

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 06-5222

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, *et al.*,

Plaintiffs-Appellants,

v.

DONALD RUMSFELD, *et al.*,

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Columbia,
C.A. No. 1:04cv01864 (RMU), The Honorable Ricardo M. Urbina

BRIEF OF *AMICI CURIAE*
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CAGEPRISONERS AND JAMES YEE IN SUPPORT OF
PLAINTIFFS-APPELLANTS

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March 20, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1 *amici* certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

Except for the following, all parties, intervenors and *amici* appearing before the District Court and this Court are listed in the Brief for Appellants Shafiq Rasul, *et al.*

1. *Amici* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee are identified in an addendum to this brief.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellants Shafiq Rasul, *et al.*

C. RELATED CASES

References to the related cases appear in Brief for Appellants Shafiq Rasul, *et al.*

CERTIFICATE PURSUANT TO RULE 29(d)

Pursuant to Circuit Rule 29(d), counsel for *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee certify that as of the date of this certification, the only other brief *amicus curiae* of which we are aware is the Brief of The Baptist Joint Committee for Religious Liberty, The National Association of Evangelicals, The National Council of Churches, The American Jewish Committee, The Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-day Adventists, And The United States Conference of Catholic Bishops as *Amicus Curiae* In Support of Cross-Appellees In Regard to the Cross-Appeal. These two briefs could not be joined as a single memorandum because the perspectives and analyses provided in each brief are completely distinct. In the instant brief, *amici* provide unique, detailed accounts of religious abuse to demonstrate the gravity and widespread nature of the religious abuses in Guantánamo and the negative impact any decision regarding qualified immunity will have on current detainees. In the Brief of Baptist Joint Committee for Religious Liberty et al, a consortium of religious entities argues that the plain text and legislative history of the Religious Freedom Restoration Act clearly evidences its application to Guantánamo and its coverage of non-US citizens. Any overlap between the briefs is insignificant and,

given the markedly different approach and experience from the *amici* in the Brief of Baptist Joint Committee for Religious Liberty, it was impractical to consolidate these two briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee makes the following disclosure:

None of the *amici* is a publicly held entity. None of the *amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *amici*.

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INTEREST OF THE *AMICI*

This Brief of *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, and Cageprisoners. and James Yee is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29 in support of the Appellants.¹

Amici are the counsel of current or former detainees held in US custody in Guantánamo Bay, organizations dedicated to the promotion of human rights and religious protections of prisoners worldwide, and James Yee the Muslim chaplain formerly serving at Guantanamo. *Amici* have observed and/or reported incidents of abuses of religious rights in Guantánamo and the failure of the US-run detention facility to provide adequate protections for its prisoners. They are deeply concerned at the widespread, first-hand and long-standing reports of substantial burdens on religious rights in Guantánamo and the growing concern that meaningful legal procedures for verifying and preventing such mistreatment will be foreclosed. *Amici* are particularly concerned that the recent decision in *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20 2007) will strip future plaintiffs of claims under the Religious Freedom Restoration Act (“RFRA”). This case therefore may determine whether current and former detainees and their counsel ever have the opportunity to put their experiences

¹ All parties have consented to the filing of this Brief of *Amici Curiae*.

before the Court, to protect their religious rights in Guantánamo and to seek redress for the injuries they have suffered from of violations of the explicit mandate of RFRA. *Amici* therefore have a strong interest in ensuring the existence of legal means through which prisoners in Guantánamo can practice their religion and challenge the ongoing abuses of their clearly established rights under RFRA.

Reprieve is a group of international charities dedicated to assisting in the provision of effective legal representation and protection of basic human rights to prisoners mandated by RFRA. It is currently representing at least 40 detainees in Guantánamo and regularly reports on the widespread human rights abuses in the US-run camps.

Cageprisoners is a non-governmental human rights organization that exists solely to raise awareness of the plight of the prisoners at Guantánamo Bay and other detainees held as part of the War on Terror. It has issued detailed reports on religious abuse in Guantánamo, including a report on the desecration of the Koran that included over 50 incidents.

James Yee is the former Muslim chaplain at Guantánamo Bay who served there in 2002 and 2003 in the rank of captain. Chaplain Yee met daily with the prisoners, observing prison operations, and ministering to the detainees. He was responsible for drafting the regulations for proper handling of the Koran by US military personnel after numerous complaints had been voiced on this issue. His

perspective on the friction between prison regulations and the practice and observance of Islam at the base is unique.

Amici also include many counsel of current and former Guantánamo detainees, listed in an addendum to this brief.

While *amici curiae* pursue and protect a wide range of legal interests, they all share a commitment to the rule of law and the preservation of the religious rights of prisoners mandated by RFRA. Thus, the participation of *amici* will assist this Court in understanding the profound implications and practical consequences of US officials' practices regarding the prisoners' exercise of their religious rights in Guantánamo Bay prison.

