No. 19-1328

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,
Defendant and Third-Party Plaintiff – Appellant

and

TIMOTHY DUGAN, CACI INTERNATIONAL INC; L-3 SERVICES, INC.
Defendants

v.

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellees,

and

TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E,
Plaintiffs

and

UNITED STATES OF AMERICA; JOHN DOES 1-60
Third-Party Defendants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Case No. 1:08-cv-00827
The Honorable Leonie M. Brinkema, United States District Judge

BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE AND ACCOUNTABILITY IN SUPPORT OF PLAINTIFFS-APPELLEES

Daniel McLaughlin
Carmen Cheung
Elzbieta T. Matthews
THE CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1328 Caption: CACI Premier Tech., Inc., v. Al-Shimari et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Center for Justice & Accountability
(name of party/amicus)

who is an amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Carmen K. Cheung Date: May 21, 2019

Counsel for: Center for Justice & Accountability

CERTIFICATE OF SERVICE

****

I certify that on May 21, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Carmen K. Cheung
(signature)

May 21, 2019
(date)

TABLE OF CONTENTS

Page Number

TABLE OF AUTHORITIES ... iii

STATEMENT OF INTEREST AND AUTHORITY TO FILE ... 1

STATEMENT OF PARTICIPATION ... 2

SUMMARY OF ARGUMENT ... 2

ARGUMENT ... 3

I. CACI erroneously conflates the United States' sovereign immunity, upon which it predicates its own derivative claim of immunity, with the immunity of foreign state actors ... 3

A. The principle of comity animating the immunity of foreign state actors does not apply to the United States' sovereign immunity ... 4

B. The immunity of foreign state actors is governed by a settled and finely-tuned body of law ... 7

i. Foreign Sovereign Immunity ... 8

ii. Status-based foreign official immunity ... 9

iii. Conduct-based foreign official immunity ... 11

II. Settled jurisprudence forecloses CACI's assertion of derivative sovereign immunity ... 15

III. CACI mischaracterizes the nature of *jus cogens* norms, including that of the prohibition against torture ... 17

A. *Jus Cogens* norms are accepted and recognized by the international community of States as a whole, not simply "christened" by judges ... 17

B. The prohibition against torture is among the limited and discrete number of accepted and recognized *jus cogens* norms ... 19

CONCLUSION ... 22

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 24
CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Al-Shimari v. CACI Premier Technology Inc.,
No. 08-CV-827 (E.D. Va) 4

BAE Sys. Tech. Sol. & Servs. v. Republic of Korea's Def. Acq. Program Admin.,
No.: PWG-14-3551, 2016 WL 6167914 (D. Md. Oct. 24, 2016) 6

Bashe Abdi Yousuf v. Mohamed Ali Samantar,
699 F.3d 763 (4th Cir. 2012) .... *passim*

Cabiri v. Assasie-Gyimah,
921 F. Supp. 1189 (S.D.N.Y. 1996) 21

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 16

Chuidian v. Philippine Nat'l Bank,
912 F.2d 1095 (9th Cir. 1990) 12

Comm. of U.S. Citizens Living in Nicar. v. Reagan,
859 F.2d 929 (D.C. Cir. 1988) 18

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 5

Guar. Tr. Co. v. United States,
304 U.S. 126 (1938) 5

Hilao v. Marcos (*In re Estate of Marcos*),
25 F.3d 1467 (9th Cir. 1994) 21

Hilton v. Guyot,
159 U.S. 113 (1895) 5

In re Grand Jury Proceedings, Doe #700,
817 F.2d 1108 (4th Cir. 1987) 5-6, 10-11, 11

