No. _____

In The Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

RICHARD MYERS, Air Force General, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Dated: August 24, 2009

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to reach the question of whether detainees at Guantánamo have the constitutional right not to be tortured in light of this Court's vacatur, on the basis of its decision in *Boumediene v. Bush*, of the Court of Appeals' previous decision in this case that detainees have no constitutional rights?

2. Whether the Court of Appeals erred in holding that petitioners' claim for religious abuse and humiliation at Guantánamo was not actionable under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, *et seq.*, because they are not "persons"?

3. Whether the Court of Appeals erred in holding that respondents are entitled to qualified immunity because petitioners' right not to be tortured was not "clearly established" at the time of their detention?

PARTIES TO THE PROCEEDING

1. Petitioners:

   Shafiq Rasul
   Asif Iqbal
   Rhuhel Ahmed
   Jamal Al-Harith

2. Respondents:

   Former Secretary of Defense
   Donald Rumsfeld

   Air Force General Richard Myers (Ret.)

   Army Major General Geoffrey Miller (Ret.)

   Army General James T. Hill (Ret.)

   Army Major General
   Michael E. Dunlavey (Ret.)

   Army Brigadier General Jay Hood

   Marine Brigadier General Michael Lehnert

   Army Colonel Nelson J. Cannon

   Army Colonel Terry Carrico

   Army Lieutenant Colonel William Cline

   Army Lieutenant Colonel Diane Beaver (Ret.)

3. Intervenors:

None

4. *Amici*:

The following Amici presented their views to the Court of Appeals:

The National Institute of Military Justice, Brigadier General (Ret.) David M. Brahms, Lieutenant Commander (Ret.) Eugene R. Fidell, Commander (Ret.) David Glazier, Elizabeth L. Hillman, Jonathan Lurie, and Diane Mazur.

Susan Benesch, Lenni B. Benson, Christopher L. Blakesley, Arturo J. Carlllo, Roger S. Clark, Marjorie Cohn, Rhonda Copelon, Angela B. Cornell, Constance de la Vega, Martin Flaherty, Hurst Hannum, Dina Haynes, Deena Hurwitz, Ian Johnstone, Daniel Kanstroom, Bert Lockwood, Beth Lyon, Jenny S. Martinez, Carlin Myer, Noah Benjamin Novogrodsky, Jamie O'Connell, Jordan J. Faust, Naomi Roht-Arriaza, Meg Satterthwaite, Ron Slye, Beth Van Schaack, David Weissbrodt, and Ellen Yaroshefsky, The Center for Justice and Accountability, Human Rights Watch, the Allard K. Lowenstein International Human Rights Clinic, and Physicians for Human Rights.

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.

Charles Carpenter, Judith Brown Chomsky, George M. Clarke III, Jerry Cohen, Joshua Colangelo-Bryan, George Daly, Jeffrey Davis, Josh Denbeaux, Mark Denbeaux, Stuart Eisenberg, Elizabeth P. Gilson, Candace Gorman, Eldon Greenberg, C. Clark Hodgson, Jr., Gaillard T. Hunt, Christopher Karagheuzoff, Ramzi Kassem, Samuel C. Kauffman, Ellen Lubell, Howard J. Manchel, Louis Marjon, Edwin S. Matthews, Brian J. Neff, Kit A. Pierson, Noah H. Rashkind, Martha Rayner, Marjorie M. Smith, Clive Stafford Smith, Mark S. Sullivan, Doris Tennant, Robert C. Weaver, Angela C. Vigil, Reprieve, CagePrisoners, and James Yee.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinions below are reported as *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (Appendix ("App.") B), and *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) (App. E).

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion on remand on April 24, 2009. Petitioners' application to this Court to extend the time for filing a petition for writ of certiorari until August 24, 2009, was granted on July 9, 2009. App. J. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V.

U.S. Const. amend. VIII.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

STATEMENT OF THE CASE

This case seeks damages from former Secretary of Defense Donald Rumsfeld and various members of the military chain of command for torture and religious abuse suffered by petitioners during their imprisonment at the Guantánamo Bay Naval Station ("Guantánamo") between 2002 and 2004. This is the second time this case has been before the Court.

In 2008, based upon its now-overruled holding that alien detainees at Guantánamo possess *no* constitutional rights, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. __, 128 S. Ct. 2229 (2008), the United States Court of Appeals for the District of Columbia Circuit directed the dismissal of petitioners' claims on grounds that petitioners are not "persons" entitled to protection of their right to worship under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), and are not entitled to be free from torture under the Fifth Amendment. *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008). The Court of Appeals also held that respondents are immune from liability for their torture and religious humiliation of petitioners. By order of December 15, 2008, this Court granted certiorari, vacated the Court of Appeals' ruling, and remanded the case for reconsideration in light of this Court's decision in *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008).

On remand, while stating its view that *Boumediene* is irrelevant to this case because it was confined only to habeas corpus and therefore aliens at Guantánamo had no *other* rights, the Court of Appeals declined to base its disposition on the applicability of *Boumediene* to the constitutional violations alleged here. The Court of Appeals ruled instead that this case should be dismissed on grounds of qualified immunity.

The Court of Appeals' manifest refusal to abide by this Court's mandate and give due effect to *Boumediene* on the constitutional issues raised in this case is reason enough to grant this writ: to affirm the Court's authority and compel an inferior court to abide by its mandate. But there are even more compelling issues which demand this Court's attention, issues at the core of ordered liberty: (i) whether detainees imprisoned by the United States at Guantánamo have a right to be free from abuse and humiliation in the practice of their religion; (ii) whether Guantánamo detainees have a constitutional right to be free from torture; and (iii) whether public officials who knowingly violate these rights can escape accountability for their conduct by raising the shield of qualified immunity when they cannot assert this defense in good faith.

