Case Nos. 13-5096, 13-5097

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

SAMI ABDULAZIZ ALLAITHI, et al.,

Plaintiffs-Appellants

v.

DONALD RUMSFELD, et al.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia
Case Nos. 08-CV-1677 (RCL), 06-CV-1996 (RCL)
Hon. Royce C. Lamberth

PETITION OF PLAINTIFFS-APPELLANTS FOR REHEARING EN BANC

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STATUTES

Plaintiffs-Appellants respectfully request that the Court rehear this case *en banc*, pursuant to Fed. R. App. P. 35 and D.C. Circuit Rule 35, on the grounds that the Panel's decision conflicts with the recent decision of the United States Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and involves several questions of exceptional importance:

1. Whether Plaintiffs, who were held in detention facilities at Guantanamo Bay, which the Supreme Court has previously characterized as a possession or territory of the United States, are "persons" who may avail themselves of the protections of the Religious Freedom Restoration Act ("RFRA");

2. Whether Plaintiffs have stated a plausible claim that the prolonged detention and abuse of individuals who had been expressly determined by Combatant Status Review Tribunals *not* to be enemy combatants falls outside the scope of employment of Defendants and individual guards.

BACKGROUND

Plaintiffs-Appellants are six former detainees at Guantanamo Bay. Three of the Plaintiffs, Messrs. Allaithi, Hasam, and Muhammad, were expressly determined by the United States not to be enemy combatants in Combatant Status Review Tribunal ("CSRT") hearings. Yet for up to two years after those determinations, they continued to be subjected to prolonged detention, and physical and religious abuse without apparent justification. As the Panel

summarized, in addition to physical abuse, Plaintiffs allegedly faced disruption of religious practices such as confiscation and desecration of the Koran, solitary confinement, sleep deprivation, and forced medication. (Op. at 3.)

The remaining three Plaintiffs, Messrs. Celikgogus, Sen, and Mert, were similarly abused at Guantanamo Bay but were released without receiving Combatant Status Review Tribunals determinations.

The Panel determined that all of Plaintiffs' claims failed, based on *Rasul I*,[1] because, *inter alia*: (1) all Defendants were acting within the scope of their employment in continuing to detain and abuse Plaintiffs, even after certain of the Plaintiffs were found not to be enemy combatants; (2) Plaintiffs are not "persons" under RFRA. Because *Hobby Lobby* establishes that this Court's previous interpretation of RFRA was wrong, and because *Rasul I* does not and should not immunize abusive conduct towards innocent persons determined by the United States not to be enemy combatants, the Court should grant rehearing *en banc*.

ARGUMENT

I. HOBBY LOBBY REQUIRES RECONSIDERATION OF THE PANEL'S HOLDING THAT PLAINTIFFS-APPELLANTS' RFRA CLAIMS ARE FORECLOSED.

The Supreme Court's recent decision in *Hobby Lobby* establishes that Plaintiffs are "persons" under RFRA, and are entitled to be free from substantial

[1] *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2009) (*Rasul I*), *judgment vacated*, 555 U.S. 1083 (2008), *judgment reinstated*, 563 F.3d 527 (D.C. Cir. 2009) (*Rasul II*).

burdens on their religious practices, even at Guantanamo Bay. In their Complaints, Plaintiffs alleged that guards regularly confiscated Plaintiffs' Korans for alleged disciplinary infractions, subjected Plaintiffs to forced shaving of their religious beards, mocked or disrupted prayers and calls to prayers, and desecrated Plaintiffs' Korans by stepping on them, and throwing them onto the floor and into the toilet.[2] This abuse was alleged to have substantially burdened Plaintiffs' exercise of religion, and was unjustified by any legitimate government interest.

RFRA prohibits "Government" from substantially burdening "a person's exercise of religion" except if the burden is in furtherance of a compelling government interest and the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1 (emphasis added). At issue here is the definition of "person." Following the Supreme Court's decision in *Hobby Lobby*, it is clear that RFRA applies to Plaintiffs-Appellants and that they have asserted a valid claim.