SUMMARY OF ARGUMENT

The court below concluded that RFRA applied to the US military base in Guantánamo Bay and held that defendants were not entitled to qualified immunity for violations of this act, because the plaintiffs' rights thereunder were well-established at the time of the alleged violations.² The Court further held that, "given the abhorrent nature of the allegations and given our Nation's fundamental commitment to religious liberty ... a reasonable official would understand that what he is doing violates that right [under RFRA]."³

² *Rasul v. Rumsfeld*, 433 F. Supp.2d 58, 71 (D.D.C. 2006).

³ *Id.* at 71 (internal citations omitted).

Amici urge that the District Court's ruling be affirmed. RFRA reflects a profound injunction against government intrusion on legitimate exercise of religious practices and observances. We express our alarm at the reliable, well-documented findings of violations of prisoners' religious rights in Guantánamo. *Amici* further are concerned that the government is systematically targeting and denigrating core tenets and rites of Islam under the guise of "penal regulations" ostensibly neutral on their face. The cited reports indicate that Muslim prisoners in US custody at the American prison in Guantánamo Bay have been and continue to be deprived of their religious rights, notwithstanding the clear protections of RFRA. We draw the Court's attention to facts in the public record⁴ to show the dire impact a reversal of the decision below would have on the Guantánamo prisoners' religious rights. Such facts are within the ambit of specific allegations of the Complaint (*see* ¶ 206) and may be shown in support thereof. Not only have

⁴ In a separate Addendum proffered herewith, *amici* provide the Court with this extra-record material to aid in deciding the legal issues, and to underscore the gravity of the decision before the Court. *See* Brief for Amicus Curiae Human Rights, Legal, and other Public Interest Organizations, *INS v. Aguirre-Aguirre*, No. 97-1754, 1999, WESTLAW 26718 (9th Cir. Jan. 21, 1999) (amicus brief concerning background conditions in Guatemala); *Regents v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978) (extra-record material concerning admissions policies of *amici curiae*); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (social science material about the effects of drugs and violence in schools); *Ravindran v. INS*, 976 F.2d 754, 756 (1st Cir. 1992) (background history of ethnic conflict in Sri Lanka); *Bajwa v. Cobb*, 727 F. Supp. 53 at n.2 (D. Mass. 1989) (extra-record sources regarding Sikhs in India). To the extent these sources are electronically available, *amici* have provided citations accordingly.

US military guards and interrogators intentionally targeted the religious practices of the prisoners, but they have done so under the umbrella of a US policy that effectively condones such behavior with a “wink and a nod.”

Were this Court to reverse and accord qualified immunity to defendants here, current and former prisoners would be denied any legal recourse. The ruling in *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007) effectively ensures (unless reversed) that this case will be the prisoners’ sole avenue to demonstrate the urgent need for the protection of their religious practices. A refusal to rein in conduct in violation of prisoners’ religious rights, by reversing the District Court’s decision denying qualified immunity, would give a green light for the continuation of such abuses.

ARGUMENT

I. THE CORE TENETS OF ISLAM REQUIRE DAILY PRAYER; IMPOSE RITUALS OF DRESS AND BEHAVIOR; AND OBLIGE SPECIAL TREATMENT OF THE KORAN

RFRA prohibits the government from “substantially burden[ing] a person’s exercise of religion, even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a). RFRA, therefore, unambiguously protects Muslim prisoners, as it does prisoners of other faiths, in their religious practices. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (RFRA could apply to protect Muslim prisoners from a grooming policy requiring prisoners to

shave); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), *on remand* 151 F.3d 1033 (7th Cir. 1998) (Table) (right to observe Ramadan protected by RFRA). Despite this well-established protection of Muslim practices, US personnel at Guantánamo have consistently targeted the core tenets of Islam in their treatment of the prisoners.

While these core tenets are generally widely known, by way of background, *amici* stress the following essential principles and practices of Islam in order to frame how the abuse in Guantánamo strikes at the core of the prisoners' right to religious practice and their religious identity. As James Yee, a military chaplain stationed in Guantánamo in 2002 and 2003, wrote, "Islam is not just a religion; it is a way of life. This was something that many Joint Task Force personnel came to understand. And because religion was the most important issue for nearly all the prisoners in Camp Delta, it became the most important weapon used against them." James Yee, *For God and Country: Faith and Patriotism Under Fire*, 110 (2005).

A. Daily Prayer

Muslims are required by the Koran to pray five times daily, at specified times. Mohamed Nimer, *Correctional Institution's Guide to Islamic Religious Practices*, Council on American-Islamic Relations 2 (2005) *available at* www.cair-net.org/downloads/correctionalguide.pdf (last visited Feb. 27, 2007). Prayer on Jum'ah (Friday) is "an essential part of Islamic religious life," and "is an obligation

on each individual Muslim.” Brief for Imam Jamh Abdullah Al-Amin, *et al.* as *Amici Curiae* Supporting Respondents, *O’Lone v. Shabazz*, 482 U.S. 342 (1987), 1987 WESTLAW 880917, at *18. On Jum’ah, it is “essential for the Muslims to observe obligatory prayers in congregation.” *Id.* at *31; *see also* Nimer, *supra* at 3 (discussing requirements for Friday congregational prayer).

