UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, *et al.*,

Plaintiffs,

v.

DONALD RUMSFELD, *et al.*

Defendants.

Civ. No. 04-01864 (RMU)
(Judge Urbina)

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This Court ordered the parties to address two questions: (1) whether the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, applies to non-resident aliens detained at the U.S. Naval Base at Guantanamo Bay, Cuba (hereinafter "Guantanamo"); and (2) if so, whether defendants are nonetheless entitled to qualified immunity as to plaintiffs' RFRA claim. Plaintiffs' response to that order did not meaningfully grapple with either question.

As to the first question, plaintiffs relied mainly on *Vermilya-Brown Co., Inc. v. United States*, 335 U.S. 377 (1949), to contend that RFRA applies to all persons – regardless of their citizenship or alien detainee status – who enter a military base or other "possession" of the United States anywhere in the world. *See* Pls.' Supplemental Br. in Further Supp. of Their Claims Pursuant to the Religious Freedom Restoration Act (hereinafter "Pls.' Supplemental Br."), at 3-8. Instead of supporting such a unique and expansive interpretation of RFRA, *Vermilya-Brown Co.* actually makes it clear that the reach of a federal statute abroad "depends upon the *purpose* of the statute."

Vermilya-Brown Co., Inc., 335 U.S. at 390 (emphasis added). There is no question that the purpose of RFRA was to restore to the American people the free exercise rights that Congress feared had been undermined by Supreme Court precedent construing the First Amendment. There is nothing to suggest that Congress intended for RFRA to go further and afford new free exercise rights to aliens abroad who were not entitled to First Amendment protections. Accordingly, alien detainees at Guantanamo cannot logically be held to have enforceable rights under RFRA.

As to the second question regarding defendants' entitlement to qualified immunity, plaintiffs' approach was merely to ignore *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 124 S.Ct. 2686 (June 28, 2004), the controlling case on the application of federal constitutional and statutory law to aliens detained at Guantanamo at the time of the alleged conduct at issue in this litigation. In *Al Odah*, the D.C. Circuit concluded that the Guantanamo detainees did not enjoy the "'privilege of litigation'" and therefore could not assert *any* cognizable constitutional or statutory claims. *Id.* at 1144 (citation omitted). Thus, as this Court found previously with respect to plaintiffs' constitutional claims, the long line of precedent culminating in *Al Odah* prevents plaintiffs from showing that they possessed clearly established federal statutory rights at the time of their detention. *See Rasul v. Rumsfeld*, 2006 WL 266570 *12-15 (D.D.C.).

I. RFRA Does Not Apply To Non-Resident Aliens Detained At Guantanamo

Plaintiffs make much of the fact that the term "covered entity" in RFRA includes "each territory and possession of the United States." 42 U.S.C. § 2000bb-2(2). Plaintiffs argue that because the Supreme Court in *Vermilya-Brown Co., Inc.*, 335 U.S. at 377, ruled that the word "possession" in the Fair Labor Standards Act ("FLSA") included a leased U.S. military base in Bermuda, RFRA must be similarly interpreted to afford rights to non-resident aliens at Guantanamo.

Plaintiffs also identified cases recognizing that Americans who live abroad or serve in the U.S. military are protected under RFRA. *See generally* Pls.' Supplemental Br. at 5-17. However, plaintiffs cited no cases applying RFRA to non-resident aliens outside the United States in any context, and their contention that RFRA should be construed to apply equally to United States citizens and aliens abroad cannot be squared with the intent of the legislation.

Plaintiffs' reliance on *Vermilya-Brown Co.* for the proposition that the use of the term "possession" in RFRA is somehow controlling in regard to its application to aliens abroad is misplaced. As the Supreme Court made clear in *Vermilya-Brown Co.*,

> the word "possession" is not a term of art, descriptive of a recognized geographical entity. *** "Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." The word "possession" has been employed in a number of statutes both before and since the Fair Labor Standards Act to describe the areas to which various congressional statutes apply. We do not find these examples sufficiently outline the meaning of the word to furnish a definition that would include or exclude this base.

