[ARGUED FEBRUARY 21, 2014; DECIDED JUNE 10, 2014]

Nos. 13-5096, 13-5097 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMI ABDULAZIZ ALLAITHI,
Plaintiff-Appellant,

v.

DONALD H. RUMSFELD, Former Secretary of Defense,
Department of Defense, et al.,
Defendants-Appellees.

YUKSEL CELIKGOGUS et al.,
Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, Former Secretary of Defense,
Department of Defense, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANTS-APPELLEES' RESPONSE TO THE PETITION FOR REHEARING EN BANC

JOYCE R. BRANDA
Acting Assistant Attorney General

MATTHEW M. COLLETTE
(202) 514-4214
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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GLOSSARY

CSRT	Combatant Status Review Tribunal
RFRA	Religious Freedom Restoration Act

INTRODUCTION AND SUMMARY

This is an appeal from the dismissal of two damages actions asserted against numerous government officials, in their individual capacities, by six plaintiffs who were formerly detained by the military in Afghanistan and at Guantanamo. This Court correctly held that plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, are barred because nonresident aliens are not among the "persons" protected by RFRA under *Rasul v. Myers*, 512 F.3d 644, 667-72 (D.C. Cir. 2008) ("*Rasul I*"), and *Rasul v. Myers*, 563 F.3d 527, 532-33 (D.C. Cir.) ("*Rasul II*"), *cert. denied*, 558 U.S. 1091 (2009).[1] Op. 13-14. Plaintiffs contend that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), undermined the correctness of that statutory holding, but *Hobby Lobby* addressed a different question, and its reasoning is consistent with the RFRA holding in the *Rasul* decisions. Moreover, rehearing is unwarranted because it would not change the outcome of this case. Even if RFRA applied here, the defendants are entitled to qualified immunity on the RFRA claims because it was not clearly established during the period of plaintiffs' detention (2001-2006) that aliens detained by the military abroad are entitled to RFRA rights.

This Court also properly concluded that the named defendants were acting within the scope of their employment when they engaged in the conduct alleged in

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[1] The Supreme Court vacated *Rasul I* for further consideration in light of *Boumediene v. Bush*, 553 U.S. 723 (2008), *see Rasul v. Myers*, 555 U.S. 1083 (2008), and *Rasul II* reinstated *Rasul I* in part, *see Rasul II*, 563 F.3d at 528-29, 532-33.

plaintiffs' complaints, and thus that the United States properly substituted itself for those defendants on plaintiffs' international-law claims. Op. 4-13. Rehearing is unwarranted to review plaintiffs' fact-intensive challenges to this Court's conclusion, which is consistent with and well supported by pertinent case law, including *Rasul I*.

Under this Court's well-established waiver and forfeiture doctrine, rehearing is also unwarranted to consider plaintiffs' challenge to the dismissal of the "John Doe" defendants, a challenge plaintiffs assert for the first time in their rehearing petition.

STATEMENT

1. Plaintiffs Sami Allaithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, and Abu Muhammad are foreign nationals whom the U.S. military took into custody in 2001 or 2002 and detained in Afghanistan and then at Guantanamo Bay. JA 29-31, 39-42, 99-100, 107-09. Plaintiffs Celikgogus, Sen, and Mert were transferred from Guantanamo prior to May 2004. JA 51, 57, 63. Subsequently, in July 2004, the Department of Defense issued several memoranda establishing military "Combatant Status Review Tribunals" ("CSRTs") to review whether then-current Guantanamo detainees were properly detained as "enemy combatants." Op. 8. In late 2004, CSRTs concluded that plaintiffs Allaithi, Hasam, and Muhammad were no longer "enemy combatants." JA 68, 74, 114. Allaithi was transferred to his home country, Egypt, in October 2005. JA 99-100, 114. Hasam (who is an Uzbek refugee) and Muhammad (who is an Algerian refugee) were transferred to Albania in November 2006. JA 42, 64, 69-70, 76.

2. After their transfers, plaintiffs filed two damages actions in district court—one brought by Allaithi and the other brought by the other five plaintiffs—against Former Secretary of Defense Donald Rumsfeld, numerous other named high-ranking Department of Defense officials, and 100 unnamed "John Does," all of whom were sued in their individual capacities. JA 23-26, 31-37, 91, 95-97, 100-05, 127. Plaintiffs alleged violations of, *inter alia*, RFRA and international law. JA 82-90, 119-26. The district court dismissed the actions, holding that "[plaintiffs'] claims are legally indistinguishable from those rejected by" *Rasul I* and *Rasul II*, JA 138. *See* JA 136-48.