Muslim prayer involves recitation from the Koran and requires that the person be able to stand, bow, and touch his or her forehead to the ground. Nimer, *supra* at 3. The restraints and living conditions for prisoners “should allow enough space for inmates to fulfill the prayer requirement.” *Id.* at 3. Before prayer, Muslims are required to wash their hands, faces, and feet with pure water (a practice called *wudu*). *Id.* at 4.

B. The Koran

Muslims believe that the Koran contains the words of God as directly recorded by the prophet Mohammad and, therefore, it must be treated with the utmost respect. Muslims generally keep the Koran in a high place inside the home and do not allow it to touch the floor or anything dirty. They also believe that “a condition for handling the Qur’an is cleanliness and ritual purity,” and the stricter

interpretations of the law consider “a non-Muslim handling the Qur’an as sacrilegious.” Yee, *supra* at 111.⁵

C. Awrah: The Requirement of Modesty During Prayer

Islam prohibits Muslims from uncovering private parts in public. For Muslim men, the *awrah*, or private region, is from the knees to the bellybutton. Nimer, *supra* at 4. It is particularly important for Muslims to cover themselves during prayer, and whenever they are in public. *Id.* at 4.

D. Beards

Wearing a beard is one of the most important cultural and religious signifiers of being a Muslim, and many Muslim scholars are of the opinion that “the wearing of a beard is a religious obligation.” *Id.* at 4.⁶ The District of Columbia has already recognized the religious nature of wearing a beard for Muslims, holding that a forced grooming policy would impose a substantial burden under RFRA. *Jackson*, 89 F. Supp. 2d at 53-54.

⁵ See also, Surah Al-Waq-ia, 56:77-80 available at <http://www.irf.net/irf/dtp/dawahtech/ques9.htm>. (“That this is indeed a Qur'an most honorable in a book well guarded which none shall touch but those who are clean.”)

⁶ See also, Sahih Al-Bukhari, Volume 7, Book 72, Hadith # 780 available at <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/072.sbt.html> (last visited Feb. 26, 2007) (“The Prophet said, ‘Keep the beards and cut the moustaches short’”).

E. Presence and/or Touching by Women

“Islam forbids any mixing between the sexes that might provide even the remotest possibility of temptation.” Shaikh Sâmî al-Mâjid, *Free-Mixing Between Men and Women*, Islam Today, available at http://www.islamtoday.net/English/showme2.cfm?cat_id=2&sub_cat_id=-594 (last visited Feb. 26, 2007). Some teachings find unlawful “any occasion where unrelated women and men are seated next to one another.” *Id.* The purpose of these laws is to prevent the “danger of their making physical contact,” which is expressly prohibited between unmarried, unrelated men and women. *Id.*

F. Ramadan

Ramadan is an annual month-long period during which Muslims refrain from eating and drinking from dawn to sunset. Nimer, *supra* at 5. This requires a temporary change in food schedule for Muslim inmates. *Id.*

As set forth below, these core tenets of Islamic religious rights under RFRA have been and are being consistently abused.

II. THE COMPLAINT ALLEGES, AND INDEPENDENT EVIDENCE CONFIRMS, CLEAR VIOLATIONS OF RFRA AT GUANTANAMO

Widespread reports by US agencies, former and current prisoners, and human rights organizations verify cruel, inhuman, and often violent abuse of prisoners’ religious rights at Guantánamo. *See, e.g.*, Army Regulation 15-6 Final Report, *Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay*,

Cuba Detention Facility, 11 (April 1, 2005) (hereinafter “Schmidt Report”) (Add. Exh. 1); Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay Cuba* 25 (2006) (hereinafter “CCR Torture Report”); Second Periodic Report of the United Nations under the Convention Against Torture, UN Doc. CAT/C/USA/2, 25 July 2006, ¶ 24 (calling for the US to rescind any torture technique involving sexual humiliation). As the District Court correctly pointed out in the decision below, acts like, “[f]lushing the Koran down the toilet and forcing Muslims to shave their beards fall[] comfortably within the conduct prohibited from government action by RFRA.” *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 69 (D.D.C. 2006). This well-reasoned holding accords with the rulings in other federal cases applying RFRA to similar abuses of religious rights. *Jackson*, 254 F.3d at 265 (RFRA could apply to protect Muslim prisoners from a grooming policy requiring prisoners to shave); *Mack*, 80 F.3d at 1175 (right to observe Ramadan protected by RFRA); *Taylor v. Cox*, 912 F. Supp. 140, 144-45 (E.D. Pa. 1995) (confiscation of Koran could be covered by RFRA).

