring) (the majority's standard "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome'").

The Court's majority held that "on these facts" – foreign conduct, foreign (and foreign-domiciled) defendants, foreign plaintiffs – the claims did not sufficiently "touch and concern" U.S. territory; likewise, the "mere corporate presence" of the foreign defendant via a "public relations" office in New York City, could not displace the presumption; because "[c]orporations are often present

in many countries, it would reach too far" to say that facts sufficient for personal jurisdiction necessarily support an ATS claim that is otherwise extraterritorial. *Id.* at 1669. Yet, the *Kiobel* majority never questioned the continuing viability of *Sosa* and foundational cases upon which *Sosa* relied, where the relevant torts occurred abroad. *See* 133 S. Ct. at 1663-65. *See also Sosa*, 542 U.S. at 732 (endorsing *Filártiga*, which recognized ATS claim against a defendant residing in New York who had committed torts in Paraguay); *id.* (endorsing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), which recognized ATS claim against a defendant residing in Hawaii for torts committed in the Philippines); *see also Kiobel*, 133 S. Ct. at 1665 (citing *Estate of Marcos*).

If there were any doubt that Part IV of the majority opinion recognizes that certain ATS claims may lie for conduct occurring outside U.S. territory, Justice Kennedy conclusively dispels it. His concurrence – which represented the fifth vote for what would otherwise have been a plurality approach – emphasized that *Kiobel* leaves open the possible application of the ATS for "human rights abuses committed abroad" in cases not covered by the "reasoning and holding" of *Kiobel*. *Id.* at 1669.

The District Court's adoption of a categorical bar to extraterritorial claims reflects the concurring approach of Justice Alito, who was joined only by Justice

Thomas. *Id*. at 1670 (Alito J., concurring). The District Court's failure to apply the *Kiobel* presumption to the facts of this case constitutes reversible error.

C. Because Plaintiffs' Claims Fall Within the Focus and Object of the ATS, They Displace the *Kiobel* Presumption.

To determine whether ATS claims meet *Kiobel*'s "touch and concern" standard, lower courts should examine the historical objectives of the ATS and the parallel concerns that motivated the *Kiobel* majority to apply the presumption against extraterritoriality to ATS claims. This is what lower courts have done in applying the *Morrison* presumption to Section 10(b) claims involving deceptive conduct occurring abroad. In *Morrison*, the Supreme Court explained that the "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." 130 S. Ct. at 2884. Given this statutory purpose, lower courts have found the presumption displaced where the facts show that "(1) the transaction [foreign or domestic] involved securities traded on a domestic exchange, (2) irrevocable liability [for a U.S.- or foreign-listed security] was incurred in the United States, or (3) title [for a U.S.- or foreign-listed security] was passed in the United States" regardless of where the deceptive conduct originated. *Arco Capital*, 2013 U.S. Dist. LEXIS 80331, at *19-20. The presumption was found applicable in *Morrison* involving a completely foreign transaction in foreign-listed securities, but lower courts recognize that the

presumption will not foreclose claims sufficiently connected to U.S. exchanges. *See id.*

In *Kiobel*, the Supreme Court recognized that the focus of the ATS – or the object of its solicitude – is to provide jurisdiction over civil claims by aliens for core international law violations, 133 S. Ct. at 1663, including those committed against ambassadors in the U.S. and those committed by U.S. citizens, so as to avoid diplomatic strife or even breaches of international law giving rise to war, *see id*. at 1666-68 (discussing *inter alia* the Marbois incident and the Bradford opinion, and citing Federalist No. 80). *See also Sosa*, 542 U.S. at 715 (explaining that when Congress passed the ATS, the three principal offenses against the law of nations fell within "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships"). Likewise, the Court cautioned that the "principles underlying the presumption" counsel against applying the ATS to claims, such as the particular foreign-cubed claims in *Kiobel*, that could cause "international discord." *Kiobel*, 133 S. Ct. at 1664-65. Accordingly, lower courts should find the presumption displaced where the claims sufficiently touch and concern U.S. territory so as to oblige the United States – from the perspective of the international community – to provide a civil remedy for grave violations of the law of nations or suffer "diplomatic strife." *Id*. at 1669.

Under the principles animating the *Kiobel* presumption and the core purposes of the ATS, it is difficult to imagine a constellation of facts that would provide more support for displacing the presumption than those presented in this case. First, the claims arise out of universally condemned acts, *i.e.* torture and war crimes, perpetrated against foreign nationals who were, by virtue of the U.S. plenary legal and political authority over Iraq and Abu Ghraib, under the custody and implicit international-law responsibility of the U.S., and where there was no conflicting law in place. Second, the atrocities were committed by U.S. actors, in a conspiracy with U.S. soldiers and via a contract with the U.S. government; accordingly, adjudication of these claims would advance U.S. obligations to punish American tortfeasors and provide a remedy to their victims, and to ensure the United States does not provide "safe haven" to torturers, particularly since, unlike in *Kiobel*, there is no other forum to adjudicate Plaintiffs' claims. Finally, the tortious conduct of the corporation's employees at Abu Ghraib was supported and facilitated by the corporation's U.S.-based conduct.

1. The U.S. Jurisdiction and Control Over the Territory in Which the Torture and War Crimes Arose is Sufficient to Displace the *Kiobel* Presumption.

(a) The Kiobel Presumption is Displaced Where Torts Occur Within the United States' "Territorial Jurisdiction."