The torture and religious humiliation of Muslim detainees at Guantánamo stands as a uniquely shameful episode in our history. This petition enables the Court to remedy that stain on the moral authority of our nation and its laws, to overrule an obdurately insupportable exercise in statutory construction that effectively renders these

petitioners, and all other detainees at Guantánamo, non-persons, and to facilitate accountability for these terrible acts. Six years ago, Shafiq Rasul petitioned this Court for the right to challenge his confinement through habeas corpus. *Rasul v. Bush*, 542 U.S. 466 (2004) ("*Rasul I*"). This Court recognized that the statutory right of habeas corpus extends to Guantánamo. *Id.* at 481. Today, he seeks vindication of his statutory right to religious dignity and his right under the Constitution not to be tortured by U.S. government officials. These are universally recognized, irreducible minima that our legal system must provide to those under its control.

I. THE CLAIMS: RELIGIOUS ABUSE AND TORTURE AT GUANTÁNAMO

The complaint below was filed by four innocent British citizens who were incarcerated at Guantánamo from January 2002 to March 2004. App. 185a, 207a. Petitioners never took up arms against the United States, never received any military training, and have never been members of any terrorist group. App. 183a, 191a-92a. They have never been charged with any crime. App. 185a. They were never determined to be enemy combatants. *Id.*[1] Respondents are former Secretary of Defense Donald Rumsfeld and high-ranking military officers who ordered and supervised

[1] The complaint was dismissed on respondents' motion to dismiss. Accordingly, at this stage of the proceedings, all factual allegations of the complaint must be presumed to be true. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. __, 128 S. Ct. 2131, 2135 n.1 (2008)

petitioners' incarceration and mistreatment at Guantánamo. App. 192a-97a.

Petitioners Rasul, Iqbal, and Ahmed are boyhood friends from the town of Tipton in England. App. 197a. At the time they were detained, they were 24, 20 and 19 respectively. App. 191a-92a. Iqbal had gone to Pakistan in September 2001 to get married. App. 198a. Ahmed joined him to be his best man. *Id.* Rasul was in Pakistan studying computer science. *Id.* All three went to Afghanistan to assist in providing relief for the humanitarian crisis that arose in 2001. App. 198a-99a. In Afghanistan they were captured by Afghan warlord Rashid Dostum, who is widely reported to have delivered prisoners to U.S. forces for the purpose of collecting a per capita bounty offered by the U.S. military. App. 183a, 199a. Dostum delivered Rasul, Iqbal, and Ahmed into U.S. custody in late 2001. App. 200a-01a.

Petitioner Al-Harith was also born and raised in England. App. 192a. He is a website designer in Manchester. App. 183a. In 2001, he traveled to Pakistan for a religious retreat. App. 183a-84a. When he was advised to leave the country because of growing animosity toward the British, he booked passage on a truck to Turkey, from which he planned to fly home to England. App. 184a. His truck was hijacked, and Al-Harith was forcibly brought to Afghanistan and turned over to the Taliban. *Id.* He was accused of being a British spy, imprisoned in isolation, and beaten by his Taliban guards. After the Taliban fled in the wake of the U.S. invasion of Afghanistan, the British Embassy's plans to

evacuate Al-Harith were preempted when U.S. forces arrived at the prison and took him into custody. App. 184a-85a.

All four petitioners were held and interrogated by the United States under appalling conditions in Afghanistan before they were transported to Guantánamo, where they were systematically tortured and abused pursuant to directives from respondent Rumsfeld and the military chain of command. App. 186a-90a, 201a-07a. For more than two years, petitioners were brutalized by conduct that included:

- repeated beatings (including with rifle butts and while shackled and blindfolded);
- prolonged solitary confinement, including isolation in total darkness;
- deliberate exposure to extremes of heat and cold;
- threats of attack from unmuzzled dogs;
- forced nakedness;
- repeated body cavity searches;
- denial of food and water;
- deliberate disruption and deprivation of sleep;

- shackling in painful stress positions for extended periods;

- injection of unknown substances into their bodies; and

- deliberate interference with and denigration of their religious beliefs and practices, including the deliberate submersion of the Koran in a filthy toilet bucket.

App. 207a-25a.

Petitioners were deliberately prevented from fulfilling their daily obligation to pray, as prayers were frequently interrupted by shouts, taunts, and the playing of earsplitting music over the camp public address system. App. 241a. The chaining of petitioners in the "short-shackling" position was not only extremely painful but also prevented them from taking the required posture for prayer. App. 217a-18a. Forced nakedness violated the Muslim tenet requiring modesty, particularly during prayer. App. 241a. Petitioners' beards were shaved forcibly (App. 205a), an infringement of Muslim religious practice. Desecration of the Koran was frequent and systematic, with numerous incidents of Korans being sprayed with high-power water hoses, splashed with urine, and thrown in the toilet bucket. App. 224a, 241a. These were calculated and illegal displays of disrespect toward the essential symbol of Islam.

Following their release, petitioners sued respondents for damages in the United States District Court for the District of Columbia. App. 179a-82a. The complaint asserted claims for torture, religious abuse, and other mistreatment under, *inter alia*, the Fifth and Eighth Amendments to the Constitution, customary international law, the Geneva Conventions, and RFRA. App. 232a-42a.

II. THE TORTURE MEMOS

The insulting of Muslims in their core beliefs was not the action of rogue guards on the night shift; it represented a clear and illegal policy choice by senior U.S. officials systematically to denigrate detainees' Muslim beliefs and cultural practices. Department of Defense documents reveal that the Secretary of Defense personally ordered many of these practices.