The acts alleged in the present complaint not only fall easily within the behavior prohibited by RFRA, but also form part of a long and well-documented history of abuse in Guantánamo. The camps at Guantánamo are a place where the

religious practices of the prisoners are substantially burdened in deliberate, degrading, and often violent ways.

A. Interruption/Prevention of Prayer

As noted, daily prayer is an essential and widely-known tenet of Islam. The guards at Guantánamo have deliberately prevented the prisoners' daily prayers in a number of ways. For example, James Yee, a military chaplain stationed in Guantánamo during 2003, describes the guards' behavior as follows:

The call to prayer could be heard throughout the camp and many days, as the recitations of the Qur'an began, I knew that on some blocks, the guards were preparing to strike. They would do everything they could to disrupt the prisoners in prayer. In every block, the prayer was led by the detainee in the northeastern most cage, considered the closest to Mecca. As they led the prayer, the MPs would gather around their cage and mock them. They would rattle the cage doors and gather stones from the gravel roads surrounding the blocks and throw them against the cages as the prisoners prayed. They'd stomp their feet and yell across the blocks to one another. They would also mock the call to prayer and play loud rock and roll music over the PA system.

Yee, *supra* at 110. A current prisoner, Sami al Haj, stated in January 2007 that this practice continues: "The guards do not respect prayer time. They talk loudly, and make noises as the prisoners try to pray." Mem. of Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2).

Reports of this deliberate, unjustifiable interruption of the prisoners' prayers were confirmed in several reports, including a 2005 investigation by Lieutenant General Randall M. Schmidt. See Schmidt Report, *supra*. In one instance, an FBI

Special Agent reported that, “in an effort to disrupt detainees who were praying during interrogations, female military intelligence personnel would wet their hands then touch the detainee’s face, causing the detainee to stop praying because he considered himself unclean.” FBI Investigation Report, Sept. 7, 2004, pg. 2, available at <http://foia.fbi.gov/filelink.html?file=/guantanamo/detainees.pdf> (last visited March 10, 2007) (Add. Exh. 3). Similarly, in October 2002, an FBI Special Agent observed a detainee who “had been gagged with duct tape that covered much of his head.” FBI Investigation Report, July 15, 2004 (Add. Exh. 9); Schmidt Report, *supra* at 11. When the agent asked the cause of this treatment, the interrogators responded that “the detainee had been chanting the Koran and would not stop.” *Id.*

Guards, further, have burdened the prisoners’ religious practices by manipulating the hours when prisoners pray:

They play the call to prayer over the public address system at the wrong times and sometimes they do not play it at all. The guards have recently increased their efforts to disrupt prayer, by raising their voices as if they were kids playing with a new toy. They also make other noises at time of prayer, like increasing the volume of the fans, talking louder, or running races in the corridor. It is childish. At other times in the day it is totally quiet, and it is often very difficult to find a guard when we need help.

Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush*, Civ. No. 05-cv-429, 21 (RJL) (D.D.C. Aug. 29, 2005).

In addition to the daily interruptions of prayer, the guards inhibit the prisoners' annual religious practices, as described by current Guantánamo prisoner Sami al Haj:

I have been in Guantánamo for 12 Eids⁷ now, and I have learned after each one that not once have I been told the correct day. This is particularly important for Eid-al-Adha, because we are obliged to fast on the day before. I have been in Guantánamo for five Ramadans as well, and I have not been told the correct start or end dates either. It would be very easy to do, and we have requested one week's notice of each holiday, without response.

Mem. Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007, pg. 3 (Add. Exh. 2). An essential aspect of a Muslim's daily prayer involves praying at the appropriate times, both during the day and throughout the year. However, these accounts indicate that the guards in Guantánamo have turned this religious requirement into a farce, overtly disrespecting the prisoners' faith-based practices and imposing a substantial burden on their daily prayers in contravention of the express language and purpose of RFRA.

During their detention and interrogation, prisoners have been chained in a fetal position, a practice referred to as "short-shackling," which is not only extraordinarily painful, but also constitutes a total inhibition on the ability to pray:

I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water. Most times

⁷ Eid is a holy day in the Muslim calendar and marks the end of Ramadan.

they had urinated or defecated [sic] on themselves, and been left there for 18, 24 hours or more.

FBI Investigation Report, August 2, 2004, *available at <http://www.aclu.org/torturefoi/released/FBI.121504.5053.pdf>* (last visited March 10, 2007) (Add. Exh.

4). In this position, prisoners are unable to stand and bow, as is required under the tenets of Islam. Nor are they able to perform the ablutions as a prerequisite to prayer. Reports of prisoners chained to the floor and kept in a state of abject filth, indicate that a substantial burden has been placed on prisoners' religious practice by military officials: according to Muslim law, Muslims must pray in a state of cleanliness.