In *Rasul v. Bush*, the Supreme Court rejected the assertion that the

presumption against extraterritoriality would preclude application of the Alien Tort Statute or federal habeas statute to claims asserted by persons detained at the U.S. Naval Base in Guantánamo Bay. 542 U.S. 466, 480 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)). The Court explained that, "whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application [to places] within the 'territorial jurisdiction' of the United States." *Id*. (quoting *Foley Bros, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Despite Cuba's retention of "ultimate sovereignty" over Guantánamo, the *Rasul* Court concluded the base was within the "territorial jurisdiction" of the United States because the U.S. government maintained "complete jurisdiction and control" over it. *Id*.

Rasul's analysis hewed to a line drawn by prior Supreme Court decisions that assessed the applicability of the presumption based on the level of actual control the United States exerted over a territory. *Compare Vermilya-Brown v. Connell,* 335 U.S. 377, 382 & n. 4 (1948) (Fair Labor Standards Act ("FLSA") applies to U.S. naval base in Bermuda because relevant lease granted "rights, power and authority" and "control" to the U.S.) *with Foley Bros,* 336 U.S. at 285 (FLSA did not apply to corporation acting in Iraq/Iran absent "some measure of legislative control" or any "transfer of property rights to the U.S.").

Particularly given its reliance on *Aramco,* the *Rasul* Court clearly understood

that the presumption against extraterritoriality operates on the assumption that Congress does not intend to legislate "beyond places over which the United States has sovereignty or has some measure of legislative control," specifically so as to "protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248 (citing *Foley Bros.*, 336 U.S. at 285). The *Rasul* Court's construction of the presumption against extraterritoriality is in perfect harmony with *Kiobel*'s articulation of the presumption, as well as its application in *Vermilya* and *Foley Bros*. To say, as the *Rasul* Court did, that the presumption has "no application" to places over which the United States exercises "territorial control," *see Rasul*, 542 U.S. at 480, is tantamount to concluding that a claim "touch[es] and concern[s] the territory of the United States …with sufficient force to displace the presumption."

(b) Because Torture and War Crimes Occurred in a Place Over Which the U.S. Had Territorial Jurisdiction, the Kiobel Presumption Is Displaced.

The District Court misunderstood the reach and relevance of U.S. authority in Iraq. Unlike the *Kiobel* plaintiffs, whose claims arose on a territory (Nigeria) over which the United States had no "measure of legislative control," *Foley Bros.*, 336 U.S. at 285, or "rights, power or authority," *Vermilya*, 335 U.S. at 382, Plaintiffs' ATS claims for torture and war crimes here substantially arose at Abu Ghraib prison in Iraq, during a time in which the United States exercised

"complete jurisdiction and control," *see Rasul*, 542 U.S. at 480. Also, as in *Rasul* (but unlike in *Kiobel*), the claims here arose during a time and under a legal regime in which there was effectively no law in operation other than United States law, thereby avoiding any of the conflict with foreign (Iraqi) law which animates *Kiobel*'s presumption. The District Court's contrary conclusion is foreclosed by *Munaf v. Geren*, 553 U.S. 674, 680 (2008), which held that the habeas statute applied extraterritorially to govern U.S. conduct in Iraq, despite U.S. participation as one of many countries in the governing Multi-National Force-Iraq, the successor to the Coalition Provisional Authority ("CPA"), and despite Iraqi then-control of prisons.

First, the District Court focused on whether the U.S. retained formal sovereignty over Iraq; it was not persuaded that it did. A1817. That is an irrelevant inquiry. The Supreme Court has repeatedly instructed that *control* – measured by practical, real-world attributes and not formal sovereignty – is the relevant touchstone for adjudicating extraterritorial claims. *See Rasul*, 542 U.S. at 475 (habeas statute and ATS apply where U.S. exercises "plenary and exclusive jurisdiction," but not "ultimate sovereignty'"); *Boumediene v. Bush*, 553 U.S. 723, 762, 764 (2008) (rejecting government's proposed "formalistic, sovereignty-based test for determining the reach of the Suspension Clause" because "questions of extraterritoriality turn on objective factors and practical concerns, not formalism");

id. at 754 (relevant question is whether U.S. exercises "dominion or power" in "the general, colloquial sense").[9]

Second, the District Court incorrectly discounted the legal significance of U.S. control over Iraq and Abu Ghraib via its governance of the Coalition Provisional Authority, because "the CPA was the product of a multinational coalition." A1817-18. This is incorrect. Given that the United States created, commanded and controlled the CPA, the U.S. government had, under the relevant practical considerations, sufficient "legislative control," *Foley Bros*., 336 U.S. at 285, and "rights, power and authority," *Vermilya-Brown*, 335 U.S. at 382, to displace the presumption against extraterritoriality, regardless of the supporting role of other countries in that coalition.

In March 2003, the United States initiated a military invasion of Iraq, overthrew its government and thereafter acted as the commander of the multinational coalition force that invaded and administered the post-invasion

[9] The District Court mistakenly relied on *In re Iraq & Afghanistan Detainees Litig.*, in which the D.C. district court incorrectly assumed that it needed to establish whether the U.S. exercised sovereignty in Iraq "simply by virtue of our Armed Forces' presence in a country with which we are at war." 479 F. Supp. 2d 85, 102-03 (D.D.C. 2007). The district court in that case relied on *Boumediene v. Bush*, 476 F.3d 981 (D.D.C. 2007), which had determined that what mattered was "Cuba - not the United States - has sovereignty over Guantanamo Bay" – a holding that was later reversed by the Supreme Court. *Boumediene*, 553 U.S. at 754-55.

occupation.[10] As the commander, the U.S. government bore exclusive responsibility for reporting to the U.N. Security Council on the Coalition Forces' behalf. *See* A660, S.C. Res. 1511 ¶25; S. C. Res. 1546 ¶31.