3. This Court affirmed. The Court held that plaintiffs' RFRA claims are barred because plaintiffs are not among the category of "persons" protected by RFRA under this Court's *Rasul* decisions. Op. 13-14. In addition, the Court held that the named defendants acted within the scope of their employment under D.C. law during the incidents alleged in plaintiffs' complaints, and thus that the United States properly substituted itself for those defendants on plaintiffs' international-law claims under the "Westfall Act," Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679). Op. 4-13. The Court explained that its holding was controlled by *Rasul I* with respect to the claims asserted by the three plaintiffs transferred prior to the institution of CSRTs, and the Court held that the rationale of *Rasul I* and related cases also required the same conclusion with respect to the claims asserted by the other three plaintiffs determined by CSRTs to no longer be "enemy combatants." Op. 4-13.

ARGUMENT

A. This Court properly affirmed the dismissal of plaintiffs' RFRA claims.

RFRA provides that "Government shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). As *Hobby Lobby* explained, RFRA was enacted in response to the Supreme Court's First Amendment free-exercise decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). 134 S. Ct. at 2761; *see also* 42 U.S.C. § 2000bb.

In *Rasul II*, this Court interpreted the term "person" in 42 U.S.C. § 2000bb-1(a). Noting that RFRA's purpose was "to restore what, in Congress's view, is the free exercise right the Constitution guaranteed," *Rasul II* held that the statutory term "person" should be "read consistently with similar language in constitutional provisions, as interpreted by the Supreme Court at the time Congress enacted RFRA" in 1993. 563 F.3d at 532-33. *Rasul II* explained that:

> Congress legislated against the background of precedent establishing that nonresident aliens were not among the "person[s]" protected by the Fifth Amendment, [*Johnson v.*] *Eisentrager*, 339 U.S. [763, 783 (1950)], and were not among "the people" protected by the Fourth Amendment, [*United States v.*] *Verdugo-Urquidez*, 494 U.S. [259, 269 (1990)]. *See also Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (Cuban and Haitian refugees at Guantanamo Bay lack First Amendment rights).

563 F.3d at 533. *Rasul II* thus held that Guantanamo detainees, as nonresident aliens, are not among the "persons" protected by RFRA. *Id.* (reinstating *Rasul I*'s judgment

on the RFRA claim); *see also Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). In the alternative, *Rasul II* held that the individual defendants in that case were entitled to qualified immunity on the RFRA claim there because it was not clearly established during the plaintiffs' detention (which ended in early 2004, 563 F.3d at 530 n.2) that RFRA protected aliens at Guantanamo. *See id.* at 533 n.6 (relying on *Rasul I*, 512 F.3d at 676 & n.5 (Brown, J., concurring)).

Relying on the *Rasul* decisions, the Court held in this case that plaintiffs' RFRA claims are barred because plaintiffs "do not fall [within RFRA's] definition of 'person.'" Op. 13-14. Plaintiffs argue that *Hobby Lobby* "establishes" that the statutory holding in the *Rasul* decisions is wrong. Pet. 4. But, as explained below, *Hobby Lobby* provides no basis for concluding that *Rasul I* and *Rasul II* were incorrectly decided, and even if it did, the outcome would remain the same because the defendants are entitled to qualified immunity under this Court's well-supported alternative holding in *Rasul II*.

1. This Court's precedent establishing that Guantanamo detainees do not fall within the definition of "persons" under RFRA remains good law after *Hobby Lobby*.

In *Hobby Lobby*, the Supreme Court held that closely held, for-profit corporations are "persons" capable of the "exercise of religion" under RFRA, carefully limiting its holding to avoid deciding whether other corporations (let alone aliens detained at Guantanamo) are protected by the statute. 134 S. Ct. at 2768-75. In analyzing whether closely held corporations are "persons" under RFRA, the Court

held that it must follow the Dictionary Act's definition of "person" (which expressly includes "corporations") "unless the context [of RFRA] indicates otherwise," 1 U.S.C. § 1, and the Court determined that nothing in RFRA indicated that closely held corporations are not "persons." 134 S. Ct. at 2768.