B. Desecration of the Koran and Misuse of Religious Materials

The most widely reported religious abuses in Guantánamo concern desecration of the Koran. Intentional mistreatment of the holy book of Islam not only constitutes a clear violation of RFRA, but it also symbolizes a profound lack of respect for the prisoners in general and has been the cause of several non-violent protests by prisoners against these violations of religious practices. *See, e.g.*, Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush*, Civ. No. 05-cv-429, 21 (RJL) (D.D.C. Aug. 29, 2005).

1. Desecration of the Koran

Reports of desecration of the Koran cover a wide range of acts by prison guards and interrogators. In a report that documents nearly fifty allegations of

desecration of the Koran, in Guantánamo and other US-run facilities, the following statement describes some of examples of treatment of the Koran by the guards:

They urinated over it, they ripped it; they cut it with scissors in front of us. They defecated on it ... One day, and in the Red Cross presence, they took all the Qur'ans of the prison to rip them in front of all of us. They behaved as regards to this noble Book as if it were a vulgar object.

Cageprisoners, *Report into the Systematic and Institutionalised US Desecration of the Qur'an and other Islamic Rituals, Testimonies of Guantánamo Bay Detainees*, Statement of Mohamed Mazouz (2005), available at <http://www.cageprisoners.com/downloads/USQuranDesecration.pdf> (last visited March 10, 2007).

Other documentation contains descriptions of guards and interrogators “regularly defiling the Qur’an by touching it intentionally, dropping it, stepping on it, and throwing it on the ground.” CCR Torture Report, *supra* at 25. Such acts were confirmed in a US military investigation into mistreatment of the Koran, which confirmed the following incidents: “guards at Camp X-ray kicked the Koran of a detainee,” “Korans were wet because the night shift guards had thrown water balloons on the block,” a guard wrote a “two word obscenity” in a Koran, and a guard stepped on a detainee’s Koran during an interrogation. United States Southern Command, *Koran Inquiry: Description of Incidents*, June 3, 2005, available at <http://usinfo.state.gov/dhr/Archive/2005/Jun/06-17154.html> (last visited March 6, 2007). In another incident confirmed by the military

investigation, a guard urinated near an air vent in the camp, and splashed urine on the detainee inside and his Koran. *Id.*

2. Misuse of Religious Materials

In addition to acts specifically targeting the Koran, the manipulation of the prisoners' religious items in Guantánamo unequivocally violates RFRA and places a substantial burden on the prisoners' ability to practice Islam.⁸ For example, guards have designated the Koran as a "comfort item" of the prisoners, which they have the power to withhold, and have confiscated it, along with other religious items, as punishment for a prisoner's failure to cooperate. This occurs even in interrogation in which interrogators make the prisoners dependent on their inquisitors for access to their holy book. *See* CCR Torture Report, *supra* at 25; *see also* Mem. Department of Defense Joint Task Force 170, Oct. 11, 2002 *reprinted in* The Torture Papers: The Road to Abu Ghraib 225-26 (Karen J. Greenberg & Joshua L Dratel eds., 2005) ("The Torture Papers") (authorizing the "removal of all comfort items (including religious items)").

Similarly, prisoner Saifullah Paracha was denied access to a Bible – a holy book under the tenets of Islam – despite numerous requests. Petitioner's Mot. To Be Allowed A Bible and Other Books, *Paracha v. Bush*, No. 04-cv-02022-PLF

⁸ Regulations governing federal prisons also require that prison staff "shall provide the inmate opportunity to possess religious scriptures of the inmate's faith." 28 C.F.R. 541.21.

(D.D.C. Nov. 1, 2005). Mr. Paracha was held in solitary confinement for nearly a year, without access to a military chaplain. *Id.*⁹ He brought a suit for a preliminary injunction under RFRA to obtain a Bible and to be allowed to attend a religious service, both of which had been denied to him for three years. Petitioner's Mot. For Preliminary Injunction Under Religious Freedom Restoration Act, *Paracha v. Bush*, No. 04-cv-02022-PLF (D.D.C. Sept. 22, 2006). Thus far, he has not been able to secure judicial relief for this rather modest but critical request. *See also* Mem. Clive Stafford Smith, *supra* at 3 (recording lack of "books about how to pray," about "the history of the Prophet," and a disproportionate number of Shia, rather than Sunni books).

This clear misuse of the religious books and articles of the prisoners constitutes a significant burden on their ability to practice Islam. These acts also strike at the core symbols of Islam, igniting outrage in Muslim communities across the globe. *See, e.g.*, Afghan Riot of Reports of Koran Abuse, International Herald Tribune, May 11, 2005, available at <http://www.ihf.com/articles/2005/05/11/africa/web.0511afghan.php> (last visited March 10, 2007). These abuses therefore are not only unequivocal violations of RFRA, but are also powerful statements of disrespect to the religion of Islam as a whole.