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 14, 21

Lafontant v. Aristide,
844 F. Supp. 128 (E.D.N.Y. 1994) 6

Paul v. Avril,
812 F. Supp. 207 (S.D. Fla. 1993) 21-22

Pullman Constr. Indus. v. United States,
23 F.3d 1166 (7th Cir. 1994) 9

Samantar v. Yousuf,
560 U.S. 305 (2010) 1, 8, 9, 12

Siderman de Blake v. Republic of Arg.,
965 F.2d 699 (9th Cir. 1992) 21

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 14

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) 5

Warfaa v. Ali,
811 F.3d 653 (4th Cir. 2016) 1, 13

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995) 21

Statutes

18 U.S.C. § 1602 (2012) 8

28 U.S.C. § 1350 (2012) 1, 13, 14

28 U.S.C. § 1602-11 (2012) 6, 8

28 U.S.C. §§ 1605, 1605A(a)(1) (2012) 8

Rules

Fed. R. App. P. 29 .... 1, 2

Treaties

Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, Dec. 10, 1984,
S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.. 20

Geneva Convention Relative to the Protection of Civilian Persons
in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 19

International Covenant on Civil and Political Rights, Dec. 19, 1996,
S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 19-20

Vienna Convention on Diplomatic Relations, April 18, 1961,
23 U.S.T. 3227, 500 U.N.T.S. 261 11

Cases from International Tribunals

Prosecutor v. Al-Bashir, *Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal*(May 6 2019) 10

Prosecutor v. Furundzija, *Case No. IT-95-17/1-T, Trial Chamber Judgment*
(Dec. 10 1998) 19

Other

Combined Third to Fifth Periodic Reports of the Unites States of America,
UN Doc. CAT/C/USA/3-5 (Aug. 12 2013) 20

H.R. Rep. No. 94-1487
(1976) 8

Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*,
44 Vand. J. Transnat'l L. 1141, 1153–54 (2011) 10

Harold Hongju Koh, *Transnational Litigation in United States Courts*
(2008) 5

Initial Report of the United States of America due in 1995,
UN Doc. CAT/C/28/Add. (Oct. 15 1999) 20

Restatement (Third) of Foreign Relations Law
of the United States § 102(2) (1987) 18

U.S. Dep't of State, Press Statement, Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan,
(Mar. 5 2019) 13

UN Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee against Torture: Canada,*
UN Doc. CAT/C/CR/34/CAN (July 7 2005) 20

UN Comm. Against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties,*
UN Doc. CAT/C/GC/3 (Dec. 13 2012) 20

STATEMENT OF INTEREST AND AUTHORITY TO FILE

This brief of *amicus curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of Plaintiffs-Appellees.

Amicus, the Center for Justice and Accountability (CJA), is an international human rights organization based in the United States. CJA's mission is to deter torture, war crimes, crimes against humanity, and other severe human rights abuses through innovative litigation, policy, and transitional justice strategies. For the past twenty years, CJA has partnered with victims and survivors in pursuit of truth, justice, and redress by seeking to hold perpetrators of torture and other atrocity crimes accountable pursuant to the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350, including before this Court. *See Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012); *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016). CJA has litigated numerous cases addressing the immunity of foreign state actors in the United States, including *Samantar v. Yousuf*, 560 U.S. 305 (2010), in which the Supreme Court held that federal common law governs whether foreign officials are immune from suit. Thus, *amicus* has a strong interest in ensuring that courts apply a consistent and appropriate legal framework to decide immunity questions in ATS and TVPA actions.

STATEMENT OF PARTICIPATION

No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this appeal have consented to the filing of this *amicus* brief, pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

On appeal, one of the principal issues before the Court is whether CACI is entitled to a derivative form of the United States' sovereign immunity. CACI's argument relies extensively on the jurisprudence governing the immunity of foreign state actors. In doing so, CACI posits a false equivalence between two distinct concepts – the immunity of the United States as the sovereign and that accorded to foreign state actors – which ignores their divergent animating principles and applicable bodies of law. *Amicus* writes to recall that settled law governs the immunity of foreign state actors, which should remain undisturbed.

Further, while the Court need not address the scope of the United States' sovereign immunity given that CACI's derivative claim is not appealable for want of jurisdiction and foreclosed as a matter of law, *amicus* wishes to correct CACI's mischaracterization of *jus cogens* norms. As stated by the Court, *jus cogens* are "universally agreed upon norms" that reflect the consistent and universal practice

of states over time. *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012). In recognizing that the prohibition against torture is among these select *jus cogens* norms, this Court held that acts of torture are, by definition, "not legitimate official acts." *Yousuf*, 699 F.3d at776. The district court's acknowledgment that acts of torture are not sovereign in nature for purposes of understanding the scope of the United States' sovereign immunity reflects a logical extension of this Court's settled jurisprudence.