In May 2003, President Bush appointed Ambassador Paul Bremer as civil Administrator of Iraq and executive of a new governing institution, the CPA. Through the CPA, the Executive Branch of the United States assumed final control over all lawmaking functions in the U.S.-occupied country:

> The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq . . . The ***CPA is vested by the President with all executive, legislative and judicial authority necessary to achieve its objectives***… The CPA Administrator has primary responsibility for exercising this authority.[11]

Thus, the CPA functioned as the government of Iraq with plenary legal and political power. *See* A643, CPA Regulation 1 §1.2 (May 16, 2003) ("The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives…"). Congress appropriated funds for the CPA "in its capacity as an

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[10] *See*, *e.g.*, Statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint Staff, *The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm.*, 108th Cong. (May 13, 2004) (available from Lexis News-All) (MNF-I "is subordinate to General Abizaid as Commander, U.S. Central Command.").

[11] White House's Office of Management and Budget (U.S. Office of Management and Budget, "Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11), June 2, 2003) (emphasis added).

entity of the U.S. Government,"[12] and the Executive Branch considered the CPA an "instrumentality" of the U.S. government in representations to the courts and other administrative agencies.[13]

Finally, even if other countries participated in the U.S.-led CPA, the critical point is that Iraqi law was broadly preempted by the CPA. The CPA immunized contractors such as CACI-PT from liability in Iraqi courts and directed that *United States domestic law* would apply to the activities of contractors such as CACI-PT. *See* A667 §3.1, 3.2; *see also infra* Section II.B. Accordingly, the principles of comity "underlying the presumption" against extraterritoriality, *Kiobel*, 133 S. Ct. at 1665, are not implicated. If U.S. law (in the form of the ATS or state law claims) were not to apply to Iraq, then *no law* would apply. Yet, the fundamental lesson of *Rasul* is that there can be no prisons beyond the law.

2. Plaintiffs' Claims Against a U.S.-Domiciled Corporation for Conspiring with U.S. Soldiers to Commit Torture and War Crimes Displace the *Kiobel* Presumption.

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[12] *See* Emergency Supplemental Appropriations Act for the Defense and Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209, 1225, 1236 (Nov. 6, 2003)

[13] *See* Supplemental Brief of the United States, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, Case No. 1:04cv199, at 2 (E.D. Va. 2004); *see also* P.L. 108-106 Sec. 3001(f)(1)(D) (identifying job of CPA Inspector General to monitor the transfer of funds "between and among the Coalition Provisional Authority, *other departments, agencies, and entities of the Federal Government*, and private and non-governmental entities") (emphasis added).

Kiobel specifies that displacement of the presumption turns on whether the "claim" sufficiently "touch[es] and concern[s]" U.S. territory – not the underlying conduct. 133 S. Ct. at 1669. Although the "mere corporate presence" of a foreign defendant in the United States such as through the defendant's public relations office in *Kiobel* would not alone be sufficient to support an ATS claim, 133 S. Ct. at 1669, the claims asserted here – that U.S.-citizen employees of a U.S.-domiciled corporation conspired with U.S. soldiers in U.S.-controlled territory – surely do.

First, unlike the claims against the British, Nigerian and Dutch corporations considered in *Kiobel*, adjudicating claims against a *U.S.*-domiciled corporation such as CACI-PT would not present a risk of "international discord." 133 S. Ct. at 1664. This is especially true because CACI-PT's alleged co-conspirators in this case are not foreign actors but United States personnel. *Compare Kiobel*, 133 S. Ct. at 1663 (claims alleged defendants aided and abetted Nigerian government). Discovery would not implicate foreign government officials, judgments or resources. Likewise, entry of a judgment against a U.S. corporation would not require the attachment of foreign assets or enforcement by a foreign government. Where courts attach liability under U.S. law to its own citizens, there is no risk of judging – and offending – foreign sovereigns. *See id*. at 1673-74 (Breyer, J., concurring) (where defendant is an American national, extraterritorial application of ATS would not conflict with "*Sosa*'s basic caution," *i.e*. "to avoid international

friction"). This is particularly true where, given the immunity from jurisdiction in Iraqi tribunals U.S. contractors enjoy, these alien Plaintiffs have no other forum in which to pursue their claims. *See infra* Section II.B.

Indeed, courts *promote* international relations and bolster international legitimacy when adjudicating claims against U.S. actors arising from universally condemned conduct (particularly in the disgraceful episode in Abu Ghraib) in the only forum available: U.S. courts. *See* U.S. Suppl. *Kiobel* Br. at 5 (recognizing that the State where a corporation is domiciled can "be thought responsible in the eyes of the international community for [failing to] afford[] a remedy for the company's actions").[14] Notably, the United States has already urged this Court to allow Plaintiffs' claims related to torture to proceed because they seek to vindicate one of our most important national interests – the prohibition of torture. Br. of Amicus

[14] In reporting to the various bodies of the United Nations charged with overseeing States parties' compliance with their treaty obligations, the United States has consistently cited the Alien Tort Statute as one mechanism by which it upholds its obligations to punish these acts and provide a remedy for these offenses, even when offenses occurred outside the U.S. *See, e.g.*, U.S. Dep't of State, United States Report to the Committee Against Torture, ¶¶51, 61-63, 277-280 (reporting on "measures giving effect to its undertakings under [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]", cites ATS cases for torture that occurred in territory of foreign sovereigns), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf; U.N. Human Rights Committee, 4th Periodic report of the United States, ¶185, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

Curiae United States, *Al Shimari v. CACI International, Inc.*, No. 09-1335, dkt. 146 at 22-23, 26 (4th Cir. Jan. 14, 2012) ("U.S. 4th Cir. Amicus Brief").