Id. at 387-88 (citation omitted). Consistent with this reasoning, courts must construe the scope of federal statutes in light of their underlying purpose. The construction of the FLSA in *Vermilya-Brown Co.* is instructive as to the proper interpretation of RFRA only to the extent that similarities of purpose exist between the two statutory schemes. *See, e.g., United States v. Spelar*, 338 U.S. 217 (1949) (rejecting extraterritorial application of the Federal Tort Claims Act at U.S. military base in Canada on the ground that the "statutory language and the legislative history relating to the ambit [of that statute] . . . differ entirely from those pertinent to the Fair Labor Standards Act"); *Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1097-98 (9th Cir. 2005) (although CERCLA

covers any "territory or possession over which the United States has jurisdiction," it does not provide Filipino residents with a cause of action for pollution of U.S. military bases outside the United States). Plaintiffs have pointed to no meaningful similarities between the FLSA and RFRA and none exist.

Unlike the FLSA, which broadly governs the treatment of employees without respect to citizenship, RFRA was a narrow and targeted legislative effort "to protect individual First Amendment rights as interpreted by Congress." *Hankins v. Lyght*, 438 F.3d 163, 173-74 (2d Cir. 2006); *see also* 140 CONG. REC. 1564 (1993) (statement of Rep. Ballenger) (RFRA will "ensure the protection of the full exercise of religion, as defined by the first amendment of the Constitution."). RFRA clearly applied to the American people. 140 CONG. REC. 1564 (1993) (statement of Rep. Ballenger) ("passage of RFRA makes it clear that Americans' right to exercise religion shall not be infringed upon"); 139 CONG. REC. 14,467 (1993) (statement of Sen. Kennedy) (Congress passed RFRA to restore "the religious rights of all Americans."); 139 CONG. REC. 14,461 (1993) (statement of Sen. Lieberman) (RFRA to protect "the people's religious freedom"); Press Secretary Statement on Religious Freedom Restoration Act, 1995 WL 106886 *1 (White House) (stating that President Clinton signed RFRA into law and remains committed to its "full implementation in order to protect the religious liberties of all Americans"). RFRA was enacted because Congress feared that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), had taken "away what many Americans consider[ed] their most treasured basic freedom – the right to worship God as they saw fit without interference from the government. *** With the enactment of the Religious Freedom Restoration Act, [Congress believed it could] give back what the Court [had taken] away.'" 139 CONG. REC. 14,464 (1993) (statement of Sen. Coats) (citation omitted). Congress' goal was

clear, unequivocal and limited; it sought only to remedy a perceived loss of free exercise rights under the First Amendment. *See id.* ("I am pleased the Senate today is moving toward restoration of religious freedom for all Americans.").[1]

The jurisprudence that Congress sought to restore through RFRA did not extend First Amendment rights to non-resident aliens outside the United States. At the time of RFRA's enactment, the courts had repeatedly rejected constitutional claims asserted by non-resident aliens. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-74 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 784-790 (1950); *Pauling v. McElroy*, 278 F.2d 252, 254 n. 3 (D.C. Cir. 1960) ("The non-resident aliens here plainly cannot appeal to the protection of the Constitution or the laws of the United States."). Constitutional protections were held to turn on citizenship, residency, or some other substantial, voluntary connection to the United States. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in furtherance of it have any force in foreign territory unless in respect of our own citizens."); *Cf. Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) (Douglas, J., dissenting) ("an alien who seeks admission [to the United States] has no First Amendment rights while outside the Nation"); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) ("those [aliens] who are excluded [from the United States] cannot assert the rights in general obtaining in a land to which they do not belong as citizens

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[1] Congress sought to accomplish that aim by reviving "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb-b1; *see also* 139 CONG. REC. 14,461 (1993) (statement of Sen. Lieberman) (RFRA "restore[s] a standard that existed prior to the Supreme Court's holding in *Oregon v. Smith*"). Congress viewed RFRA as a return to First Amendment rights as they had been defined prior to *Employment Division v. Smith*. 139 CONG. REC. 14,462 (1993) (Sen. Lieberman) (RFRA "does not create a new legal standard. It returns us to a standard that existed in a majority of judicial circuits prior to 1987.").

or otherwise").