In their complaint, petitioners identified memoranda and reports generated, received, and approved by respondents, which outlined, planned, authorized, and implemented the program of torture and abuse directed at petitioners and other Guantánamo detainees.[2] For example, on December 2, 2002, respondent Rumsfeld approved a memorandum specifically intended for implementation at Guantánamo, authorizing numerous illegal and unprecedented interrogation methods, including putting detainees in stress

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[2] Since the filing of the complaint in 2004, numerous additional memoranda and reports have been made public further detailing respondents' direct role in sanctioning petitioners' torture and abuse.

positions for up to four hours; forcing detainees to strip naked; intimidating detainees with guard dogs; interrogating them for 20 hours at a time; depriving them of sleep; forcing them to wear hoods; shaving their heads and beards; incarcerating them in darkness and silence; exposing them to extremes of hot and cold; and using what was euphemistically called "mild, non-injurious physical contact." App. 187a-88a. Petitioners were subjected to all of these abusive practices – and more.

Rumsfeld subsequently withdrew this memorandum but quickly commissioned a "Working Group" to study detainee interrogation practices. In its March 6, 2003 report, this group addressed the legal consequences of authorizing these methods. App. 188a-89a.[3] It detailed the requirements of international and domestic law governing interrogations, including the Geneva Conventions, the United Nations Convention Against Torture, customary international law, and numerous sections of the U.S. criminal code. *Id.* The report acknowledged that the described interrogation techniques and conditions of imprisonment were illegal, but it reauthorized them and sought to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." App. 188a (internal quotations omitted). The purpose of the report, like the other memos prepared and approved by respondents, was to assist respondents in evading recognized legal prohibitions of their intended conduct. These documents can only be seen as a

[3] A revised version of the Report was issued on April 4, 2003.

shameful nadir for American law, exposing respondents' conscious and calculated awareness that the practices they directed were illegal and in violation of clearly established legal rights.

III. DECISIONS OF THE DISTRICT COURT

In the district court, respondents moved to dismiss the complaint, asserting, *inter alia*, that plaintiffs had no rights under the Constitution. Respondents further contended that they were entitled to qualified immunity with respect to the constitutional and RFRA claims. The district court dismissed petitioners' constitutional claims based on qualified immunity, holding that, regardless of whether detainees have a right not to be tortured that is protected under the Constitution, such rights could not have been clearly established until this Court decided *Rasul I.* App. 165a.[4]

The district court denied respondents' motion to dismiss petitioners' RFRA claim, holding that the complaint did allege actionable conduct. App. 95a-96a. As the court observed, "[f]lushing the Koran down the toilet and forcing [petitioners] to shave their beards falls comfortably within the conduct prohibited … by RFRA." App. 117a-18a. The court further held that RFRA's applicability to U.S. military facilities and to U.S. civilian and military officers, including those serving at Guantánamo, was clear under the plain language of the statute and

[4] Petitioners' Complaint also asserted claims under international law and the Geneva Conventions. These claims are not at issue in this Petition.

therefore well-established at the time that petitioners were abused. App. 118a-22a.

IV. DECISIONS OF THE COURT OF APPEALS

Respondents filed a timely notice of appeal of the district court's order denying dismissal on the basis of qualified immunity with respect to the RFRA claim. On petitioners' request, the district court certified its decision on the remaining issues pursuant to Fed. R. Civ. P. 54(b), allowing the petitioners to cross-appeal. App. 91a-93a.

Based on its now overruled opinion in *Boumediene*, 476 F.3d 981, the Court of Appeals held in 2008 that petitioners had no right under the Constitution not to be tortured, noting that "Guantanamo detainees lack constitutional rights because they are aliens without property or presence in the United States." App. 60a. As in *Boumediene*, the Court of Appeals invoked its categorical reading of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as supporting its "property or presence" requirement and rejected the proposition that this Court's decision in *Rasul I* had distinguished *Eisentrager* in the context of Guantánamo. App. 62a-65a. The Court of Appeals held in the alternative that, even if Guantánamo detainees had a constitutional right not to be tortured, that right was not clearly established and therefore respondents were entitled to qualified immunity. App. 65a-67a.

The Court of Appeals reversed the district court's ruling that denied respondents' motion to

dismiss the RFRA claims, with the panel majority holding that petitioners "do not fall with[in] the definition of 'person'" under RFRA (App. 78a) and therefore they lacked standing to invoke RFRA's protections. The Court of Appeals did not apply ordinary principles of statutory construction to the broad term "person." Instead, it reasoned that RFRA was in essence a codification of constitutional free exercise principles, and therefore the word "person" should be imbued with a constitutional construction consistent with the Court of Appeals' reading of this Court's Fourth and Fifth Amendment jurisprudence, which, the Court of Appeals concluded, categorically excluded recognition of any constitutional rights of aliens at Guantánamo. App. 76a-78a.

Judge Brown wrote a separate concurrence criticizing the majority's failure to apply ordinary principles of statutory construction in reaching its conclusion that Guantánamo detainees are not "persons." Judge Brown observed that the panel majority's ruling on the scope of RFRA left the Court of Appeals, "with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantanamo are not 'person[s].' This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human." App. 89a (alteration in original).

On December 15, 2008, this Court granted certiorari, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of the Court's recent

decision reversing the Court of Appeals in *Boumediene*. App. D. After supplemental briefing, the Court of Appeals issued a new *per curium* opinion on April 24, 2009. App. B. Despite this Court's express instructions that it consider the effect of *Boumediene*, the Court of Appeals declined to base its decision on whether its earlier rejection of petitioners' constitutional claims could withstand analysis under *Boumediene*. App. 4a-8a. Although the court expressed its view in dicta that *Boumediene* was explicitly confined to habeas corpus, the court announced that it would avoid deciding the case based on any consideration of the constitutional issue and instead would confine its grounds for dismissal to qualified immunity. App. 8a-9a. The court justified shifting its grounds for decision and ignoring this Court's mandate on the authority of *Pearson v. Callahan*, 129 S. Ct. 808 (2009). App. 8a-9a.