⁹ Guantánamo has been without a Muslim chaplain for three years, since Chaplain James Yee was removed from the facility.

C. Forced Undressing

The Muslim tenet of modesty requires that men be covered from the waist to the knees at all times, a requirement that is particularly important during prayer. Some of the cruelest, most inhuman, and degrading treatment of the prisoners in Guantánamo involves the forcible undressing of prisoners, without any stated or conceivable justification, explicitly in order to prevent them from praying.

As recounted by his counsel, former Guantánamo prisoner Ait Idir's experience demonstrates unequivocal abuse of this requirement of Islam, and also the US soldiers' awareness of the religious obligations of the prisoners:

Knowing that Arab men are required to be clothed while praying, military police ordered all 48 prisoners in Romeo Block to give up their pants. Mr. Ait Idir told the guards that, as a Muslim, he would be unable to pray without his pants on, and so he begged them not to force him to undress. He offered them his shoes only. The guards threatened to use force. A colonel ... told him the IRF [Immediate Reaction Force] would forcibly take his pants. The Colonel would make no accommodation to allow [Idir] to pray in his pants. Mr. Ait Idir offered to give up the pants if the officer promised to return them for prayers. The officer said the pants would not be returned for prayers ... As threatened, the IRF came. Before entering, they sprayed tear gas into his cell.

CCR Torture Report, *supra* at 27 (2006). "Prisoners," according to another report, "continue to be held in only their shorts, because the authorities know that this is inappropriate and humiliating for a Muslim." Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush*, Civ. No. 05-cv-429, 21 (RJL) (D.D.C. Aug. 29, 2005). As a 2002 FBI Report noted, as early as March 2002, the Military

Police at Guantánamo were aware that, “in the Muslim culture, people do not get dressed, shower, or use the bathroom in front of others; however, they are being forced to do so.” FBI Special Agent Report, April 6, 2002 *available at* http://www.aclu.org/torturefoia/released/052505/index_orig.html (Add. Exh. 5). Prisoners are not deprived of their trousers for security reasons, but, rather, are forced to undress specifically to prevent their prayer.

D. Forced Shaving

Regular and on-going reports of demeaning treatment of the prisoners and their religious practices include reports of guards forcibly shaving prisoners’ heads and beards, sometimes as a punishment for vague allegations or for failure to cooperate. *See, e.g.* FBI Investigation Report, April 8, 2003 (Add. Exh. 6). In at least two instances, the guards shaved crosses into the prisoners’ heads, forcibly compelling them to wear the insignia of another religion. Department of Defense Records, Substantiated Cases of Misconduct at JTF-GTMO, July 19, 2005, *available at* <http://action.aclu.org/torturefoia/released/072605/> (Add. Exh. 7).

Such acts unambiguously focus on the beard as a symbol of Islamic culture and religious practice. Furthermore, they continue in Guantánamo to this day. Mem. Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2) (“They shave off our beards when we are punished”).

E. Sexual Abuse Targeting Islam

The reports of sexual abuse demonstrate guards explicitly targeting the Muslim tenets of modesty and cleanliness. The following examples from the abusive interrogation of Mr. Mohammed al-Qahtani – a prisoner currently held in Guantánamo demonstrates the extent of this kind of sexual abuse. Mr. al-Qahtani was forced to wear a woman’s bra and had a thong placed on his head during the course of interrogation; he was forced to stand naked for five minutes with females present; he was laid out on the floor and straddled by a female interrogator; and in another incident he was forced to undergo a “dance instruction” with a male interrogator. Decl. of Gitanjali S. Gutierrez, Attorney for Mohammed al-Qahtani, 17-18, *available at* <http://www.ccr-ny.org/v2/GermanCase2006/Germancase.asp> (last visited March 10, 2007); *see also* Schmidt Report, *supra* at 1-2. Furthermore, the interrogation log concerning Mr. al-Qahtani lists ten incidents where he became agitated at the presence of a woman, or at the inappropriate sexual touching to which he was subjected. Decl. Gitanjali S. Gutierrez, *supra* at 17.¹⁰

These forms of sexual abuse have often been combined with physically violent interrogation techniques, as the following report describes:

¹⁰ *See also*, Adam Zagorin & Michael Duffy, Inside the Interrogation of Detainee 063, Time Magazine, June 12, 2005, *available at* <http://www.time.com/time/magazine/article/0,9171,1071284,00.html> (last visited March 10, 2007).

[An FBI Special Agent] observed [redacted] position herself between the detainee and the surveillance camera monitor. The detainee was shackled and his hands were cuffed to his waist. [Special Agent] observed [redacted] apparently whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male). On more than one occasion the detainee appeared to be grimacing in pain, and [redacted]'s hands appeared to be making some contact with the detainee. Although SA could not see her hands at all times, he saw them moving towards the detainee's lap ... SA asked what had happened to cause the detainee to grimace in pain. The marine said [redacted] had grabbed the detainee's thumbs and bent them backwards and indicated that she had also grabbed his genitals.