Plaintiffs' reliance (Pet. 4-5) on *Hobby Lobby*'s Dictionary Act reasoning does not support their argument here. *Hobby Lobby* held that the Dictionary Act definition applies "'*unless the context indicates otherwise*.'" 134 S. Ct. at 2768 (quoting 1 U.S.C. § 1) (emphasis added). In this case, RFRA's context indicates that the statutory term "person" excludes nonresident aliens. As *Rasul II* explained, when Congress enacted RFRA, it "legislated against the background of precedent" understood to establish that nonresident aliens are not among the category of "persons" or "people" protected by constitutional provisions that are *in pari materia* with RFRA. 563 F.3d at 533. This Court thus correctly concluded that Congress would have thought that the term "person" in RFRA excludes nonresident aliens. *Id.*

In addition, the canon that statutes should not be construed to apply extraterritorially in the absence of a contrary clear statement, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), provides an additional indication that the statutory term "person" does not encompass plaintiffs, given RFRA's lack of any clear statement that it applies extraterritorially to leaseholds like Guantanamo.[2] Nor can a

[2] Contrary to plaintiffs' suggestion (Pet. 6), Guantanamo is not a "territory" or "possession" under RFRA, 42 U.S.C. § 2000bb-2(2), and thus RFRA's "territory and

clear statement be derived from the Dictionary Act, which does not suggest extraterritorial application, much less that it should apply to extend a statute to the military's detention of aliens overseas in connection with ongoing hostilities. Thus, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988); *see Lebron v. Rumsfeld*, 670 F.3d 540, 557-58 (4th Cir. 2012) ("Courts have long been reluctant to interpret statutes in ways that allow litigants to interfere with the mission of our nation's military, preferring that Congress explicitly authorize [such] suits . . . .").

Plaintiffs suggest that *Hobby Lobby* held that courts may *never* consider "existing constitutional case law" in construing the term "person" in RFRA. Pet. 4-5. But *Hobby Lobby*'s holding regarding reliance on pre-RFRA constitutional precedent was far more limited, establishing only that that it was inappropriate to determine whether an entity is capable of the "exercise of religion" within the meaning of 42 U.S.C. § 2000bb-1(a) based on whether pre-*Smith* First Amendment precedent had

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possession" language is not a clear statement that RFRA applies to Guantanamo. RFRA defines "government" as "includ[ing] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity," *id.* § 2000bb-2(1), and it defines "covered entity" as "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States," *id.* § 2000bb-2(2). These definitions assume that the "territor[ies]" and "possession[s]" covered by RFRA have their own governmental structure (*e.g.*, "branch[es]"), but Guantanamo has no such structure and instead is controlled by the United States. Guantanamo is thus not a "territory" or "possession" under RFRA. *Cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386, 390 (1948) (meaning of "territory" and "possession" depends on statute's context and purposes).

established an affirmative answer to that question. *See* 134 S. Ct. at 2761-62, 2767 n.18, 2772-73. That holding has no bearing here for two reasons.

First, *Hobby Lobby*'s holding regarding the inappropriateness of looking to pre-*Smith* case law was limited to cases in which a court is interpreting the phrase "exercise of religion" and thus does not apply where, as here, a court is interpreting the term "person." *See id.* The Court explained that pre-*Smith* First Amendment case law did not necessarily establish whether an entity is capable of engaging in the "exercise of religion" within the meaning of RFRA because "exercise of religion" has always been expressly defined by RFRA to *depart* from such case law. *See id.* at 2772 (noting, for example, that the current definition of "exercise of religion" deleted the prior definition's reference to the First Amendment). By contrast, the statutory term "person" is not defined in RFRA and thus is appropriately construed in accordance with constitutional provisions that are *in pari materia* with RFRA.

Even if *Hobby Lobby*'s holding regarding reliance on pre-RFRA case law applies to the interpretation of the term "person," it still does not preclude reliance on constitutional law precedents here. *Hobby Lobby* rejected the narrow contention that the *absence* of pre-*Smith* precedents "squarely h[olding]" that for-profit corporations are capable of exercising religion necessarily means that such corporations are not covered under RFRA. 134 S. Ct. at 2772; *see also id.* at 2767 n.18; *id.* at 2773 (rejecting argument that a plaintiff has no RFRA rights "unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court

entertained in the years before *Smith*"). By contrast, this Court's *Rasul* decisions relied on pre-RFRA constitutional precedents that Congress would have believed *affirmatively established* that nonresident aliens are not among the category of "persons" or "people" protected by constitutional provisions that are *in pari materia* with RFRA. *Rasul II*, 563 F.3d at 533. Reliance on those precedents in construing the term "person" in RFRA was thus entirely proper.

2. The defendants are entitled to qualified immunity on plaintiffs' RFRA claims.

Even if RFRA applied to plaintiffs (and assuming it permitted an action for money damages against officials sued in their individual capacities), rehearing is unwarranted here because the outcome would be the same: the defendants plainly have qualified immunity. Qualified immunity shields a government official from civil liability if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To qualify as a "clearly established" right, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). The defendants here are entitled to qualified immunity because it was not clearly established during plaintiffs' detention (which spanned various periods between 2001 and 2006, *supra* p. 2) that plaintiffs have RFRA rights.