REASONS FOR GRANTING THE PETITION

The sordid spectacle of American soldiers torturing and humiliating captives at Abu Ghraib is surpassed only by the revelation that at Guantánamo similar despicable practices were conceived, authorized, and systematically implemented by senior officials of the U.S. government. The tragic irony that such inhumanity could be perpetrated by American officials has brought shame to our country, has disappointed and angered our allies, and has emboldened our enemies. The Court of Appeals' decision compounds that harm by holding that these leaders are immune from having to account for their actions and reiterating,

albeit in dicta, that these plaintiffs have no right to religious dignity or to be free from torture. It now falls to this Court, the last haven for affirmation of our constitutional order, to hold these officials responsible and to affirm these fundamental rights.

Without doubt, this is an uncomfortable and unwelcome task. Yet this Court has been a bulwark in a series of cases that have refused to allow Guantánamo to be left as an indelible rebuke to our claim to be a beacon of freedom. This case presents a unique and compelling opportunity for this Court to affirm that torture at Guantánamo was a violation of fundamental rights and to make clear to inferior courts that its constitutional jurisprudence regarding Guantánamo must be taken seriously. Left in place, the Court of Appeals' decision will be a final assertion of judicial indifference in the face of calculated torture and humiliation of Muslims in their religion. The decision cannot stand.

I. THE COURT OF APPEALS REBUFFED THIS COURT'S MANDATE TO RECONSIDER THIS CASE IN LIGHT OF *BOUMEDIENE*.

Despite this Court's explicit direction to the Court of Appeals to consider this Court's intervening decision in *Boumediene* in reevaluating petitioners' claims, the Court of Appeals simply declined to do so. Instead, the Court of Appeals decided the case on remand on an alternative ground, namely that petitioners' claims are precluded by qualified immunity. This disposition misapplies this Court's precedent and flouts its authority.

As an initial matter, the Court of Appeals below ruled that this Court had already decided the very issue it had framed on remand. According to the Court of Appeals, since this Court confined its holding in *Boumediene* to "the extraterritorial reach of the Suspension Clause" and "disclaimed any intention to disturb existing law" as to any other constitutional provision, it was not open to the Court of Appeals to apply the *Boumediene* analysis here. App. 6a-7a. The court further concluded that it was beyond its power to determine whether *Boumediene* has "eroded the precedential force of *Eisentrager* and its progeny" on which it had earlier based its opinion that petitioners have no constitutional rights. App. 7a.

In short, the Court of Appeals viewed itself as precluded by this Court's precedent from doing precisely what this Court directed it to do. Plainly, this Court was fully aware that *Boumediene* dealt with habeas corpus, but it nonetheless directed the Court of Appeals to examine how *Boumediene* affected the analysis here, where habeas is not in issue. Yet this appears not to have entered the Court of Appeals' calculus. Nor did the Court of Appeals consider that this Court had itself declared in *Boumediene* how the application of *Eisentrager* and its progeny must be modified. This Court did not leave it to the Court of Appeals to determine *whether Eisentrager*'s authority had been eroded – this Court had already clearly held that it had – but directed it to consider *how* that erosion affected this case.

The Court of Appeals further sought to justify its refusal to consider the impact of *Boumediene* on petitioners' constitutional claims on grounds that *Pearson v. Callahan*, 129 S. Ct. 808 (2009), allowed it to avoid the constitutional issues and resolve the case solely on immunity grounds. Yet *Pearson* did not address the circumstance presented here – where the court below had already ruled that no constitutional right existed and its decision was vacated by this Court with explicit directions to reconsider that very issue in light of more recent authority. Moreover, even without regard to this circumstance, *Pearson* would not support avoidance of the constitutional issue here.

Pearson did not reverse the sequence approved in *Saucier v. Katz*, 533 U.S. 194 (2001), which required the courts to resolve the underlying issue of whether the claimant's constitutional rights were violated before reaching the question whether the defendant has qualified immunity. *Pearson* merely held that the *Saucier* sequence is not "an inflexible requirement" and the lower courts may make a reasonable exercise of discretion to reverse it in appropriate cases. 129 S. Ct. at 813. *Pearson* nonetheless reaffirmed that the *Saucier* sequence "is often appropriate" and "often beneficial," and it described the many circumstances that continue to favor it, *id.* at 818, most of which are clearly applicable here. Yet the Court of Appeals here invoked *Pearson* as conferring unfettered authority for avoiding any constitutional issue without giving any consideration to the circumstances of the particular case.

A genuine exercise of discretion requires careful weighing of the competing considerations for and against the alternative choices. *E.g.*, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). Dissenting in *Schlup v. Delo*, 513 U.S. 298 (1995), Justice Scalia observed that an exercise of discretion "may not be done without considering relevant factors and giving a 'justifying reason.'" *Id.* at 348. Yet here, the court below made no pretense of considering whether the specific circumstances of the instant case favored avoidance of the constitutional issue by addressing immunity first. This is the antithesis of the analysis required by *Pearson*.

None of the concerns set out in *Pearson* that might counsel against reaching the constitutional issue is present here. This is not a case in which the issue "is so fact-bound that the decision provides little guidance for future cases;" it is not a case where the issue is otherwise pending before a higher court or where it rests on an "uncertain interpretation of state law;" and it is not a case, petitioners submit, where the arguments are poorly presented. *Pearson*, 129 S. Ct. at 819-20. Instead, this is precisely the type of case which *Pearson* itself recognized should follow the *Saucier* sequence.

As the *Pearson* Court observed, the *Saucier* two-step procedure requiring resolution of the constitutional issue first "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* at 818. Here, recognition of the constitutional right of Guantánamo detainees to be

free from torture at the hands of government officials is largely, if not entirely, "dependent on cases in which the defendant may seek qualified immunity." *Id.* at 821-22. This is not a case like the ones identified by this Court in *Pearson* where the constitutional issue is likely otherwise to be presented in a criminal action, a suit against a municipality, or an action for injunctive relief. If courts are allowed to follow the path set by the Court of Appeals, there may never be a proper occasion for recognizing the constitutional right at issue here because qualified immunity will almost invariably be in issue. The principle that there is a constitutional right for detainees not to be tortured thus will likely never be addressed. This is reason enough alone for granting the writ.