In *Rasul I*, 512 F.3d at 667-72, a panel of this Court reversed the District Court's holding that Guantanamo detainees could assert RFRA claims, as RFRA expressly protected the religious exercise of "persons," "a broadly applicable term [including] aliens." *Id.* at 668. Instead, the panel concluded that RFRA's purpose was limited to restoring the free exercise of religion guaranteed by the

[2] *E.g.* JA045 ¶ 50; JA049 ¶ 67; JA055 ¶ 89; JA060-61 ¶¶ 112-13; JA068-69 ¶ 142; JA073 ¶¶ 160-61; JA075 ¶ 167; JA089 ¶ 234; JA110 ¶ 53; JA 111 ¶ 56; JA 113 ¶ 61; JA 125-26 ¶¶ 126-28.

Constitution, *id.* at 671, and that RFRA "did not expand the scope of the exercise of religion beyond that encompassed by the First Amendment," *id.* at 669. *Rasul I* therefore held that RFRA's use of the term "person" should be interpreted consistently with the constitutional definition of "person," which did not include aliens. *Id.* at 671-72; *but see id.* at 673-76 (Brown, J., concurring) (referencing "unfortunate and quite dubious distinction of being the only court to declare those held at Guantanamo are not 'person[s].'").

The Panel deciding this case relied on *Rasul I* in concluding that Plaintiffs' claims under RFRA were foreclosed. *See* Op. at 13-14 (Plaintiffs "do not fall [within RFRA's] definition of 'person' and are therefore barred from bringing a RFRA challenge.").

A. *Rasul I*'s decision regarding RFRA is no longer good law.

Hobby Lobby establishes that this Court's previous interpretation of RFRA was incorrect. In *Hobby Lobby*, the Supreme Court held that Congress intended RFRA, as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, "to effect a complete separation from First Amendment case law." 134 S. Ct. at 2762. Thus, rather than relying on the definition of "person" from existing constitutional case law, the Supreme Court held instead that the meaning of "person" in RFRA is to be determined by reference to the Dictionary Act, 1 U.S.C. § 1, which defines "person" as including

"corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *See id.* at 2768-69. RFRA's protection is therefore not limited to persons who have successfully brought a free-exercise claim under the Constitution. *See id.* at 2773 (it "would be absurd" to refuse to "allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that [the Supreme Court] entertained in the years before *Smith*."). *Contra Rasul I*, 512 F.3d at 671 ("RFRA . . . was not intended to expand the scope of free exercise of religion beyond that protected by the First Amendment"); *id.* ("'person' as used in RFRA should be interpreted as it is in constitutional provisions"). Following *Hobby Lobby*'s determination that the meaning of "persons" is unconstrained by existing constitutional case law, *Rasul I* is no longer good law and the Panel's dismissal of Plaintiffs' RFRA claims, based on *Rasul I*, should be reconsidered.

B. Plaintiffs have asserted a valid RFRA claim.

RFRA prohibits the "Government" from substantially burdening a person's exercise of religion. 42 U.S.C. § 2000bb-1. In turn, "Government" is broadly defined and applies to individual persons, branches, departments, agencies and instrumentalities of the United States, and also applies to the "territor[ies] and possession[s] of the United States." 42 U.S.C. § 2000bb-2(2). "Government" thus

encompasses the Department of Defense, as well as its individual officers and employees – the Defendants in this case.

The Supreme Court has recognized on several occasions and in different contexts that Guantanamo Bay is a possession or territory of the United States. *See, e.g., Rasul v. Rumsfeld*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States . . ."); (emphasis added); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389 n.16 (1948) (Guantanamo Bay is a "possession" for the purpose of several congressional acts); *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 65-67 (D.D.C. 2006) (finding that RFRA applies in Guantanamo Bay, which is a possession or territory), *rev'd on other grounds by Rasul I*; *see also Boumediene v. Bush*, 553 U.S. 723, 768-79 (2008) ("Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo Bay is not abroad; it is within the constant jurisdiction of the United States.") (emphasis added).