ARGUMENT

I. CACI erroneously conflates the United States' sovereign immunity, upon which it predicates its own derivative claim of immunity, with the immunity of foreign state actors

CACI's argument that it enjoys a derivative form of the United States' sovereign immunity relies extensively on jurisprudence concerning immunities of *foreign* sovereigns and officials in United States courts. In doing so, CACI erroneously conflates the United States' sovereign immunity with the immunity of foreign state actors. CACI muddles this distinction throughout its briefing, both on appeal and before the district court, regardless of whether it is arguing for or against the United States' sovereign immunity. *See e.g.,* Br. of Appellant, at 21-22,

ECF 18[1] (relying on *Yousuf*, 699 F.3d at 776-77, and foreign sovereign immunity jurisprudence to argue that the United States enjoys sovereign immunity from Plaintiffs' claims); *see also* Third-Party Pl. Opp'n to the United States' Mot. to Dismiss, JA.1209-11 (relying on *Yousuf* to suggest that the United States is *not* immune from Plaintiffs' claims).

The immunity enjoyed by the United States is different from that conferred upon foreign state actors as a matter of comity. The United States itself has rejected any equivalency between the two in this case. *See* United States' Reply in Further Support of Its Mot. to Dismiss, at 3, D.E. 744 ("The single case CACI cites in support of its jus cogens argument – *Yousuf* – has nothing to do with the United States' sovereign immunity." (citing *Yousuf v. Samantar,* 699 F.3d at 777 (4th Cir. 2012)). Indeed, as detailed herein, the immunity of foreign state actors and the immunity of the United States as the sovereign are two distinct concepts animated by separate underlying principles and governed by divergent bodies of law.

A. The principle of comity animating the immunity of foreign state actors does not apply to the United States' sovereign immunity

The principle of comity animates the immunity afforded to foreign state actors in U.S. courts. As described by the Supreme Court, comity is the

[1] Docket entries for *CACI Premier Technology. Inc. v. Al-Shimari*, No. 19-1328 (4th Cir.) are abbreviated "ECF", those for *Al-Shimari v. CACI Premier Technology Inc.*, No. 08-CV-827 (E.D. Va.) are abbreviated "D.E."

"recognition which one nation allows within its territory to . . . judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot,* 159 U.S. 113, 163–64 (1895); *see also* Harold Hongju Koh, *Transnational Litigation in United States Courts* 19 (2008) (noting that comity "flows from the respect that one sovereign is obliged to give to the sovereign acts of a coequal nation-state.").

The concept of foreign sovereign immunity has long been recognized as founded on the principle of comity. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-35 (1938) ("[U]pon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent."); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983) ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (holding that the purpose of foreign sovereign immunity is to give "states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." (citing *Verlinden B.V*, 461 U.S. at 486)). As such, immunity for foreign sovereigns should attach "only when it serves th[e] goals" of comity and respect for foreign sovereignty. *In re Grand Jury Proceedings, Doe No. 700*,

817 F.2d 1108, 1110-1111 (4th Cir. 1987). The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11, which prescribes the immunity of foreign sovereigns, "codified the longstanding practice by U.S. courts to grant limited immunity to foreign governments . . . as a matter of comity." *See BAE Sys. Tech. Solution & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, Case No. PWG-14-3551, 2016 WL 6167914, at *2 (D. Md. Oct. 24, 2016), *aff'd*, 884 F.3d 463 (4th Cir. 2018).

The principle of comity is at its strongest when a foreign sovereign is directly involved. Under the FSIA, courts are entrusted to render foreign sovereign immunity determinations according to the FSIA's statutory framework. Comity concerns are likewise implicated in actions against incumbent heads-of-state or diplomats. These suits bear on the Executive's Article 2, Section 3 foreign affairs power to "receive Ambassadors and other public Ministers[,]" which implies the power to accredit diplomats and recognize foreign heads-of-state. *Yousuf*, 699 F.3d at 772. As a result, courts have given weight to the Executive's status-based immunity determinations as regards sitting heads-of-state and diplomats. *Yousuf*, 699 F.3d at 769; s*ee also Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994). Comity concerns, along with the constitutional prerogative of the Executive, are diminished when it comes to questions of foreign official immunity, which "do not involve any act of recognition for which the Executive

Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties." *Yousuf*, 699 F.3d at 773.