This Court held in *Rasul II* that it was not clearly established as of 2004 that Guantanamo detainees are protected by RFRA, 563 F.3d at 533 n.6, and plaintiffs

have never offered any basis for questioning the correctness of that holding or its applicability to this case. Dismissal of plaintiffs' RFRA claims should thus be affirmed on this basis alone. In addition, and independent of *Rasul II*'s qualified immunity holding, because this Court held in 2008 and 2009 in the *Rasul* decisions that Guantanamo detainees are not among the "persons" protected by RFRA based on authority issued well before the period of plaintiffs' detention here (2001-2006), a reasonable official could certainly have come to the same conclusion during plaintiffs' detention, thus making qualified immunity appropriate here. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *Bame v. Dillard*, 637 F.3d 380, 386-88 (D.C. Cir. 2011). *Hobby Lobby* is not to the contrary because, *inter alia*, a 2014 decision could not possibly clearly establish plaintiffs' rights during the 2001-2006 time period at issue here.

The defendants are also entitled to qualified immunity for a third reason—it was not clearly established during plaintiffs' detention that RFRA applies to individuals detained by the military in connection with an ongoing armed conflict. The Fourth Circuit so held with respect to a citizen detained in the U.S. as an "enemy combatant" until 2006, explaining that courts have "long been reluctant to interpret statutes in ways that . . . interfere with [the] military, preferring that Congress explicitly authorize [such] suits," *Lebron*, 670 F.3d at 557-58; *id.* at 545, 556-60; *see also Padilla v. Yoo*, 678 F.3d 748, 762 (9th Cir. 2012) ("application of RFRA to enemy combatants in military detention was not clearly established in 2001-03"). Indeed, as Judge Brown explained in her concurrence in *Rasul II*, the application of RFRA in "the military

detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate." 563 F.3d at 535 (Brown, J., concurring).

Because it was not clearly established between 2001 and 2006 that plaintiffs have RFRA rights, the defendants here are entitled to qualified immunity. Rehearing to review this Court's dismissal of plaintiffs' RFRA claims is unwarranted.

B. This Court correctly affirmed the substitution of the United States for the named defendants on plaintiffs' international-law claims.

This Court correctly concluded that the named defendants in this case were acting within the scope of their employment under D.C. law during the events alleged in plaintiffs' complaints, and thus that the United States properly substituted itself for those defendants under the Westfall Act, 28 U.S.C. § 2679(b)(1), (d)(1). Op. 4-13. This Court's holding does not conflict with any precedent in the Supreme Court, this Court, or any other court of appeals. Rehearing to review plaintiffs' fact-intensive challenges is unwarranted.

1. Under D.C. law, which follows the scope-of-employment standard articulated in the Restatement (Second) of Agency (1958) ("Restatement"), "'[c]onduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master[;] and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.'" *Council on Am. Islamic Relations v. Ballenger*,

444 F.3d 659, 663 (D.C. Cir. 2006) (quoting Restatement § 228(1)). In *Rasul I* (which plaintiffs do not challenge in their petition, *see* Pet. 9 & n.4), this Court held that numerous high-ranking Department of Defense officials (including eight of the defendants here) were acting within the scope of their employment under D.C. law with respect to allegations of unlawful detention and mistreatment asserted by Guantanamo detainees who were transferred prior to the institution of CSRTs. 512 F.3d at 649 & n.1, 655-60, 663. The Court explained that "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in." *Id.* at 658; *see also Ali v. Rumsfeld*, 649 F.3d 762, 764, 774-75 (D.C. Cir.) (following *Rasul I* in similar case concerning military detention in Afghanistan and Iraq), *en banc denied* (D.C. Cir. 2011).

In this case, the Court held that *Rasul I* controls the claims asserted by the three plaintiffs transferred prior to the institution of CSRTs (Celikgogus, Sen, and Mert), Op. 6-7, and plaintiffs do not challenge that conclusion, Pet. 9 n.4. This Court also held that the named defendants were acting within the scope of their employment with respect to the allegations of unlawful detention and mistreatment asserted by the three plaintiffs who were determined by CSRTs to no longer be "enemy combatants" (Allaithi, Hasam, and Muhammad). Op. 7-13. In reaching that conclusion, the Court explained that the Department of Defense's July 2004 memoranda showed that the defendants were expected to continue to detain plaintiffs after their CSRTs until they could be transferred to another country, Op. 7-9, and the Court observed that "the

need to maintain an orderly detention environment remained after CSRT clearance," Op. 11. In addition, the Court held that plaintiffs' complaints did not allege that the named defendants' actions were "completely devoid of a purpose to serve the United States," and the complaints failed to "specify how the named defendants were involved with [the alleged abuses]." Op. 13 (emphasis omitted).