Plaintiffs erroneously suggest that it would be anomalous to apply RFRA to United States citizens abroad but not to afford the same protections to alien detainees. *See* Pls.' Supplemental Br., at 17. Plaintiffs ignore the fact that the identical distinction has applied to constitutional protections. It has long been recognized that United States citizens generally retain constitutional protections when they travel abroad, *Reid v. Covert*, 354 U.S. 1, 40 (1957), but non-resident aliens do not, *see Verdugo-Urquidez*, 494 U.S. at 269-74; *Eisentrager*, 339 U.S. at 784-790. Consequently, construing RFRA as affording no protections to alien detainees at Guantanamo is fully consistent with Congress' limited purpose in enacting the statute – to restore free exercise rights to their perceived status under the Constitution before *Smith*.[2]

Disregarding RFRA's legislative history, plaintiffs' RFRA claim rests on the presumption that Congress intended far more than the mere restoration of First Amendment free exercise rights in enacting RFRA. The logical implication of plaintiffs' argument is that Congress actually sought in RFRA to create for non-resident aliens abroad a whole new category of rights lacking any prior constitutional foundation. Plaintiffs cite to nothing in the language of RFRA or its legislative history supporting such a conclusion; they apparently contend that Congress' silence in failing to specify otherwise is enough. However, mere silence is plainly inadequate to support such an expansive and remarkable interpretation of RFRA.

It is well settled that there is a strong presumption against extraterritorial application of

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[2] Consistent with this analysis, the location within the United States of some of the alleged decisionmakers can make no difference with respect to the RFRA claim. It is not the location of decisionmakers that is controlling; it is the non-resident status of the alien detainees that logically precludes RFRA coverage under the intent of the statute.

federal law. Courts "read the text of congressional statutes not to apply extraterritorially, unless there are contextual reasons for reading the text otherwise." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1344 (D.C. Cir. 2004). Under this canon, courts "resolve restrictively any doubts concerning the extraterritorial application of a statute" based on the assumption that Congress legislates with knowledge of this rule. *Arc Ecology*, 411 F.3d at 1097-98 (citing *Smith v. United States*, 507 U.S. 197, 204 (1993)). Indeed, this canon specifically "counsels against" interpreting federal statutes "to provide a cause of action to foreign claimants" on a military base in a foreign country. *Id.* at 1098 (citing *EEOC v. ARAMCO*, 499 U.S. 244, 258 (1991)). If RFRA is to be read in accordance with this principle of statutory construction and the clear intent of Congress as reflected in its legislative history, the statute cannot reasonably be construed to afford protections to alien detainees at Guantanamo.

II. The Defendants Are Entitled To Qualified Immunity On Plaintiffs' RFRA Claim

As discussed in prior briefing, plaintiffs cannot overcome the assertion of qualified immunity by arguing that the scope of RFRA is broad enough to encompass alien detainees at Guantanamo. Plaintiffs must go much further and demonstrate that it was so clear during their detention that they had enforceable rights under RFRA that the issue was not subject even to reasonable debate. *See Zweibon v. Mitchell*, 720 F.2d 162, 171-73 (D.C. Cir. 1983). Plaintiffs have not and cannot sustain that burden.

Plaintiffs have not cited a single case applying RFRA to a non-resident alien at any location outside the United States. The scant authority plaintiffs have cited in support of their RFRA claim is all readily distinguishable from the present case. Plaintiffs cannot credibly contend based on the Supreme Court's interpretation of the FLSA in *Vermilya-Brown Co.* that there is no room for

argument as to whether RFRA applies to alien detainees at Guantanamo. *Vermilya-Brown Co.* made clear that courts must look to the underlying purpose of a statute to determine its scope. Since the purpose of RFRA was to restore constitutional rights Congress feared were jeopardized by the *Smith* decision, the statute cannot reasonably be held to afford rights to non-resident aliens outside the country who lacked those constitutional rights in the first place. Similarly, the cases cited by plaintiffs establishing that RFRA applies to United States citizens abroad in the military cannot establish that RFRA is equally applicable to non-resident aliens outside the country. Distinguishing between United States citizens and non-resident aliens abroad comports with RFRA's focus on restoring constitutional rights because the Constitution employs the same distinction between citizens and aliens. That was recognized by this Court when it dismissed plaintiffs' constitutional claims on the ground that it is not clearly established that alien detainees at Guantanamo are entitled to constitutional protections.[3]