In contrast, the United States' sovereign immunity does not raise issues of comity. The foreign affairs concerns implicated in allowing suits against foreign sovereigns to proceed in American courts are irrelevant to the question of whether the United States is immune from suit within its own court system. Rather, the United States' sovereign immunity springs from a distinct source, namely historic common law notions tied to the inherent powers of the sovereign *vis à vis* its own subjects. *See generally* Mem. Op. Regarding CACI Premier Tech. Inc.'s Mot. to Dismiss for Lack of Jurisdiction and Third Party Compl., JA.2303-14 (tracing the historical background of the sovereign immunity doctrine).

B. The immunity of foreign state actors is governed by a settled and finely-tuned body of law

Reflecting the separate animating principles at issue, the body of law that governs the immunity of foreign state actors is distinct from that which governs the United States' sovereign immunity. CACI conflates these two bodies of law however, and ignores the Court's finely-tuned jurisprudence regulating the scope of immunity accorded to foreign state actors present in the United States. *Amicus* seeks to underscore that settled law governs: (i) foreign sovereign immunity; (ii) the status-based immunity of foreign officials; and (iii) the conduct-based immunity of foreign officials, which should remain undisturbed.

i. Foreign Sovereign Immunity

CACI cites without distinction to foreign sovereign immunity cases decided pursuant to the FSIA, 28 U.S.C. §§ 1602-11, in support of the United States' sovereign immunity. *See* Br. of Appellant, at 21-22, ECF 18 (relying on five FSIA cases). But the FSIA, which provides that a foreign state shall be immune from jurisdiction of federal and state courts unless the case falls within one of the FSIA's statutorily specified exceptions, governs only *foreign sovereigns*. 28 U.S.C. §§ 1605(a), 1605A(a)(1).

In 1976, Congress enacted the FSIA to transfer primary responsibility for deciding whether foreign states are entitled to claim immunity from the State Department to the courts. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) (citing 18 U.S.C. § 1602); *see also* H.R. Rep. No. 94-1487, at 7 (1976) (transferring sovereign immunity determination to the judicial branch "assur[es] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process"). The FSIA is now the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Samantar*, 560 U.S. at 314 (internal citations omitted).

By its terms, the Foreign Sovereign Immunities Act does not regulate the United States' sovereign immunity. The district court's Memorandum Opinion states at the outset that FSIA cases are "not helpful" in analyzing the scope of the

United States' sovereign immunity. JA.2302 n.4; *see also* Br. for the United States as Amicus Curiae, at 12, ECF 25-1 (stating that decisions on foreign sovereign immunity under the FSIA are "inapposite to the requirements of federal sovereign immunity"). Among others, the FSIA has its own provisions for service of process and jurisdiction that are applicable (and logical) only with respect to foreign sovereigns.[2]

Nor does the FSIA apply to individual foreign officials, including where they are sued for conduct undertaken in their official capacity. *Samantar*, 560 U.S. at 314-15. In light of the "text, purpose, and history of the FSIA," a foreign sovereign is not deemed coextensive with its individual foreign government officials. *Samantar*, 560 U.S. at 325. Instead, the immunity of current and former foreign officials is largely governed by common law.

ii. Status-based foreign official immunity

The common law, reflecting customary international law, has long distinguished between two forms of immunity for foreign officials: immunities

[2] Notably, amicus agrees with Plaintiffs that, while pretrial orders denying foreign sovereign immunity under the FSIA are immediately appealable, this Court has no jurisdiction over an interlocutory appeal of a pretrial order denying the United States' sovereign immunity. *See Pullman Constructions Industries, Inc., v. United States*, 23 F.3d 1166, 1168 (7th Cir. 1994) (holding that denial of the United States' sovereign immunity is not subject to immediate review under the collateral order doctrine, unlike the denial of foreign sovereign immunity, which is grounded in "a governmental body's right to avoid litigation in another sovereign's courts").

based on a person's status (status-based foreign official immunity) and those based on the official character of a person's acts (conduct-based foreign official immunity). *See* Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 Vand. J. Transnat'l L. 1141, 1153–54 (2011).