As discussed *supra*, following *Hobby Lobby* there can be no question that Plaintiffs, as individuals, are "persons" under RFRA. And Plaintiffs' status as prisoners of the United States does not deprive them of RFRA rights. Indeed, RFRA (and RLUIPA) specifically protects the religious exercise of prisoners ("institutionalized persons"), including those residing in any "institution" of a

territory or possession of the United States. 42 U.S.C. §§ 1997, 2000cc-1; *see also Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005) (finding RLUIPA as applied to prisons constitutional, and quoting Justice Department's position that neither RLUIPA nor RFRA "have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system."); *Khatib v. County of Orange*, 639 F.3d 898, 906-07 (9th Cir. 2011) (Gould, J., concurring) ("Congress intended to safeguard the permissible religious observance of powerless persons incarcerated by the state," including the protection of Muslim religious practices); *Hankins v. Lyght*, 441 F.3d 96, 106 (2d Cir. 2006); *Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2001) (RFRA applies to prisoners in Guam because of Congress's authority over U.S. territories). In addition, Congress has mandated that RFRA and RLUIPA are to be construed "in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g); *see Hobby Lobby*, 134 S. Ct. at 2760 ("Congress enacted RFRA . . . in order to provide very broad protection for religious liberty."); *id.* at 2767 ("RFRA was designed to provide very broad protection for religious liberty . . . far beyond what [the Supreme] Court has held is constitutionally required.")

Plaintiffs' allegations of religious abuse plausibly state a claim under RFRA. And even if Defendants' practices were in furtherance of a compelling interest such

as prison administration, or security or penological concerns – which Plaintiffs deny is the case – this Court cannot hold, as a matter of law, that practices such as throwing a Koran to the floor or into the toilet is the "least restrictive means of furthering" that interest. *See* 42 U.S.C. § 2000bb-1. In any event, the balancing of these concerns should be accomplished, at the earliest, on summary judgment and not on a motion to dismiss. *See Khatib*, 639 F.3d at 905-06 (district court should balance security and administrative concerns with free exercise burdens at summary judgment); *see also Sample v. Lappin*, 424 F. Supp. 2d 187, 196 (D.D.C. 2006) (denying summary judgment to Bureau of Prisons where it had not met its burden to prove that denying Jewish prisoner wine at Passover altogether was the least restrictive means of fulfilling the government's interest in controlling alcohol consumption in BOP facilities).[3]

Hobby Lobby establishes that Plaintiffs-Appellants are "persons" and that the Panel's decision to dismiss their RFRA claims should be reconsidered. Given the importance of resolving these claims under current law, the Court should grant rehearing en banc.

[3] Plaintiffs assert that qualified immunity would not impact their claims, and are prepared to address that issue – and any others identified by the Court – in further briefing should this petition be granted.

II. THE PROLONGED DETENTION AND ABUSE OF NON-ENEMY COMBATANTS IS NOT WITHIN DEFENDANTS' SCOPE OF EMPLOYMENT.

In finding that the abuse and prolonged detention of *non-enemy* combatants was within the Defendants' scope of employment, the Panel relied on *Rasul I*. But *Rasul I*, by its own terms, applies only to known and suspected enemy combatants. Three Plaintiffs here[4] faced inexplicable prolonged detention and abuse[5] even after the United States concluded in CSRT proceedings that they were not enemy combatants. Thus, even if *Rasul I* were properly decided, the Panel's decision erroneously relied on that opinion to find that the abuse of non-enemy combatants fell – as a matter of law – within Defendants' scope of employment.

Not only did the Panel's decision erroneously rely on *Rasul I* with respect to the three Plaintiffs found not to be enemy combatants, but it also misapplied the District of Columbia's scope of employment test and the motion to dismiss standard by making unwarranted inferences in favor of the government. For example, despite the absence of any evidence in the record, the Panel surmised that the abuse of non-enemy combatants *could have been* motivated by the Defendants' need to "maintain an orderly detention environment" (Op. at 11), and justified the

[4] The three remaining Plaintiffs agree with the Panel's decision that they "cannot prevail [as to their Alien Tort Statute claims] with *Rasul I* in the books." Op. at 6-7. However, should the Court grant rehearing *en banc*, the remaining Plaintiffs intend to argue that *Rasul I* did not correctly apply the scope of employment test.
[5] The Panel noted that Mr. Allaithi did not specifically allege abuse following his CSRT clearance. *See* Op. at 10 n.4.

dismissal on this supposition and others. Whether this assumption is ultimately true is a factual matter that can only be evaluated at summary judgment or trial. It certainly cannot be inferred against Plaintiffs on a motion to dismiss.

A. The Panel should not have relied on *Rasul I* to find that the prolonged detention and abuse of *non-enemy combatants* fell, as a matter of law, within the scope of employment of Defendants and guards.