In addition, a core, historical underpinning of the ATS is to remediate international law violations committed by U.S. subjects, lest the U.S. lose legitimacy in the international community. Even skeptics of a broad reading of the ATS recognize that, at the time of the ATS' passage, "every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens." Anthony J. Bellia, Jr. and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 448 (2011)*; see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Intl. L. 587, 630–31 (2002) (describing how the ATS was "consistent with the law of international responsibility in the late 1700s"); Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 Va. J. Intl. L. 649, 652 (2002) (describing a sovereign's obligation to remedy citizens' law of nations violations).

The Supreme Court itself underscored this central function of the ATS in its analysis of a legal opinion by then-U.S. Attorney General William Bradford which addressed the viability of the ATS to punish Americans who were part of a plunder of a British slave colony in Sierra Leone. *Sosa*, 542 U.S. at 721 (citing Breach of Neutrality, 1 Op. Atty. Gen. 57, 58 (Jul 6, 1795)). Referring to the recently-enacted ATS, Bradford explained that, even though the attacks in question occurred on

foreign (British) territory, "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States." *Id*. (quoting 1 Op. Atty. Gen. at 59)). While *Kiobel* recognized its interpretive significance, the Court found the Bradford opinion inapposite to the facts before it, as the opinion "deals with *U.S. citizens*" and thus would not implicate the concerns regarding international comity underlying the presumption. *Kiobel*, 133 S. Ct. at 1668 (emphasis added).

Finally, the landmark *Filártiga* case, endorsed by the Supreme Court in *Sosa*, 542 U.S. at 732 (citing *Filártiga*, 630 F.2d at 890), further supports claims against U.S. tortfeasors such as CACI-PT. *Filártiga* held that a Paraguayan citizen could bring an ATS claim for torture that occurred in Paraguay, against a defendant who had been residing in the U.S. 630 F.2d at 878. Recognizing that "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind," *Sosa*, 542 U.S. at 732 (quoting *Filártiga*), *Sosa* and *Filártiga* reinforce the principle that the ATS should subject U.S. citizens and persons residing in its territory to liability for egregious human rights violations committed against foreign nationals. *See also* Restatement (Third) of Foreign Relations Law of the United States, §402(2) and cmt. e (1987) (recognizing jurisdiction over a state's nationals for activities inside and outside its territory). Otherwise, the United States would essentially be providing "a safe harbor…for a

torturer or other common enemy of mankind." *Kiobel*, 133 S. Ct. at 1671 (Breyer, J. concurring).

This Court should not permit U.S.-domiciled corporations such as CACI-PT a "safe harbor" from accountability for its role in torture and war crimes in Abu Ghraib.

3. CACI-PT's Furtherance of the Conspiracy from the U.S. Further Compels Displacement of the *Kiobel* Presumption.

Plaintiffs' claims that CACI-PT furthered the serious violations occurring in Abu Ghraib through conduct occurring inside the United States further compels displacement of the *Kiobel* presumption. First, the contract under which CACI-PT provided interrogation services at Abu Ghraib was issued in the United States, *see* A439 -40 ¶¶14-16, and those contracted services facilitated the role of CACI-PT employees in the conspiracy. *See Newmarket Corp. v. Innospec Inc.*, 2011 U.S. Dist. LEXIS 54901, *15-16 (E.D. Va. May 20, 2011) (business transactions between parties in Virginia supported extraterritorial application of Virginia Business Conspiracy statute to bribery claims that took place in Iraq and Indonesia). Second, much of the "decision-making vital to the sustainability" of the conspiracy came from the U.S. *See, e.g., Aluminum Bahr. B.S.C. v. Alcoa Inc.*, 2012 U.S. Dist. LEXIS 80478, *9 (W.D. Pa. June 11, 2012). CACI-PT ratified and encouraged the role its employees played in the torture conspiracy through decisions it made in Virginia. A437 -38 ¶8. The recruiting and hiring of

interrogators to send to Abu Ghraib was completed – without due care – in the U.S., *see* A407-08 ¶¶146-147, as were decisions to promote CACI-PT employees at Abu Ghraib who are alleged to have directed the torture and abuse, *see* A409 ¶154.

Further, CACI-PT's U.S.-based management turned a blind eye to reports of employee abuse and failed to adequately train and supervise employees to prevent reasonably foreseeable abuses of detainees at Abu Ghraib. *See* A408-09 ¶¶148, 150-151. Likewise, CACI-PT's U.S.-based management attempted to cover up misconduct of its employees, and thereby perpetuated and prolonged the conspiracy, by misleading United States government and international officials regarding CACI-PT's role in detainee abuse and failing to report instances of detainee abuse. *See* A408-09 ¶¶149, 152, 153, 155. CACI-PT did so in order to continue earning millions of dollars from its contract with the United States government. A409-10 ¶¶156-157.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' COMMON LAW CLAIMS.

A. The District Court Erred in Dismissing the Rashid Plaintiffs' Common Law Claims Based on the Statute of Limitations.

The District Court granted partial summary judgment to CACI and dismissed the Rashid Plaintiffs' common law claims on the ground that their claims were not asserted within Virginia's two-year statute of limitations for

personal injury claims. This constitutes reversible error for two reasons: First, contrary to the Supreme Court's directive in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the court applied the limitations law of Virginia rather than Ohio, the forum from which this case was transferred under 28 U.S.C. §1404(a). Second, even assuming Virginia law governed, the court failed to abide by governing non-retroactivity principles, which counsel against applying a new Virginia Supreme Court decision issued long after the commencement of this action.

1. The District Court Applied the Wrong Limitations Law.

When a case is transferred pursuant to 28 U.S.C. § 1404(a), "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." *Van Dusen*, 376 U.S. at 639. The transfer should result merely in a change in courtroom, not a change in law. *Id*. Failing to heed *Van Dusen*'s clear rule, the District Court looked to the statute of limitations law of the transferee court (Virginia) rather than the law of the transferor court (Ohio) and dismissed the Rashid Plaintiffs' common law claims.