CACI relies on the Court's statement in *Yousuf* that "allegations of *jus cogens* violations do not overcome head-of-state or any other status-based immunity," to imply that the same applies *pari passu* for the United States' sovereign immunity. Br. of Appellant, at 21, ECF 18 (citing *Yousuf,* 699 F.3d at 776 n.6). "Like the related doctrine of sovereign state immunity" however, the status based immunity of sitting heads-of-state is rooted in comity (*Yousuf*, 699 F.3d at 769), and is distinguishable from the United States' sovereign immunity.

Status immunities (immunities *ratione personae*) provide certain specific foreign officials—"sitting heads of state, diplomats, and members of qualifying special missions"—with immunity from suit, during the time they hold that status. *Id.*; *Yousuf*, 699 F.3d at 773–74.[3] The purpose of these status-based immunities is not to confer an "individual right" for the official to claim (*Doe No. 700*, 817 F.2d

[3] *But cf. Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019) (concluding that there is no head-of-state immunity under customary international law vis-à-vis an international court).

at 1111), but rather to honor the principle of comity among states. *See* Vienna Convention on Diplomatic Relations, preamble, art. 23(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 261 (the purpose of "immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States").

In light of the pressing comity concerns, courts have acknowledged that, under the U.S. Constitution, the Executive Branch determines whether an individual is entitled to claim status-based immunity as a diplomat or incumbent head of state. *Yousuf*, 699 F.3d at 769. Once that status-based determination is made by the Executive, and unless waived by the foreign state, a status-based immunity attaches to an individual regardless of the substance of the claim, though only for the pendency of his or her current official position. *See Doe No. 700*, 817 F.2d at 1111 (immunity attaches to the head-of-state only while he or she occupies that office). As a corollary, a *former* head of state is not entitled to head-of-state immunity, but rather retains only the common law conduct-based immunity potentially available to foreign officials. *Id.*

iii. Conduct-based foreign official immunity

CACI further draws on this Court's decision in *Yousuf*, in which the Court found that a former Prime Minister of Somalia was not entitled to conduct-based immunity from torture claims, to argue that the United States, and derivatively

CACI, is entitled to sovereign immunity. *See* Br. of Appellant, at 21-22, ECF 18; *but see* Third-Party Pl. Op. to the United States' Mot. to Dismiss, JA.1209-11 (relying on *Yousuf* to suggest that the United States is not immune from Plaintiffs' claims).

At common law, as articulated by the Supreme Court, "foreign sovereign immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" *Samantar*, 560 U.S. at 322 n.17 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990)).

Unlike its status-based counterpart, conduct-based immunity looks specifically to the nature of the underlying acts at issue, which are determinative of whether the immunity applies. Conduct-based immunity does not shield either a current or former foreign official from suit for private acts like drug possession or fraud. That is because a suit for "private acts where the officer purports to act as an individual and not as an official" is not considered "a suit against the sovereign." *Yousuf*, 699 F.3d at 775. In these instances, comity concerns are diminished, as are the constitutional prerogatives of the Executive branch. The views of the Executive Branch on the application of conduct immunities are not binding on the judiciary, even if they can carry substantial weight, because conduct-based immunity determinations rarely implicate the Executive's constitutional recognition power

and more significantly turn on legal and factual findings that are the province of the courts. *See Yousuf*, 699 F.3d at 773.

Applying this logic, a unanimous panel of this Court held in *Yousuf* that foreign officials committing *jus cogens* violations of international law are not subject to common law immunity – particularly when the United States declines to suggest immunity. *Yousuf*, 699 F.3d at 776–77. *Jus cogens* violations, such as acts of torture, are not shielded by foreign official immunity because, by definition, they cannot be legally authorized, and therefore are always beyond the scope of the official's authority. *Id.* at 777 ("[U]nder international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."); *accord Warfaa v. Ali*, 811 F.3d 653, 661-62 (4th Cir. 2016) (holding that *Yousuf* forecloses a former foreign official's claim of conduct-based immunity for *jus cogens* violations), *cert denied* 137 S. Ct. 2289 (2017).