Letter from T. J. Harrington, Deputy Assistant Director, Counterterrorism to Major General Donald J. Ryder, DOA Criminal Investigation Command re: Suspected Mistreatment of Detainees, July 14, 2004 *available at <http://www.aclu.org/torturefoia/released/010505.html>* (Add. Exh. 8); *see also* Schmidt Report, *supra* at 1-2.

These sexual abuses evidence some of the clearest violations of the prisoners' rights; not only are prisoners subjected to acts of physical torture, but the mistreatment specifically targets the religious convictions and practices of the prisoners.

III. RELIGIOUS ABUSE IN VIOLATION OF RFRA IS STANDARD PRACTICE AT GUANTÁNAMO

From January 2002, when the first prisoners arrived in Guantánamo, to today, reports concerning the systematic, pervasive violations of the prisoners'

religious rights demonstrate the existence of a pattern, practice and policy of the guards at the camps and their superiors in Guantánamo, the Southern Command, and in Washington. Far from being the acts of rogue low-level perpetrators on the base, the recorded abuses occurred within a well-documented policy framework in which former Secretary of Defense Donald Rumsfeld and other top officials in the chain of command over subordinate soldiers at Guantánamo sanctioned the violation of the prisoners' religious rights and failed to punish such violations when they occurred. A ruling granting qualified immunity to defendants in this case would effectively condone a policy that specifically targeted the religious beliefs of the prisoners through degradation, manipulation, and violence. Further, it would constitute a green light to continue these practices in the future. The individual liability attached to the RFRA claims in the present case represents one of the only meaningful ways the current prisoners can demand accountability for acts committed in Guantánamo and former detainees can seek redress for the injuries caused by these violations.

In October 2002, the Department of Defense issued a set of suggested guidelines for interrogation, which included as so-called Category II techniques, the "removal of all comfort items (including religious items) ... removal of clothing ... [and] forced grooming (shaving of facial hair etc. ...)." Mem. for Commander, Joint Task Force 170, Department of Defense, Oct. 11, 2002 *reprinted in* The

Torture Papers: The Road to Abu Ghraib 227-28 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (“The Torture Papers”). In December 2002, Donald Rumsfeld signed the approval of these techniques, which had been outlined in November in a memo by William J. Haynes. Mem. re: Counter Resistance Techniques, Office of the Secretary of Defense, Nov. 27, 2002 *reprinted in* The Torture Papers, *supra* at 237. In January 2003, Rumsfeld rescinded the December general approval of Category II techniques. Thereafter, such techniques were not explicitly forbidden, but required his personal approval for their use. Mem. for Commander USSOUTHCOM re: Counter-Resistance Techniques, January 15, 2003, *reprinted in* The Torture Papers, *supra* at 239.

However, in April 2003, Rumsfeld again authorized the use of interrogation techniques that would unequivocally have the effect of inhibiting the prisoners’ religious practices. These techniques included “forced grooming (forcing a detainee to shave hair or beard)” and “removal of clothing (potential removal of all clothing; removal to be done by military police if not agreed to by the subject).” Mem. from the Commander, US Southern Command re: Counter Resistance Techniques in the War on Terrorism, April 16, 2003 *reprinted in* The Torture Papers, *supra* at 360. As Professor Joseph Margulies points out, another important aspect of this order is that it “allows interrogators to use *any* interrogation technique, even those not listed in the order, so long as they get prior approval

from the secretary of defense.” Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 107 (2006).

A 2005 investigation into alleged abuses at Guantánamo demonstrates how easily these approved techniques were used to violate the prisoners’ religious rights. For example, in response to the allegation that “female military interrogators performed acts designed to take advantage of their gender in relation to Muslim males,” the Report found that such behavior was authorized as “non-injurious touching,” specifically permitted by defendant Rumsfeld as a Category III technique. Schmidt Report, *supra* at 7. During 2002 and 2003, several reports of such “non-injurious” touching, included reports of female interrogators touching prisoners, rubbing lotion on their arms and legs, and in at least one instance, smearing a prisoner with red ink and telling him it was menstrual blood, all exemplars of extreme religious abuse. *Id.* at 8.

Faced with continued violation of their religious rights, and in response to several reports of desecration of the Koran in Guantánamo, the prisoners organized two major hunger strikes, one in 2002 and another in 2005. Center for Constitutional Rights, *The Guantánamo Prisoner Hunger Strikes & Protests* (2005) available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Gitmo_

Hunger_Strike_Report_Sept_2005.pdf (last visited Feb. 26, 2007).¹¹ Reports of mistreatment of the Koran in 2005 also triggered large protests, and broad condemnation by Muslim communities around the world. N.C. Aizenman, *Afghan Protests Spread*, Washington Post, May 14, 2005, at A01.