In contrast to the irrelevant authority relied on by plaintiffs, defendants' qualified immunity motion is supported by a long line of decisions limiting the ability of non-resident aliens abroad to seek redress under federal law. Most important among those decisions is the D.C. Circuit's decision

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[3] Nor can plaintiffs avoid dismissal on qualified immunity grounds by arguing that various military regulations and international agreements endowed them with clearly established rights. They previously made an identical argument in support of their constitutional claims, and this Court, following a long line of well-settled precedent, rejected it. Regulations or other collateral provisions that do not separately create a private cause of action for damages cannot be considered for qualified immunity purposes. *See Rasul v. Rumsfeld*, 2006 WL 266570 *15 (D.D.C.); *see also Davis v. Scherer*, 468 U.S. 183, 193-97 (1984) (Under such a system, "officials would be liable in an indeterminate amount for violation of a constitutional right – one that was not clearly defined or perhaps not even clearly established – merely because their official conduct also violated some statute or regulation"; "this would disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."); *see also Tripp v. Dep't of Defense*, 173 F.Supp.2d 58, 61 (D.D.C. 2001).

in *Al Odah*, which was binding authority on the rights of alien detainees at Guantanamo at the time of the alleged conduct at issue.[4] The court found in *Al Odah* that Guantanamo was neither a territory nor a possession of the United States and that the "'privilege of litigation'" did not extend to non-resident aliens detained there. *Al Odah*, 321 F.3d at 1144 (citation omitted). The opinion was not vague or equivocal in any relevant respect; it expressly stated that the Guantanamo detainees could not assert claims "based on violations of the Constitution or treaties or federal law . . . [because] the courts [were] not open to them." *Id.*[5] Plaintiffs offer no theory as to how such a clear and important decision that directly concerned the rights of alien detainees at Guantanamo and was binding authority at the relevant time could conceivably be read not to present at least some logical doubt regarding the reach of RFRA there.

In addition, plaintiffs inadvertently demonstrated in their supplemental brief that their RFRA claim should be dismissed on qualified immunity grounds in light of *Larsen v. United States Navy*, 346 F.Supp.2d 122 (D.D.C. 2004). Plaintiffs contend in their supplemental brief that they were subjected to a campaign of anti-Muslim bias at Guantanamo. *See* Pls.' Supplemental Br., at 22. That starkly conflicts with this Court's holding in *Larsen* that RFRA covers neutral regulations of general applicability that adversely impact religious freedom, but not intentional religious

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[4] Remarkably, plaintiffs do not even mention *Al Odah* in their supplemental brief.

[5] The D.C. Circuit relied in part on *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995), where the Eleventh Circuit overturned the lower court's finding that "Guantanamo Bay 'was a United States territory'" and once "again reject[ed] the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functional[ly] equivalent' to being land borders or ports of entry of the United States or otherwise within the United States." *Id.* at 1425. The Eleventh Circuit concluded that the Cuban and Haitian detainees at Guantanamo could not assert cognizable statutory claims. *Id.*

discrimination. *Larsen*, 346 F.Supp.2d. at 136-37; *see also Omar v. Casterline*, 414 F.Supp.2d 582, 594 (W.D. La. 2006). *Larsen* thus presents legitimate doubt as to whether RFRA even covers the kind of conduct alleged in this case, thereby requiring dismissal of plaintiffs' RFRA claim on qualified immunity grounds regardless of the scope of RFRA's reach as to alien detainees at Guantanamo.

CONCLUSION

For all the reasons discussed above, plaintiffs have no rights under RFRA, let alone any clearly established rights. Accordingly, their remaining RFRA claim cannot proceed and should be dismissed with prejudice.

Respectfully submitted,

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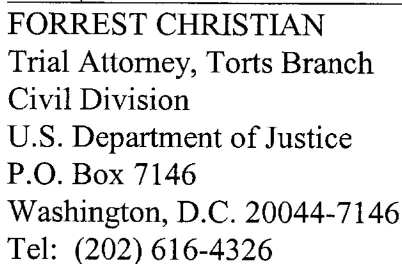

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