The *Van Dusen* decision leaves no doubt that the law of the transferor court should govern the entire case – including matters that arose after transfer. The Supreme Court approvingly cited *H.L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1962), in which the Court of Appeals approved a transfer from a federal court in New York to one in Alabama, noting that the transferee court would be obliged

to apply New York law even to matters added by amendment after transfer. *See* 376 U.S. at 631.

The principle is the same here: amendments to the complaint after transfer, whether to add claims or plaintiffs, are controlled by the law that the transferor court would have applied. *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994) (applying choice of law rules of the transferor court even after plaintiff amended his complaint to add claims in the transferee court); *Riddle v. Shell Oil Co.*, 764 F. Supp. 418, 423 (W.D. Va. 1990) ("If this court were to apply [defendant]'s reasoning, a plaintiff would have to go back to the court where the case was originally filed whenever the plaintiff wanted to amend his complaint. Such an argument not only contravenes the policy of judicial economy, but also ignores the fact that this court is sitting as a Mississippi court. Although served in Virginia, defendant Unocal was made party to an action governed by the law of Mississippi.").

The *Van Dusen* rule applies even where it is the plaintiff who seeks a § 1404(a) transfer. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). In such circumstances, the Supreme Court noted in a dictum, "[p]laintiffs in the position of the Ferenses must go to the distant forum because they have no guarantee, until the court there examines the facts, that they may obtain a transfer." *Id.* at 532. Contrary to the conclusion of the court below, that dictum has no application here,

where the Rashid Plaintiffs are not "in the position of the Ferenses": the transfer was requested by defendants, not plaintiffs, and the Rashid Plaintiffs did not file a new action (as in *Ferens*) but instead joined, via a Rule 15(a)(1) amendment, in an *existing* complaint raising the same claims that they wished to assert. That amendment was made as of right under Rule 15, but an amendment joining plaintiffs is only proper where the claims both arise out of the same (or same series of) transactions or occurrences, and have common questions of law or fact. Fed. R. Civ. P. 20(a)(1). Those limitations give assurance that plaintiffs added post-transfer will only be able to rely on the law of the transferor forum when they are appropriately joined in the same "action." *See Hinson v. Norwest Fin. S. Carolina*, 239 F.3d 611, 618 (4th Cir. 2001) ("a court determining whether to grant a motion to amend to join additional plaintiffs must consider both the general principles of amendment provided by Rule 15(a) and also the more specific joinder provisions of Rule 20(a)").

If the District Court properly applied the choice of law principles of the transferor court, the Rashid Plaintiffs' common law claims would be found timely. The Southern District of Ohio would look to Ohio's choice-of-law rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), regardless of what substantive law applies to a claim, *see Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 834 (N.D. Ohio 2010) ("Ohio

courts are required to apply Ohio's statute of limitations to an action filed in Ohio even if that action would be time-barred in another state."). Ohio recognizes cross-jurisdictional equitable tolling for all members of a purported class. *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002). There is no dispute that tolling of the statute of limitations during the approximately three-and-one-half-year pendency of the *Saleh* class action (June 9, 2004-Dec. 6, 2007) means that the claims of the Rashid Plaintiffs are timely under Ohio law.

2. The District Court Improperly Applied the Casey Decision Retroactively.

Even if Virginia supplied the appropriate limitations law for the Rashid Plaintiffs' common law claims, the District Court failed to properly assess the appropriateness, under governing non-retroactivity principles, of application of the new statute of limitations principles recently announced in *Casey v. Merck & Co.*, 722 S.E.2d 842 (Va. 2012) (rejecting tolling for members of putative class during pendency of class action). Under Virginia law, a decision cannot be retroactively applied if:

> (1) the decision sought to be applied retroactively established a new principle of law either by overruling clear past precedent on which litigants may have relied *or by deciding an issue of first impression whose resolution was not clearly foreshadowed*; (2) the retroactive application of the new rule would further retard its operation; and (3) substantial inequity would result if the new law were applied retrospectively.

City of Richmond v. Blaylock, 440 S.E.2d 598, 599 (Va. 1994) (emphasis added).

The District Court's decision misstated and misapplied the *Blaylock* test. It omitted the portion of the *Blaylock* test italicized above and concluded that the novel *Casey* ruling had to be applied retroactively because it did not overturn clear past precedent. *Al Shimari*, 933 F. Supp. 2d at *24.

Casey decided an issue of first impression that was not foreshadowed in Virginia law. The Second Circuit Court of Appeals certified to the Virginia Supreme Court the question whether "Virginia law permit[s] equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction" precisely because there was no dispositive decision in the prior jurisprudence of Virginia. *Casey v. Merck & Co.*, 653 F.3d 95, 104 (2d Cir. 2011). Indeed, in this case, the District Court initially read the law of Virginia to have tolled the claims of the Rashid Plaintiffs, premised on the then-closest Virginia authority, *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 541 S.E.2d 909, 912 (Va. 2001) (holding plaintiff's limitations period in Virginia was tolled during pendency of plaintiff's claim in federal court outside of Virginia), and in accord with well-established federal tolling law, *Crown v. Parker*, 462 U.S. 345, 350 (1983); *Am. Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974). *See* A122-25.