Following the hunger strike in 2005, a US military inquiry confirmed several instances of defilement of the Koran. United States Southern Command News Release, Koran Inquiry: Description of Incidents, June 3, 2005, *available at* www.globalsecurity.org/security/library/report/2005/pr050603a.pdf (last visited March 6, 2007). This inquiry found nine incidents, and five confirmed incidents of intentional and unintentional mishandling of the Koran. *Id.*

Despite these findings by the US government, the abuses continue today. As recently as March 2007, detainees continue to report mistreatment of the Koran, interruption of prayer, and acts of sexual degradation in Guantánamo. Mem. of Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2) (stating that female guards are present during showers, prisoners “continue to be forced to expose the private parts of [their] bodies,” guards “manhandle” the

¹¹ See also *Watching Over the World's Most Infamous Prisoners*, Newhouse News Service, March 22, 2002 (“The protests began Feb. 27, a day after an Army guard removed a turban from the head of a detainee who said he was praying”); *Guantanamo Inmates on Hunger Strike*, Al Jazeera Online (July 22, 2005) (“The prisoners are demanding . . . greater respect for their religion—including an end to desecration of the Qu’ran”) *available at* <http://english.aljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm> (last visited March 10, 2007).

Koran, guards talk loudly during prayer times, and prisoners are punished for fasting according to their faith); *see also* Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush*, Civ. No. 05-cv-429, 21-23 (RJL) (D.D.C. Aug. 29, 2005) (alleging deliberate interruption of prayer, mistreatment of the Koran, and forced undressing). Notwithstanding these many allegations, countless reports, and widespread protests, the standard procedure in Guantánamo continues to be one of religious abuse, humiliation, and violence. There has been no meaningful change in policy towards the religious rights of prisoners in US custody in Guantánamo. Further, the passage of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), evidences the clear intent of the US government not only to eviscerate the prisoners' rights, including religious rights under RFRA, but to preclude any avenues for them for judicial review of and redress for their mistreatment.

This failure to protect the clearly established rights of prisoners in the face of overwhelming evidence of serious abuses of religious practices is symptomatic of a culture of impunity that pervades Guantánamo: guards, interrogators, and officials have acted in clear contravention of the prisoners' religious rights and in a manner specifically designed to demean and humiliate them. The reports discussed above unmask the defendants' argument regarding qualified immunity as disingenuous: no reasonable official in Guantánamo could imagine that these kinds

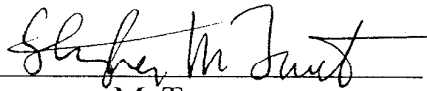
of abuses fell within any conceivable moral or legal framework. *See Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 69 (D.D.C. 2006) (“given the abhorrent nature of the allegations and given ‘our Nation’s fundamental commitment to religious liberty,’ it seems to this court that in this case ‘a reasonable official would understand that what he is doing violates that right’”) (internal citations omitted). Those at the highest level of command, similarly, knowingly encouraged policies which were outrageous violations of the religious rights of the detainees. With such widespread documentation of the abuses at Guantánamo, it is particularly important to preserve legal recourse for the detainees and their counsel in order to protect their religious rights. Such rights unarguably exist in Guantánamo and are clearly protected under RFRA.

CONCLUSION

Amici are deeply concerned by these reports of serious violations of prisoners’ religious rights in Guantánamo and call upon the court to recognize, not only the clear applicability of RFRA to this situation, but also to acknowledge the defendants’ evil, insidious, and outrageous conduct alleged in the complaint and supported by independent reports. The defendants, from the highest level of command to the lowest private, cannot possibly invoke any privilege to treat their wards with such extreme disregard for their religious practices, and beliefs. *Amici* draw the Court’s attention to incidents in the public record in order to demonstrate

the widespread nature of the attacks on the prisoners' religious practices and to highlight the profound impact of a reversal of the decision below denying U.S. officials' qualified immunity. *Amici*, therefore, request the Court uphold the decision below, recognize plaintiffs' clearly established rights under RFRA and deny defendants defense of qualified immunity.

Respectfully submitted,



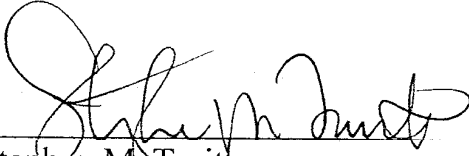
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

I hereby certify, pursuant to Fed. R. Add. P. 32 (a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 6,438 words, (which does not exceed the applicable 7,000 word limit).



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of March, 2007, the foregoing Brief Of *Amici Curiae* Counsel For Guantánamo Detainees, Reprieve, Cageprisoners, And James Yee In Support Of Plaintiffs-Appellants was served by U.S. mail, postage prepaid, upon the following:

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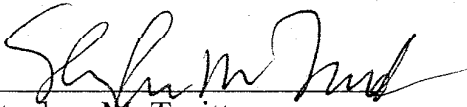
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