II. THE COURT OF APPEALS' DECISION THAT PETITIONERS ARE NOT "PERSONS" FOR PURPOSES OF THE RELIGIOUS FREEDOM RESTORATION ACT MISAPPLIES THAT STATUTE AND CONTRAVENES LONGSTANDING SUPREME COURT AUTHORITY REAFFIRMED IN *BOUMEDIENE*.

RFRA provides a cause of action to any "person" whose religious exercise has been substantially burdened by the government. App. 176a (42 U.S.C. § 2000bb-1(c)). It precludes the government or any of its officers from infringing on a person's exercise of religion, unless the restriction is the "least restrictive means of furthering [a] compelling governmental interest." App. 175a (42

U.S.C. § 2000bb-1(b)(2)). As the district court recognized, RFRA on its face provides a cause of action for petitioners in the circumstances presented here. The complaint alleged that respondents deliberately infringed on petitioners' religious exercise by, *inter alia*, interfering with their prayer, shaving their beards, forcing nudity, and desecrating their Korans. App. 205a, 224a, 241a.

In its initial decision, the Court of Appeals rejected the district court's straightforward application of RFRA. Instead, it held that, because Guantánamo detainees have no constitutional rights, they also have no rights under RFRA. On remand, the court reaffirmed this position in only slightly modified form. It held that, because Guantánamo detainees have no constitutional rights other than the right of habeas corpus recognized in *Boumediene*, they also have no rights under RFRA. This decision was manifestly wrong for two independent reasons.

First, the court's decision on remand is in sharp conflict with this Court's authority on statutory construction. In *Rasul I*, this Court dealt with a virtually identical instance of statutory construction – the question whether the habeas statute applied at Guatánamo. Like RFRA, the habeas statute has a constitutional analog, and thus the Court was faced, as it is here, with the question whether the statute should be read to be co-extensive with the constitutional provision. As the Court expressly held in *Rasul I* with respect to the application of the federal habeas statute to detention of these petitioners:

> Considering that [§ 2241] draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

542 U.S. at 481 (footnote omitted). No less so here. RFRA, like the habeas statute, draws no distinction between citizens and aliens, and nothing in RFRA suggests any variance in its geographical reach based on a plaintiff's citizenship.

By its express terms, RFRA protects all "persons" from government interference with their exercise of religion. As Judge Brown noted in her concurrence, the majority's construction of the term "persons" to exclude petitioners contradicts the "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." App. 83a. Where an unambiguous word is undefined in a statute, it must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Given its "ordinary or natural meaning," "person" is a broad term that encompasses human beings regardless of their place of residence or citizenship. Where Congress intends to limit the term "person" by citizenship or residence, it knows how to do so.

This Court has expressly instructed that exceptions are not to be judicially implied into a statute unless the absence of the exception would lead to an absurd result. *United States v. Rutherford*, 442 U.S. 544, 555 (1979). The Court of Appeals ignored this instruction and, as it did in its now-reversed decision in *Rasul I*, fashioned its own Guantánamo exception to a statute that includes no such condition or qualification.

The Court of Appeals' ruling conflicts as well with this Court's construction of the scope of RFRA. As this Court observed in *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA's "restrictions apply to every agency and official …. [and] to all federal and state law, statutory or otherwise." *Id.* at 532. Contrary to the Court of Appeals' conclusion, RFRA was not enacted merely to be co-extensive with the First Amendment, which would have made the statute superfluous. Rather, it was enacted to supplement the First Amendment by extending protection to religious practices that this Court had expressly held were *not* protected by the First Amendment. App. 173a-74a (42 U.S.C. § 2000bb); *see* S. Rep. 103-111, at 4, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. Prior to the passage of RFRA, this Court had held that the First Amendment did not protect the religious practice of using illegal drugs against the effect of a law of neutral application, *Employment Div. Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990), that it did not protect the rights of military officers to wear yarmulkes while in uniform, *Goldman v. Weinberger*, 475 U.S. 503 (1986), and that it did not protect the rights of Muslim prisoners to attend

Friday services, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). With its deliberately broad and unconditional language, RFRA protects these and many other practices. It applies in prisons; it applies to the military; it applies to all government officers wherever situated; it applies to all territories and possessions of the United States. And, petitioners submit, it applies in any setting where the government exercises unchallenged authority and control. Far from simply duplicating constitutional protections, RFRA expressly supplements and extends protection beyond the scope of the First Amendment.[5]

The language of the statute iterates the broad purpose "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." App. 175a (42 U.S.C. § 2000bb(b)(2)). The Court of Appeals' conclusion that RFRA "did not expand the scope of the exercise of religion beyond that encompassed by the First Amendment," App. 73a, is thus demonstrably incorrect and entirely at odds with the purpose, effect, and express language of RFRA.

But the decision below is wrong for a second, far more troubling, reason. Having wrongly concluded that RFRA merely codifies the Constitution, the Court of Appeals then compounded its error by limiting RFRA's meaning based on its

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[5] This construction of RFRA has been adopted by the United States, which has urged it in this Court. *See* Brief of the United States as Amicus Curiae, *City of Boerne v. Flores*, 1997 U.S. S. Ct. Briefs LEXIS 185, at *70, 71 n.40 (Jan. 10, 1997) (citing cases).

incorrect (and now overruled) construction of Fourth and Fifth Amendment jurisprudence. Based on its own decision in *Boumediene*, in its initial decision here the Court of Appeals had held that, because nonresident aliens are not "persons" under the Fourth or Fifth Amendments, they have no *statutory* rights under RFRA. App. 78a. On remand, while, on the one hand, declaring that it *would not decide* the predicate constitutional issue, the Court of Appeals, on the other hand, reaffirmed its earlier construction of RFRA which turned precisely on its now-vacated holding that detainees at Guantánamo have no constitutional rights.