The District Court did not address the remaining *Blaylock* factors, neither of which supports retroactive application of the new *Casey* rule. Retroactive

application to the Rashid Plaintiffs does nothing to further the operation of the *Casey* rule. CACI has known since 2008 that it would have to defend this action, due to the timely, identical claims filed by Plaintiff Al Shimari. Refusing to give retroactive effect to the *Casey* decision would not undermine the policy rationale of preventing "a flood of subsequent filings [in Virginia] once a class action in another forum is dismissed," because new plaintiffs are now on notice of the *Casey* rule. Furthermore, substantial inequity would result if the new law were applied retrospectively to the Rashid Plaintiffs to deny the Rashid Plaintiffs a state law remedy. *See Fieldcrest Cannon, Inc. v. Marshall*, 1997 Va. App. LEXIS 195, *3 n.1 (Va. Ct. App. Apr. 1, 1997) (noting that where "retrospective application would result in substantial inequity to claimants whose claims in tort are now barred by the statute of limitations," the court would not retroactively apply the judgment); *Piedmont Mfg. Co. v. East*, 1997 Va. App. LEXIS 90, *3 n.1 (Va. Ct. App. Feb. 25, 1997) (same). Had the Rashid Plaintiffs known in 2008 that Virginia would not permit equitable tolling, they would have filed their claims in Ohio; it was CACI-PT's premature appeal that delayed this case for nearly four years and denied these Plaintiffs an opportunity to plead their claims in a jurisdiction amenable to their state law claims.

B. The District Court Dismissal of Plaintiff Al Shimari's Common Law Claims Was Based on an Erroneous Choice of Law Analysis that Provides Blanket Immunity for Contractor Misconduct.

Choice-of-law rules exist to assist a court in selecting *which* of potentially conflicting bodies of substantive law to apply, not to decide *whether* any body of law applies. Yet, here, the District Court interpreted choice-of-law principles in a manner that forecloses application of any law altogether, granting CACI-PT (and any contractors) blanket immunity from tort principles contrary to U.S. law and public policy.[15]

1. The Governing Legal Regime in Iraq Requires Application of Virginia Law.

In the typical tort case, the state of the place of injury or conduct will have an interest in having its laws apply because injury and tortious conduct are the "two principal elements" of tort law. Restatement (Second) of Conflict Laws § 146 cmt. d (1971). However, these factors carry no weight in this case because, at the time the tortious conduct occurred, Iraq was under occupation and its local laws did not apply to occupation forces or their contractors; in exchange for immunity from Iraqi court jurisdiction, U.S. contractors were to be subject to U.S. domestic law. *See* A667, §3.1. Indeed, CACI-PT's contract with the U.S.

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[15] The District Court considered this issue solely with respect to Plaintiff Al Shimari, because the common law claims of the Rashid Plaintiffs had previously been dismissed on statute of limitations grounds. That dismissal was in error, *see* Section II (A) *supra*, and the arguments in this section therefore should apply equally to all of the Plaintiffs.

government put CACI-PT on notice that it was bound to comply with U.S. law, including the prohibition of torture. *See* A439-40 , A472-73 ¶¶15, 189-92.

Specifically, on June 26, 2003, the CPA issued Order 17, declaring that "under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory," and that Coalition personnel are therefore "subject to the exclusive jurisdiction of their Parent States," A667 §2.4, in a manner consistent with jurisdictional principles, *see Coleman v. Tennessee*, 97 U.S. 509, 515 (1879) (Union soldiers during Civil War "were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished"); *Dow v. Johnson*, 100 U.S. 158, 165 (1880) ("[T]he tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army."); *see also* Order 17 §3.1. Thus, Order 17 further directs suits against contractors to be brought in the courts of, and under the laws of, the nation from which the contractor was sent. *See* A668, §6 (stating personal injury claims "arising from or attributed to Coalition personnel or any persons employed by them…that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State…in a manner consistent with the national laws of the Parent State.")

If there were any doubt about the applicability of U.S. tort law to unlawful contractor conduct, a public notice issued by Ambassador Bremer in conjunction with Order 17, A1183, emphasized that the Order was not intended to grant immunity. The notice states that while Coalition personnel "are not subject to local law or the jurisdiction of local courts," this "*will not prevent legal proceedings against Coalition personnel for unlawful acts they may commit.* It simply ensures that such proceedings will be undertaken in accordance with the laws of the State that contributed the personnel to the Coalition." (emphasis added).

Unlike the garden-variety tort case, where the place of injury and/or tortious conduct will usually serve as the basis for the choice of law, here Iraqi law was displaced by a legal regime requiring application of U.S. tort law. Yet, faced with the decision to apply the tort law of the "Parent State" as directed by CPA 17 (and contemplated by *Dow* and *Coleman*), or to apply *no* law whatsoever, the District Court accepted CACI-PT's invitation to do the latter and grant it immunity from legal obligations imposed on it by the tort law of the United States.[16]

2. The District Court Erred in Overbroadly Interpreting the "Combat Activities" Language in CPA Order 17 in Contradiction With its Prior Ruling and U.S. Law.

[16] Although much of the debate in the briefs and decision below focused on whether Ohio or Virginia law should apply, that debate was unnecessary, because both states recognize the core tort principles, such as assault and battery, that form the basis of the Plaintiffs' common law claims.

The District Court correctly identified CPA Order 17 as a key to the choice of law inquiry. However, it interpreted Section 6 of the Order in a manner that not only contradicts the court's own prior rulings, but would also swallow the expressed intent of the Coalition that contractors not be given immunity from tort claims.

The court incorrectly concluded that CACI-PT's abuse of the detainees arose "in connection with military combat activities," and that it was therefore immune from the tort actions authorized by Section 6 of Order 17. Yet, section 6 should be read in accordance with background principles of federal and international law, and therefore was intended only to preserve the "soldier's privilege" to inflict injuries on the battlefield in accordance with the laws of war without fear of legal retribution, a principle that is reflected in provisions of the Federal Tort Claims Act and the Foreign Claims Act exempting from tort claims injuries that arise as a result of combatant activity.[17]

[17] The Federal Tort Claims Act (FTCA) contains an exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Similarly, the Foreign Claims Act will only permit compensation for a claim that "did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat." 10 U.S.C. § 2734(b). Notably, the FTCA excludes contractors from its scope. *See* 28 U.S.C. § 2671.