2. Plaintiffs offer no persuasive grounds for granting rehearing. Plaintiffs contend (Pet. 10-12) that *Rasul I*'s holding was limited to "suspected enemy combatants" and should not have been extended to this case. But plaintiffs' argument (Pet. 11-12) that Allaithi, Hasam, and Muhammad were no longer detainable after their successful CSRTs under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001), misses the point. The question here turns not on the legal basis for detention, but upon the work that the individual defendants were employed to perform. On that question, there is no doubt that the defendants were employed to operate the detention facility and maintain its security with respect to *all* detainees, including those awaiting transfer to another country.

Plaintiffs argue that the named defendants "were authorized and employed by the United States to detain and interrogate suspected enemy combatants, not to abuse non-enemy combatants," and they contend that the United States did not "expect[] force (or abuse) to be used" against plaintiffs after their CSRTs. Pet. 13 (emphasis omitted). But, as this Court explained, it is well established that conduct is within the scope of employment under the first Restatement factor if it is "incidental" to

authorized conduct, and conduct is "incidental" if it is "foreseeable." Op. 9. Here, as in *Rasul I*, plaintiffs' alleged post-CSRT mistreatment was at least incidental to plaintiffs' detention and foreseeable, given that "the need to maintain an orderly detention environment remained after CSRT clearance." Op. 10-11. Plaintiffs also assert that they have "plausibly alleged that Defendants' acts . . . were motivated by animus against Muslims, and not because of any penological interest." Pet. 13. Tellingly, however, plaintiffs cite nothing in their complaints to support this contention, and for good reason—there are no such adequate allegations.

Plaintiffs' contention that the Court "impermissibly drew inferences against [them]," Pet. 14 (emphasis omitted), fares no better. The passages in the opinion cited by plaintiffs were not, as plaintiffs seek to portray them, "justifications for Defendants[']actions," Pet. 14, but explanations for why it remained part of the defendants' jobs to continue to detain Allaithi, Hasam, and Muhammad after their CSRTs and to maintain security at the detention facility during this time period.[3] As

[3] Contrary to plaintiffs' apparent contention (Pet. 14), the Court also properly concluded that the pleadings here established that the named defendants served, at least in part, the United States' interest in maintaining security at Guantanamo. Op. 12. *See, e.g.*, JA 36 ¶ 27 (allegation in complaint that defendant Bumgarner was "responsible for guarding the prisoners and providing security" and "exercised command and control over subordinate troops"); Restatement § 235 cmt. a ("If . . . the servant . . . does the kind of act which he is authorized to perform within working hours and at an authorized place, there is an inference that he is acting within the scope of employment [for purposes of determining if he had any intent to serve the master]."). Indeed, plaintiffs have pointed to *no* adequate allegations in the complaints from which it could be inferred that the named defendants were "completely devoid of a purpose to serve the United States," as required under the Restatement. Op. 13.

the Court explained, those conclusions are well supported by the July 2004 Department of Defense memoranda and common sense. Op. 8-11. Once again, plaintiffs confuse the relevant question—this case turns not on whether the alleged actions were justified but whether they were within the scope of the defendants' employment. The Court did not err on that question, and rehearing is unwarranted.

C. This Court properly concluded that plaintiffs forfeited any challenge to the dismissal of the "John Doe" defendants.

Plaintiffs did not challenge the dismissal of the "John Doe" defendants in their appellate briefs or at oral argument. Nonetheless, plaintiffs contend that because they "appealed the District Court's Order . . . in its entirety," Pet. 15, the Court erred in holding that they had forfeited such a challenge, Op. 3 n.1. It is well established, however, that an appellant forfeits a challenge where, as here, he does not assert the challenge in his opening appellate brief, much less in *any* brief or at argument. *See, e.g.*, *United States v. Gewin*, 759 F.3d 72, 78 n.1 (D.C. Cir. 2014); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008). Rehearing is unwarranted to review this Court's straightforward application of that principle to this case, and plaintiffs also "may not raise an issue for the first time on rehearing." *United States v. Whitmore*, 384 F.3d 836, 836 (D.C. Cir. 2004); *Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

MATTHEW M. COLLETTE
(202) 514-4214

s/ Sydney Foster
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

OCTOBER 2014

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2014, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. On or before October 21, 2014, I will cause nineteen paper copies to be delivered to the Court via hand delivery. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/Sydney Foster
Sydney Foster