As this Court stated in *Rasul I*, and reaffirmed in reversing *Boumediene*, the Court of Appeals was plainly wrong in holding categorically that Guantánamo detainees have no enforceable constitutional rights. In *Boumediene*, this Court grounded the recognition of those rights in longstanding jurisprudence beginning with the *Insular Cases*, *e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. United States*, 195 U.S. 138 (1904), and their progeny, which more than a century ago had determined that the applicability of a constitutional provision outside the sovereign territory of the United States "depends upon the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous." *Boumediene*, 128 S. Ct. at 2255 (internal quotations omitted). Reaffirming its prior holding in *Rasul I*, this Court again ruled that the constitutional right to habeas corpus applies at

Guantánamo because it is under the government's "complete and total control." *Id*. at 2262.

Had the Court of Appeals honored this Court's mandate to reconsider its earlier decision in light of *Boumediene*, this would have exposed the false premise on which the court had construed the meaning of "persons" in the RFRA statute. In its initial decision, the Court of Appeals' syllogism was that "persons" must be confined to those who enjoy constitutional rights and cannot include aliens at Guantánamo because, under the court's premise, they categorically have no such rights. In its decision on remand, the Court of Appeals concluded that *Boumediene*'s recognition of Guantánamo detainees' constitutional right of habeas was limited to that single right and refused to examine whether *Boumediene*'s analytical basis undercuts the court's categorical premise. Plainly it does. Like habeas corpus, the right to be free from official religious abuse at Guantánamo would certainly not be "impracticable and anomalous." *Id.* at 2255.

Certiorari is warranted here not simply because a lower court fundamentally misconstrued a statute. Rather, the Court of Appeals has, once again, directly and obdurately in conflict with this Court's jurisprudence, rejected the proposition that detainees have even the most basic of rights and concluded that government action at Guantánamo is subject to no constitutional constraints or accountability.

Since detentions at Guantánamo commenced in 2002, the Court of Appeals has been faced with

several cases asserting rights on behalf of detainees. In each instance, the Court of Appeals has held that detainees do not possess the right being asserted. *E.g.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *Boumediene*, 476 F.3d 981. On certiorari, this Court has reversed each of those decisions and affirmed that the detainees possess cognizable rights under the laws of the United States and under the Constitution. *Rasul I*, 542 U.S. at 473; *Hamdan v. Rumsfeld*, 548 U.S. 557, 625-26 (2006); *Boumediene*, 128 S. Ct. at 2262. Nevertheless, despite these rulings and this Court's explicit instruction to reconsider its stance in this case, the Court of Appeals ignored both the principles of statutory construction that should have resolved this case in petitioners' favor and the clear line of this Court's jurisprudence rejecting the Court of Appeals' blanket repudiation of detainee rights. Petitioners respectfully submit that an unequivocal affirmation of this Court's Guantánamo jurisprudence – and its unequivocal application to the fundamental rights to be free from torture and religious abuse – is a critical reason for the Court to grant review in this case. Petitioners further submit that a holding that Guantánamo detainees are not "persons" cannot be left in place.

III. PRISONERS IN U.S. CUSTODY AT GUANTÁNAMO HAVE A CONSTITUTIONAL RIGHT NOT TO BE TORTURED, AND OFFICIALS WHO VIOLATE THAT RIGHT ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Whatever euphemisms are applied, whatever abstractions are invoked, petitioners were deliberately tortured at the behest and direction of the former Secretary of Defense and senior officers in the chain of command. Respondents conceived and implemented their program of torture and abuse in violation of the express policy statements of the President, applicable military regulations, the Constitution, U.S. and international law, and any pretense of honor or decency. Not only should respondents (or any reasonable officers serving in respondents' positions) have known of the illegality of their conduct, the complaint is replete with allegations that respondents in fact *did know*. They requested, wrote, and received memorandum after memorandum, all detailing the various ways in which their conduct and orders were violations of applicable law. App. 186a-90a. It was for this very reason that each report or memorandum tried to concoct a *post hoc* basis for immunity for respondents' unconstitutional and illegal acts.

In its initial decision, the Court of Appeals held that petitioners have no constitutional right to be free of torture inflicted by government officers. In its decision on remand, the court avoided the question whether *Boumediene* undercuts its earlier

thesis and ruled that in any event the right not to be tortured was not clearly established when petitioners were detained. This Court should make clear that officials cannot take refuge in constitutional ignorance or purported ambiguity when they are attempting to evade rather than comply with the law.

In *Boumediene*, this Court rejected the Court of Appeals' categorical conclusion that the Constitution stops at the water's edge and made clear that its holding was rooted in over a century of jurisprudence. On remand here, while purporting to eschew a definitive ruling on the constitutionality of torture at Guantánamo, the Court of Appeals did not hesitate to announce its view that *Boumediene* is limited to the Suspension Clause and has no applicability to other constitutional rights. The court below thereby not only disregarded *Boumediene*'s underlying analysis and the historical precedent on which it was explicitly based, but ignored this Court's express statement that, like the rights guaranteed under the Suspension Clause, "the substantive guarantees of the Fifth and Fourteenth Amendments" apply to foreign nationals, like petitioners, "who have the privilege of litigating in our courts." 128 S. Ct. at 2246. Indeed, in reaching its conclusion, the Court of Appeals disregarded its own previous decision in *Boumediene*, which recognized that there is no principled distinction between the right to habeas corpus guaranteed under the Suspension Clause and other rights guaranteed under the Constitution. As the Court of Appeals observed:

> [T]he dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right. But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power. Consider the First Amendment…. Like the Suspension Clause, the First Amendment is framed as a limitation on Congress: "Congress shall make no law…." Yet no one would deny that the First Amendment protects the rights to free speech and religion and assembly…. There is the notion that the Suspension Clause is different from the Fourth, Fifth, and Sixth Amendments because it does not mention individuals and those amendments do (respectively, "people," "person," and "the accused")…. That cannot be right.