Without analysis, the court below nevertheless declared that "[t]he detention and interrogation of potential enemy combatants or hostile individuals is most certainly connected with contemporaneous military combat operations." A1830. In doing so, the court contradicted its own prior decision that it was "inclined to adopt the more limited definition [of combat activity] because it comports with the common sense notion that a government contractor does not necessarily conduct combatant activities merely because it provides services in support of a war effort." A168 (citing *Skeels v. United States*, 72 F. Supp. 372, 374 (D. La. 1947)("combat activities," as used in the FTCA, "means the actual engaging in the exercise of physical force")). Because all of the contractors in Iraq were in some way supporting the military effort, the court's adoption of an expansive view of "combat activities" would effectively confer the immunity from legal responsibility that the Coalition told the world it did not intend to confer.

More importantly, cloaking abuses inflicted on helpless detainees in tort immunity would provoke a conflict with principles of national and international law to which the United States has subscribed. Torture of a detainee off of the battlefield is different than injury sustained as a result of the inherent violence of warfare. As this Court stated in *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), upholding a CIA contractor's conviction for fatally assaulting an Afghan prisoner during an interrogation, "[n]o true 'battlefield interrogation' took place

here; rather, Passaro administered a beating in a detention cell. . . . Passaro was a civilian contractor with instructions to interrogate, not to beat." *Id*. at 218. This Court rejected the Defendant's claim that upholding his conviction would "criminalize acts otherwise permissible in the heat of battle. To accept this argument would equate a violent and unauthorized 'interrogation' of a bound and guarded man with permissible battlefield conduct." *Id.* That is why the U.S. government urged this Court that Plaintiffs should be able to pursue state law tort claims that rise to the level of torture against CACI-PT. U.S. 4th Cir. Amicus Brief at 19-22.

The Geneva Conventions similarly distinguish between active hostilities and detention. The immunity enjoyed by a combatant to inflict injury on hostile personnel pursuant to lawful superior orders disappears once the opponent is disarmed and no longer engaged in combat; it is equally inapplicable in the detention of civilians. *See* Geneva Convention Relative to the Treatment of Civilian Persons in Times of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (protecting "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by

… detention."). Here, Plaintiffs were not combatants; they were civilians swept up by Coalition forces, like thousands of others, in reaction to the Iraqi insurgency.[18]

The decision below also cannot be squared with the many interpretive materials issued by the U.S. government confining the concept of "combat activities" to physical hostilities against *armed* opponents, as opposed to supporting operations. For example, Department of Defense Instruction 1100.22, defines "combat" as

> an authorized, deliberate, destructive, and/or disruptive action against the armed forces or other military objectives of another sovereign government or other armed actors on behalf of the United States (i.e., planning, preparing, and executing operations to actively seek out, close with, and disrupt and/or destroy an enemy, hostile force, or other military objective). Includes employing firepower and/or other destructive/disruptive capabilities to the foregoing ends.

Similarly, Army Regulation 27-20 defines combat activities as "[a]ctivities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for

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[18] As a matter of international humanitarian law, Plaintiffs were designated civilian security detainees. A1114 at DOD-00200 (describing Plaintiff Al Shimari as a "civilian internee"); A1124 at DOD-00016 (identifying Plaintiff Rashid as a "civilian internee"); A946 ¶ 60) (explaining that for Al-Zuba'e, there are no documents produced by the Department of Defense in this litigation describing or listing him as an "enemy combatant" or "terrorist"). *See also* A1135-48 (expert opinion of Professor Geoffrey Corn explaining that civilians subject to an occupation who are detained are typically considered "civilian internees" under international law and owed a duty of care).

impending armed attack." In contrast, the regulation defines "noncombat activities" to be activities "essentially military in nature" that includes "practice firing of missiles and weapons, training, and field exercises, maneuvers that include the operation of aircraft and vehicles, . . . and movement of combat or other vehicles designed especially for military use."

Under CACI-PT's contract to supply interrogation services to the United States in Iraq, its employees were expressly forbidden from bearing arms or engaging in any combat activities. A1393 at ¶20 (j)) ("Contractors are to be considered non-combatants and are not authorized to be armed"). Indeed, the Department of Defense prohibits contractors from engaging in such an inherently governmental function. See Army Regulation 715-9, 2-1(c) ("Contractor personnel are not combatants…."); *id.*, Appendix B-2(a) "Prohibited contract functions include actions that directly result in disruptive and/or destructive combat capabilities…"); 73 Fed. Reg. 16764-65 (Mar. 31, 2008) (DoD Comment on proposed rule: "The Government is not contracting out combat functions.").

3. The District Court Erred in Overbroadly Interpreting the CPA's Exceptions for Contract Disputes in a Manner that Would Immunize All Government Contractors for Any Wrongdoing.

The District Court also erred by transforming the narrow immunity from Iraqi law for actions regarding contractual disputes, into a global immunity for anything even tangentially connected with the contract. The CPA structure

provides immunity from Iraqi jurisdiction in exchange for application of U.S. domestic law. *See supra* at 48 (citing *Dow* and *Coleman*). The court failed to apprehend this fundamental legal framework. It compounded this misunderstanding by expansively interpreting a separate, limited provision of CPA 17 beyond plausible construction to afford blanket immunity to CACI-PT.

Section 3 of Order 17 provides that contractors

> shall not be subject *to Iraqi laws* or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA. Coalition contractors … shall not be subject to *Iraqi laws or regulations* with respect to licensing and registration of employees, businesses and corporations in relation to such contracts.