In ruling against Messrs. Allaithi, Hasam and Muhammad, the three Plaintiffs determined not to be enemy combatants, the Panel held that *Rasul I* nevertheless controls, because the "conduct described here was incidental to 'the *detention* and interrogation of suspected enemy combatants' and therefore 'the type of conduct the defendants were employed to engage in.'" Op. at 10-11 (*quoting Rasul I*, 512 F.3d at 658-59) (italics original, underline added). The Panel then concluded that although "the intelligence rationale [for abuse] has dissipated [after a CSRT clearance], the need to maintain an orderly detention environment remained after the CSRT clearance." *Id.* at 11.

The Panel acknowledged that *Rasul I* involved only the detention and abuse of suspected enemy combatants. Yet there is nothing in *Rasul I* that warrants extending its holding to non-enemy combatants. *See Rasul I*, 512 F.3d at 658 ("detention and interrogation of suspected enemy combatants"), 660 ("foreseeable that conduct that would ordinarily be indisputably 'seriously criminal' would be implemented by military officials responsible for detaining and interrogating

suspected enemy combatants"), 662 ("defendants were employed to detain and interrogate suspected enemy combatants") (emphasis added). Indeed, consistent with the case law of this Court and the Supreme Court, *Rasul I* should not have been extended as it was by the Panel, and should, at most, be limited to cases involving enemy combatants, *i.e.* "those . . . persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[6] *See* Authorization for the Use of Military Force ("AUMF"), 107 P.L. 40, 115 Stat. 224 (2001); *Hamdi v. United States*, 542 U.S. 507, 523 (2004); *see also id.* at 518 ("individuals who fought against the United States . . . are [the] individuals Congress sought to target in passing the AUMF. . . . [D]etention of individuals falling into t[hat] limited category . . . is fundamental and accepted") (emphasis added), 524, 526-27; *Al Janko v. Gates*, 741 F.3d 136, 138, 141, 144 (D.C. Cir. 2014) (generally describing that only persons found to be enemy combatants are "properly" detained); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013); *Hussain v. Obama*, 718 F.3d 964, 967 (D.C. Cir. 2013) (detention justified only if government has proven that detainee is enemy combatant); *Rasul I*, 512 F.3d at 656. Once Plaintiffs were determined by the

[6] The AUMF was subsequently broadened to allow for the detention of individuals who are part of al Qaeda, the Taliban, or associated forces, or individuals who substantially support those forces. *See Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). But none of the Plaintiffs fall within the original or enlarged definitions of enemy combatant.

United States not to be enemy combatants, the rationale for their detention under *Rasul I* and these other cases – as authorized by the AUMF – no longer exists. Following that determination, any continued prolonged detention and abuse must be justified with evidence, not suppositions.

B. The prolonged detention and abuse of non-enemy combatants is not – as a matter of law – within the scope of employment of Defendants.

The Panel's conclusion that the prolonged abuse and detention of Plaintiffs fell within the scope of employment of Defendants was entirely without evidentiary support and should not have been made – as a matter of law – at this stage of the proceedings.

According to D.C. law, four elements must be met in order for an employee's act to be within the scope of employment: (1) the act must be "of the kind he is employed to perform," (2) the act must "occur substantially within the authorized time and space limits"; (3) the act must be "actuated, at least in part, by a purpose to serve the master,"; and (4) "if force is intentionally used by the servant against another, the use of force" must not be "unexpectable by the master." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) (*quoting* Rest. (Second) of Agency § 228). These determinations almost always involve an assessment of facts and should not be resolved as a matter of law, except in the clearest of cases. *See Majano v. United States*, 469 F.3d 138,

140-41 (D.C. Cir. 2006);[7] *Jordan v. Medley*, 711 F.2d 211, 215 (D.C. Cir. 1983) ("general rule that scope of employment presents a jury question"); *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (whether assault stemmed solely from personal motives or arose out of the conduct of the employer's business was question for trier of fact, not question of law).

As explained *supra*, Defendants were authorized and employed by the United States to detain and interrogate suspected enemy combatants, not to abuse non-enemy combatants. And Plaintiffs have plausibly alleged that Defendants' acts (*e.g.,* depriving Plaintiffs of and defacing the Koran) were motivated by animus against Muslims, and not because of any penological interest. Defendants have not shown – and cannot show on a motion to dismiss – that the United States and Congress expected force (or abuse) to be used against innocent persons who the United States had determined were not enemy combatants. On the contrary, the inference that must be drawn in favor of Plaintiffs is that the United States would have expected persons determined not to be enemy combatants to be promptly released without being subjected to further abuse.