476 F.3d at 993 (internal citations omitted). Thus, the Court of Appeals accepted in *Boumediene* that habeas rights could not be segregated from other fundamental rights; this Court's decision in *Boumediene* should have made analytically impossible the Court of Appeals' result-driven holding in the remand of this case.

In view of the Court of Appeals' disregard for *Boumediene*, it is critical that this Court not just vacate but strongly reject the Court of Appeals' earlier contrary ruling, to which it continued to

adhere on remand, that respondents' conduct at Guantánamo was not constrained by the Constitution and, accordingly, that they were free to torture and abuse petitioners without risk of personal liability.

A. Any Reasonable Officer Would Know that Torture and Deliberate Abuse Are Illegal Under All Sources of Law.

The Constitution prohibits torture by government officials of persons in government custody wherever they may be held. The principle that government officials cannot torture prisoners is not new. As long ago as 1936, this Court considered whether the right not to be tortured was "fundamental" for the purpose of imposing it on the States under the Due Process Clause of the Fourteenth Amendment. *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, the Court held that torture is inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 286 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)). Thus, the right not to be tortured was protected by the Fourteenth Amendment, and torture was banned as a matter of state as well as federal practice.

Torture is also "universally condemned" under international law. *Sosa v. Alvarez Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring). U.S. courts have recognized for more than twenty-five

years that no foreign sovereign has the authority to order torture. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), cited with approval by this Court in *Sosa*, 542 U.S. at 738 n.29, the Second Circuit held that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." 630 F.2d at 881. "[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Id*. at 890.

The United States is a signatory to the Convention Against Torture. 2 U.S. Dep't of State, Treaties in Force at 182 (2007), *available at* http://www.state.gov/documents/organization/89668.pdf. The U.S. government has repeatedly, officially, and publicly condemned torture in any and all circumstances and acknowledged that:

- the prohibition on torture applies to the U.S. military;
- "[t]orture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer"; and
- "a commanding officer who orders such punishment would be acting outside the scope of his or her position and would be *individually liable* for the intentional infliction of bodily and emotional harm."

Initial Report of the United States to the United Nations' Committee Against Torture (Oct. 15, 1999), App. 246a, 249a (emphasis added).

The U.S. government could not have been more clear in articulating the scope and nature of its own obligations:

> The United States is unequivocally opposed to the use and practice of torture. No circumstances whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for *or defense to committing torture*. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government…. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States *and in other parts of the world.*

Second Periodic Report of the United States to the United Nations Committee Against Torture (May 6, 2005), App. 255a-56a (emphasis added).

The prohibition against torture is not only deeply embedded as a matter of policy and customary international law, it is a bedrock norm of constitutional law. As the Court noted in *Brown*, torture "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 297 U.S. at 285 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

From the *Insular Cases* to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J. concurring), to *Rasul I*, to *Boumediene*, this Court has for more than a century adopted a functional analysis of what constitutional rights may be applied outside the United States. That analysis has never been premised on rigid territorial lines but on the concept that "fundamental" rights apply where they can practicably be enforced. And as *Brown* teaches, few if any rights are more "fundamental" than the right of a prisoner not to be tortured. As Justice Scalia recognized in his dissent in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a case decided the year before petitioners were sent to Guantánamo, this norm is so obvious that, even in the case of aliens who may be entitled to only minimal constitutional protection, it is certain that "they cannot be tortured." *Id.* at 704 (Scalia, J. dissenting). In sum, it has been long established that there is an irreducible constitutional minimum that government officials owe to human beings under their control – whether citizens or aliens and

wherever that control is exercised – and that minimum necessarily includes the prohibition of torture.

This Court's decision in *Boumediene* reaffirms the principle that the Constitution's reach is not measured by geography but by the practicality of enforcing its provisions wherever the government exercises power and control. The test is not whether petitioners have "property or presence" within the United States, but whether enforcement of the Constitution where the petitioner is located would be "impractical or anomalous." Particularly pertinent here, the Supreme Court unequivocally rejected any construction of *Eisentrager* as having "adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause," because it would represent "a complete repudiation" of the "functional approach" taken in the *Insular Cases* and *Reid v. Covert*, 354 U.S. 1 (1957). *Boumediene*, 128 S. Ct. at 2257-58. The Court characterized the constricted reading of *Eisentrager* adopted by the Court of Appeals as overlooking the "common thread uniting the Insular Cases, *Eisentrager* and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258.

As a result, the Supreme Court reaffirmed its holding in *Rasul I* that Guantánamo is for all practical purposes U.S. territory and detainees should be treated accordingly. It elaborated a functional test, according protection of fundamental constitutional rights to detainees as long as the extension of these rights was not "impracticable or

anomalous." Importantly, it viewed the issue of detainee rights as one of separation of powers and rejected the idea that the executive branch could create a legal black hole where the government could act without constitutional constraint or reasonable judicial oversight:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.

Id. at 2259 (internal citations omitted).

On remand, the Court of Appeals, in disregard of this Court's direction, refused to reexamine whether petitioners have a constitutional right to be free from government-inflicted torture in light of this Court's decision in *Boumediene*, but the court made it abundantly clear that it continued to adhere to a territorial view, that the Constitution precludes recognition of any constitutional rights of these detainees save the right of habeas corpus. Stated simply, this is not a permissible reading of

Boumediene; it is an unwillingness to accept its premises. This Court should not allow this decision to stand as the last judicial word on torture at Guantánamo. Nor can such an obdurate reading of precedent supply a safe harbor for government officials that knowingly ordered torture.