A667, §3.1 (emphasis added). Section 3 further provides that contractors are immune from Iraqi legal process "with respect to acts performed by them within their official activities pursuant to the terms and conditions of the contract." CPA Order 17 §3.2.

Consistent with the entire CPA legal regime, the provisions only exempt contractors from contract actions *in Iraqi* tribunals. Nevertheless, the District Court reasoned that "[t]he alleged acts were performed as a result of CACI-PT being in Iraq to perform its contractual duty" and that, therefore, it should have immunity from suit.

This is not an action in contract; Plaintiffs not are seeking to enforce any "terms and conditions" of CACI's contract with the United States. Plaintiffs' claims of torture and abuse are based in tort and do not involve contractual terms between CACI-PT and the U.S. government. To read Section 3 as the District Court did would not only run counter to the CPA legal structure, *see McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 544 (5th Cir. 2012) (equivalent of section 3 in revised CPA Order 17 does not immunize contractors from tort claims), it would mean that no contractor could ever be liable for any misconduct in Iraq, as all contractors were there – as their title implies – to fulfill a contract. Neither the CPA nor U.S. law and policy contemplate such blanket immunity for private contractors for their misconduct.

III. THE AWARD OF COSTS TO CACI CONSTITUTES AN ABUSE OF DISCRETION

The Fourth Circuit has circumscribed "the bounds of discretion" in awarding costs under Rule 54(d)(1) by several factors, including the losing party's inability to pay and the closeness and difficulty of the issues decided. *Cherry*, 186 F.3d at 446. Where the district court exceeds those bounds, as it has here, its judgment is reviewable by this Court.

First, Plaintiffs are financially unable to pay costs. *See Teague v. Bakker*, 35 F.3d 978, 996-97 (4th Cir. 1994). Three of the Plaintiffs live in the outlying villages of Baghdad, Iraq. Plaintiff Al Shimari is a schoolteacher who earns a

modest income of approximately $500 per month. Plaintiffs Al-Zuba'e and Rashid are self-employed, as a livestock trader and construction worker, respectively, earning inconsistent and unreliable incomes, amounting to around $200 to $300 in good months and even less in slower months. (Dkt. #467.)

Second, the issues in the case "were close and difficult." *Ellis v. Grant Thornton LLP*, 434 Fed. Appx. 232, 235 (4th Cir. 2011). The question resulting in the dismissal of Plaintiffs' ATS claims could not have been anticipated by the parties or the court. The question was so novel that it was raised *sua sponte* by the U.S. Supreme Court. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012). Before the Supreme Court's decision was handed down on April 17, 2013 – more than four and half years after Plaintiffs filed the present litigation – the Supreme Court had not questioned the extraterritorial reach of the ATS. *See Sosa*, 542 U.S. at 732 (citing with approval a number of lower court cases where the conduct at issue occurred in foreign territory). Every federal circuit court to address the issue prior to *Kiobel* had held the ATS applies extraterritorially, without qualification or limitation. *See Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) ("no court to our knowledge has ever held that [ATS] doesn't apply extraterritorially"); *see also, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 24-26 (D.C. Cir. 2011). In fact, the District Court

reinstated Plaintiffs' ATS claims on November 1, 2012, while the decision on the question of extraterritoriality was pending in *Kiobel*. A197

Further, as with Plaintiffs' ATS claims, there was no law of the case to support dismissal of the Plaintiffs' common law claims on statute of limitations grounds or Plaintiff Al Shimari's claims on choice of law grounds. *See Musick v. Dorel Juvenile Group, Inc*., 2012 U.S. Dist. LEXIS 17734, at *3-4 (W.D. Va. Feb. 13, 2012) (citing *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 732-33 (6th Cir. 1986)). Indeed, the District Court's dismissal on such grounds reflected a change in Virginia law, *see supra* Section II(A)(2) and, in part, a change in the position of the District Court, *see supra* at p 51.

Finally, Plaintiffs raised serious claims of war crimes, torture, and cruel, inhuman or degrading treatment arising out of a notorious and disgraceful international incident, which political, diplomatic and military leaders have all condemned. Vigorous pursuit of these claims – on behalf of victims of this shameful episode against a contractor whose employees directed the abuse – are of significant national interest. The imposition of costs would deter the attempt to seek judicial redress for such violations of serious international law violations in the future. *See Bowoto v. Chevron Corp.*, 2009 U.S. Dist. LEXIS 38174 at *12-13 (N.D. Cal. Apr. 22, 2009) ("The threat of deterring future litigants from prosecuting human rights claims in the future is especially present in a case such as

this, where plaintiffs have paltry resources and defendants are large and powerful economic actors.").

CONCLUSION

For the foregoing reasons, the Court should reverse (1) the District Court's order granting CACI-PT's motion to dismiss Plaintiffs' ATS claims and Plaintiff Al Shimari's common law claims and (2) the District Court's order dismissing the Rashid Plaintiffs' common law claims as untimely, and remand this case to the District Court. The Court should also vacate the finding of Plaintiffs' liability for costs.

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REQUEST FOR ORAL ARGUMENT

Because this case presents an important question of first impression in the Fourth Circuit, and because the District Court's reasoning with regards to the extraterritorial application of claims brought under the Alien Tort Statute, choice-of-law analysis and assignment of costs would have significant consequences in tort cases broadly, and particularly for victims of war crimes, torture, and cruel, inhuman or degrading treatment directed by U.S. private actors, Plaintiffs believe that the Court's decisional process would be aided by oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 13,960 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). 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.

By */S/ Robert P. LoBue*

October 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing this brief to be filed electronically via this Court's CM/ECF system, which will automatically serve the following counsel of record:

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