Congressional enactment of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, reinforces the conclusion that *jus cogens* violations, such as acts of torture, are not shielded by conduct-based foreign official immunity.[4] The

---

[4] The Executive branch recently expressed its support for ongoing suits against foreign state officials for alleged *jus cogens* violations in third-party countries. *See* U.S. Dep't of State, Press Statement, Support for Germany's Request for Lebanon

TVPA creates a right of action against foreign officials who commit torture and extrajudicial killing while acting "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note; *see Sosa v. Alvarez- Machain*, 542 U.S. 692, 728 (2004) (A "clear mandate appears in the Torture Victim Protection Act . . . providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." (quoting H. R. Rep. No. 102-367(I))). Thus, by definition, all suits under this statute involve "'some governmental involvement in the torture or killing to prove a claim'" under claim of official authority or color of law. *Kadic*, *v. Karadzic*, 70 F.3d 232, 245 (2d Cir 1995) (quoting H. R. Rep. No. 102-367(I), at 5). If claims of governmental authority or involvement rendered all actions "official" and therefore immune from suit, the TVPA would be rendered a dead letter. "Thus, in enacting the TVPA, Congress essentially created an express private right of action for individuals victimized by torture and extrajudicial killing that constitute violations of *jus cogens* norms." *Yousuf*, 699 F.3d at 777 (4th Cir. 2012); *see also* Br. of Appellant, at 21, ECF 18 ("With respect to foreign official immunity, the Court noted that

---

to Extradite Syrian General Jamil Hassan, (Mar. 5, 2019) https://www.state.gov/support-for-germanys-request-for-lebanon-to-extradite-syrian-general-jamil-hassan/ (noting that General Hassan is "notorious for his alleged involvement in the extensive use of torture in Syrian detention centers" and calling for his extradition to Germany to face charges of crimes against humanity).

Congress had created a substantive cause of action under the Torture Victims Protection Act . . . encompassing torture committed under color of foreign law, indicating an understanding that foreign official immunity [does not] bar such claims." (citing *Yousuf*, 699 F.3d at 776-77)).

As the foregoing illustrates, the immunity of foreign state actors is rooted in the principle of comity and regulated by its own body of law, which reflects distinctions based on the source of applicable law, the nature of the actor involved, their current status, the nature of the underlying acts, and the respective roles of the Executive and Judicial branches. By cherry-picking from the jurisprudence governing foreign immunities to inform its arguments regarding the scope of the United States' sovereign immunity in its own domestic courts, CACI fails to accurately depict the settled and well-reasoned jurisprudence governing the immunity of foreign actors present in the United States, which should remain undisturbed.

II. Settled jurisprudence forecloses CACI's assertion of derivative sovereign immunity

Having muddled the distinction between the immunity of foreign government actors and that of the United States as a sovereign, CACI then asserts that it derives its own form of sovereign immunity. Settled jurisprudence forecloses this argument. As detailed in Appellee's briefing, which *amicus* supports, the Supreme Court rejected "the notion that private persons performing

Government work acquire the Government's embracive immunity." *See* Br. of Appellee, at 38-39, ECF 31 (citing *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 672 (2016)). While the United States has not formally taken a position on CACI's derivative immunity argument on appeal (*see* Br. of the United States as *Amicus Curiae*, at 1, ECF 25-1), it has highlighted the gulf that separates its own sovereign immunity from the derivative form that CACI asserts. *See* United States Reply Br. in Further Support of Its Mot. to Dismiss, at 1, D.E. 744 ("[T]he United States and CACI are not joined at the hip. The United States is the Sovereign. CACI is not: it is simply a government contractor that seeks to profit from lucrative contracts with the United States. And although government contractors may benefit from certain immunities in connection with their contracted-for work, '[t]hat immunity . . . unlike the sovereign's, is not absolute.'" (quoting *Campbell-Ewald*, 136 S.Ct. at 672 (2016))).