B. The Court Should Make Clear that Government Officials Who Order Torture Are Not Entitled to Qualified Immunity.

Equally important to the condemnation of government-inflicted torture wherever it occurs is the repudiation of the use of qualified immunity to insulate misconduct that respondents knew was legally wrong and morally reprehensible on the pretext that they did not know it was also unconstitutional. At its core, qualified immunity must rest on a genuine good faith belief that the conduct being challenged was not wrongful. This case presents the Court with the opportunity to make clear that qualified immunity cannot be used as a stratagem to enable government officials to create a lawless enclave where they can knowingly engage in despicable practices with impunity.

Respondents knew, as any civilized person would know, and as their own duties of high government office and military command require, that torture and deliberate abuse are wrong and violate fundamental rights wherever they occur. They brought detainees to Guantánamo rather than to a detention facility within our borders in a

calculated attempt to circumvent the constitutional provisions that forbid torture. Their memos evidence, however, that they were aware that every source of controlling law, including U.S. criminal law and the Uniform Code of Military Justice, expressly prohibited torture and did apply at Guantánamo, that the conduct they were contemplating was "otherwise criminal," and that they were seeking post hoc rationalizations and concocted defenses that would somehow render lawful that which was plainly unlawful. App. 188a-89a. Respondents' gamble that Guantánamo might be recognized as a haven for torture – where torture was concededly illegal but possibly not unconstitutional – is not the kind of conduct that the doctrine of qualified immunity is intended to protect.

The Court of Appeals relied on the absence of any constitutional ruling directly on point that prohibits torture at Guantánamo. But this Court has made clear that the lack of a directly applicable precedent does not insulate egregious conduct. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court unambiguously rejected the proposition that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640. For a right to be clearly established, it is enough that "the contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. … [I]n the light of pre-existing law, the unlawfulness must be apparent." *Id.* There can be no doubt that the unlawfulness of torture and abuse was clear to the Secretary of Defense and senior military officers.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), prison guards shackled prisoners to a hitching post on a hot day, conduct very similar to the "short-shackling" of petitioners here. App. 217a. In *Hope*, the guards defended the claims against them on the ground that no decision had established that the Constitution prohibited the practice. The Court held that the "obvious cruelty inherent" in the use of the hitching post and treatment "antithetical to human dignity… under circumstances that were both degrading and dangerous" were sufficient to put the guards on notice of a constitutional violation. 536 U.S. at 745. In so ruling, the Court noted that defendants knowingly violated their own regulations, which further put defendants on notice and precluded their reliance on qualified immunity. The fact that the specific practice had never been addressed by the courts did not afford the defendants in *Hope* an escape into qualified immunity. That respondents in this action are senior government officials rather than prison guards in no way changes the analysis; if anything, it should apply with greater force here.

Similarly, in *United States v. Lanier*, 520 U.S. 259 (1997), a state court judge was charged with criminal constitutional violations pursuant to 18 U.S.C. § 242. Lanier argued that he was not on notice that the Constitution was implicated in his criminal conduct – sexual assault of five women who worked in the courthouse – even though he was aware that state criminal statutes prohibited such behavior. In essence, his position was that although he knew his conduct was wrongful, and even illegal, he could not have known it was a constitutional infraction because there was no precedent on point.

This Court summarily rejected Lanier's defense because the illegality of his conduct, if not its unconstitutionality, was obvious. Analogizing Lanier's due process defense to an assertion of qualified immunity, the Court stated, "[t]he easiest cases don't even arise. There has never been…[a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. at 271 (internal citations and quotations omitted) (alteration in original). The teaching of *Lanier* is clear: the torturer, the "hostis humani generis, an enemy of all mankind," like the hypothetical child slaver in *Lanier*, cannot rely on the absence of a case on point.

Like the defendant in *Lanier*, the Court of Appeals approached the question of qualified immunity here with a single, narrow question – was there a case holding that torture at Guantánamo violated specific provisions of the Constitution? Because the court answered this question in the negative, it held that respondents could not be held liable, regardless of the illegality of their conduct under other applicable laws. This is precisely the approach that this Court rejected in evaluating Lanier's substantive due process defense. If the Court of Appeals had applied the standard enunciated in *Lanier*, which would have required it to accept that, irrespective of a constitutional precedent on point, any reasonable officer would know that torture was prohibited by every other source of law, it would have rejected respondents' qualified immunity defense.

While the standard is an objective one, good faith remains at the heart of qualified immunity; indeed, the terms qualified immunity and "good faith" immunity are often used interchangeably. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Such immunity is not intended to protect defendants who engage in deliberately unlawful conduct. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). As the Court made clear in *Harlow*: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." 457 U.S. at 819. Yet a license for lawless conduct – a license to torture, abuse, and humiliate – is precisely what respondents sought at Guantánamo. In granting review, this Court has the opportunity definitively to revoke that "license," extend a minimum guarantee of dignity and decency to the hundreds who remain in detention at Guantánamo, and reaffirm to the world that this nation will not excuse torture by our own officials while condemning it by others.

Respondents selected Guantánamo as petitioners' detention facility in a cynical attempt to avoid accountability for conduct that had long been held unconstitutional when it occurred in U.S. prisons. But Guantánamo is not a Hobbesian enclave where respondents could violate clear prohibitions on their conduct imposed by statute and regulations and then point to a purported constitutional void as a basis for immunity. It is of critical importance that this Court strongly affirm that torture is unequivocally beyond the pale for officials of the United States, wherever they may be operating.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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August 24, 2009

In The
Supreme Court of the United States

No. _____

SHAFIQ RASUL, *et al.*,
***Petitioners*,**

v.

RICHARD MYERS, Air Force General, *et al.*,
***Respondents*.**

AFFIDAVIT OF SERVICE

I, Teodora I. Mihaylova, of lawful age, being duly sworn, upon my oath state that I did, on the 24th day of August, 2009, hand file with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Petition for Writ of Certiorari, and further sent, via UPS Ground, three (3) copies of said Petition to:

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AFFIDAVIT OF COMPLIANCE

This Petition for Writ of Certiorari has been prepared using:

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As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 8,930 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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