Rather than accept Plaintiffs' plausible pleadings as true and draw reasonable inferences in favor of Plaintiffs on a motion to dismiss, the Panel

[7] This Court previously recognized that "[o]n the infrequent occasions when courts have resolved scope of employment questions as a matter of law, . . . it has generally been to hold that the employee's action was *not* within the scope of her employment . . . ." *Id.*

impermissibly drew inferences against Plaintiffs and posited justifications for Defendants actions, without any evidence in the record. For example, the Panel asserted that: (1) Defendants' actions towards Plaintiffs were motivated by "the need to maintain an orderly detention environment" (Op. at 11); (2) Defendants' actions were for the purpose of fulfilling the "well-recognized penological interest in 'maintaining security and discipline' at Guantanamo Bay" (Op. at 12); (3) Defendants' actions were justified because Plaintiffs "may [have] decide[d] to be disruptive until [their] release" (*id.*); (4) Plaintiffs' prolonged detention of up to two years following clearance does not "indicate[] a failure to effectuate an immediate release of detention" because of "the realities of war, and, for that matter, administrative bureaucracy" (Op. at 8-9).

Each of these hypothetical explanations may ultimately be established with evidence at summary judgment or trial, or, conversely, proved false. But on a motion to dismiss the Court must draw reasonable inferences in favor of Plaintiffs, not Defendants. *E.g., Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012). The Panel failed to do so.

C. Because the United States was not substituted for the Doe Defendants, the dismissal of the entire case was improper.

The Panel upheld the dismissal of the action against all Defendants – both the named Defendants and Doe Defendants. Yet, the Attorney General never certified that the Doe Defendants were acting within the scope of employment, and

therefore – as Defendants' counsel admitted during oral argument – the United States was never substituted as a defendant for these individuals (primarily prison guards conducting the actual abuse of Plaintiffs). *See* 28 U.S.C. § 2679(d)(1). As a result, Plaintiffs' claims against the Doe Defendants are not foreclosed by the provisions of the Westfall Act – and cannot be foreclosed prior to a valid substitution. *See id.* The Panel nevertheless deemed forfeited any arguments concerning the claims against the Doe Defendants as it held that Plaintiffs "did not appeal the district court's dismissal of that aspect of their respective cases." Op. at 3 n.1.

This is incorrect. Plaintiffs appealed the District Court's Order dismissing the case in its entirety and thus have not forfeited any issues on appeal. But even if that were the case, the Court should permit briefing of this argument *en banc* to avoid injustice, as it has not been decided by this Court or any other, and as it involves a straightforward legal question that does not require further factual development. *See, e.g., Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013).

CONCLUSION

For the foregoing reasons, this Court should rehear this case *en banc*.

Dated: August 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I caused the Petition of Plaintiffs-Appellants for Rehearing En Banc to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that pursuant to D.C. Circuit Rule 35, twenty paper copies of this Petition will be filed with the Clerk.

/s/ Russell P. Cohen
Russell P. Cohen

ADDENDUM

Pursuant to D.C. Circuit Rule 35(c)

CERTIFICATE AS TO PARTIES

The parties who appeared before the District Court and in this Court are:

Plaintiffs-Appellants: Sami Abdulaziz Al Laithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam and Abu Muhammad.[1]

Defendants-Appellees: Donald Rumsfeld, Gen. Richard Myers, Gen. Peter Pace, Gen. James T. Hill, Gen. Bantz Craddock, Maj. Gen. Michael Lehnert, Maj. Gen. Michael E. Dunlavey, Maj. Gen. Geoffrey Miller, Brig. Gen. Jay Hood, Rear Adm. Harry B. Harris, Jr., Col. Terry Carrico, Col. Adolph McQueen, Brig. Gen. Nelson J. Cannon, Col. Mike Bumgarner, Col. Wade Dennis, and Esteban Rodriguez.

No amici or intervenors appeared in the District Court or in this Court.

[1] Messrs. Hasam and Muhammad are using pseudonyms (with the District Court's permission) in order to protect their families from persecution relating to their status as former Guantanamo detainees. See JA20.