CACI's appeal of the district court's ruling that it is not entitled to any form of derivative sovereign immunity turns solely on the issue of whether CACI should enjoy an immunity co-extensive with that of the United States. It does not. The scope of the United States' own sovereign immunity, or any *jus cogens* exception to that immunity, is immaterial to CACI's appeal. Those issues are extraneous to whether CACI, a private contractor who is alleged to have violated federal laws and the terms of its government contract by engaging in unlawful conduct, can

benefit from a derivative form of sovereign immunity. Plaintiffs have not brought suit against the United States, nor is the United States a party to this suit.[5] The only underlying claims at issue are those brought by Plaintiffs against CACI for acts of conspiracy and aiding and abetting the torture, cruel, inhuman and degrading treatment and war crimes that Plaintiffs allege. This Court should uphold the district court order denying CACI's assertion of derivative sovereign immunity on the basis that it is unavailable to CACI as a matter of settled law.

III. CACI mischaracterizes the nature of *jus cogens* norms, including that of the prohibition against torture

If this Court does address the scope of the United States' sovereign immunity and its interaction with *jus cogens*, it should reject CACI's characterizations of *jus cogens* norms, including that of the prohibition against torture.

A. *Jus cogens* norms are accepted and recognized by the international community of States as a whole, not simply "christened" by judges

CACI distorts the nature of *jus cogens* norms by insinuating that they are crafted by judges out of thin air. Br. of Appellant, at 24, ECF 18 ("A federal judge

[5] On January 17, 2018, nine-and-a-half years after this case was commenced, CACI filed a third-party complaint against the United States and sixty unnamed individuals. D.E. 655. On March 22, 2019, the District Court granted the United States' motion for summary judgment and dismissed the third-party complaint as to the United States. JA.2352, JA.2353. CACI has not appealed the District Court's grant of summary judgment to the United States and the United States is not an adverse party to this appeal. *See* CACI Docketing Statement, ECF 11.

could christen a new *jus cogens* norm and use that super-norm to invalidate any law, judicial doctrine, or state action in derogation of that norm."). CACI's (mis)understanding of *jus cogens* norms is fundamentally at odds with this Court's jurisprudence.

As acknowledged by this Court, "[a] jus cogens norm, also known as a peremptory norm of general international law, can be defined as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Yousuf,* 699 F.3d at 775 (internal quotations omitted). As detailed by the district court, *jus cogens* norms first develop from customary international law, which is a body of law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." JA.2320 (quoting *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (quoting Restatement (Third) of Foreign Relations Law § 102(2) (Am. Law Inst. 1987))). Only if there is then "a further recognition by the international community as a whole that this is a norm from which no derogation is permitted" (*id.*) does it attain the rarefied status of a "universally agreed upon norm[]." *Yousuf,* 699 F.3d at 775 (citations omitted). Correctly understood, *jus cogens* norms are thus not simply "christened" by judges; rather they reflect the consistent and universal practice of states over time.

B. The prohibition against torture is among the limited and discrete number of accepted and recognized *jus cogens* norms

This Court has recognized that the prohibition against torture is one of a limited and discrete number of "universally agreed-upon norms." *Yousuf,* 699 F.3d at 775 (citations omitted). Under international law, the prohibition against torture has attained the status of a *jus cogens* norm. *See, e.g., Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 153 (Dec. 10, 1998) ("Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.").

The United States has also long recognized and affirmed the prohibition against torture, as expressed through its ratification of numerous treaties prohibiting this conduct. Torture of civilians during wartime or occupation constitute "grave breaches" of the Fourth Geneva Convention. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Fourth Geneva Convention stipulates that "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches." *Id.*, art. 148. Likewise, the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified in 1992, prohibits torture. International Covenant on Civil and

Political Rights, art. 6-7, Dec. 19, 1996, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171. In 1994, the United States became a party to the UN Convention Against Torture ("Torture Convention"). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter: CAT]. The Torture Convention requires that State parties enact domestic legislation to require that every State party define, punish and redress torture. *See* CAT, arts. 2, 4 and 14.[6] The United States has consistently affirmed its commitment to prohibiting, punishing and redressing torture in its reports to the Committee Against Torture.[7]

---

[6] As of May 1, 2019, there are 166 States Parties to the Convention against Torture. Notably, article 14 of the Convention against Torture states, "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT, art. 14; *see also* UN Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/CR/34/CAN ¶ 5(f) (July 7, 2005) (stating that states have an obligation to provide civil redress and compensation to victims of torture); UN Comm. Against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3 ¶¶ 5, 20, 22 (Dec. 13, 2012) (stating that article 14 *requires* States Parties to provide a procedure permitting victims and their families to obtain reparations from those responsible for torture regardless of where it was committed). The U.S. signed the Convention against Torture on April 18, 1988 and ratified it on October 21, 1994.

[7] *See, e.g., Initial Report of the United States of America due in 1995,* UN Doc. CAT/C/28/Add.5 ¶¶ 5-6 (Oct. 15 1999), *available at* https://2001-2009.state.gov/documents/organization/100296.pdf; *See also Combined Third to Fifth Periodic Reports of the Unites States of America*, UN Doc. CAT/C/USA/3-5 ¶¶ 2-3 (Aug. 12, 2013), *available at*

Drawing on the clear prohibition against torture in international and domestic law, this Court acknowledged that acts of torture are by definition "not legitimate official acts." *Yousuf,* 699 F.3d at 776. Indeed, ample authority supports the principle that torture cannot be officially "authorized" by a state. *See e.g.*, *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994) (holding that acts of torture were "not taken within any official mandate"); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens."); *Kadic*, 70 F.3d at 250 (doubting "that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (holding that acts of torture "exceed anything that might be considered to have been lawfully within the scope of [an officer's] official authority."); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (acts of torture beyond the scope of defendant's official authority); *Paul v. Avril*,

---

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en ("The absolute prohibition of torture is of fundamental importance to the United States. . . . As a nation that played a leading role in the effort to bring this treaty into force, the United States will remain a leader in the effort to end torture around the world and to address the needs of torture victims.").

812 F. Supp. 207, 212 (S.D. Fla. 1993) (acts of torture "hardly qualify as official public acts.").

In concluding that the United States did not have sovereign immunity for violations of *jus cogens* norms, the district court similarly found that acts of torture were not "sovereign" in nature. JA.2338-42. While the complex interaction between *jus cogens* norms and the United States' sovereign immunity is beyond the ambit of this submission, the district court's conclusion that acts of torture violate a *jus cogens* norm and are, by definition, not sovereign in nature constitutes a logical extension of this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should (i) leave undisturbed its settled jurisprudence governing the immunity of foreign state actors; (ii) affirm the district court's order denying CACI's claimed derivative sovereign immunity on the basis that CACI's argument is foreclosed as a matter of law; and (iii) reject CACI's mischaracterizations of *jus cogens* norms if this Court does address their interaction with the United States' sovereign immunity.

Dated: May 21, 2019 Respectfully submitted,

_/s/ Carmen K. Cheung_____________

CENTER FOR JUSTICE & ACCOUNTABILITY
Daniel McLaughlin
dmclaughlin@cja.org
Carmen K. Cheung
ccheung@cja.org
Elzbieta T. Matthews
ematthews@cja.org
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444 (telephone)

Counsel for Amicus

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. **Type-Volume Limitation**: This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 5,277 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements**: This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Carmen K. Cheung
Carmen K. Cheung

Counsel for Amicus

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

/s/ Carmen K. Cheung______________
Carmen K. Cheung

Counsel for Amicus

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. ______________________________ as

[ ]Retained [ ]Court-appointed(CJA) [ ]Court-assigned(non-CJA) [ ]Federal Defender [ ]Pro Bono [ ]Government

COUNSEL FOR: ____

____as the

(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

____

(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

____ ________________

Name (printed or typed) Voice Phone

____ ________________

Firm Name (if applicable) Fax Number

____

____ ________________________________

Address E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on ________________ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

____________________________ ____________________________

Signature Date