UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, et al.,	
Plaintiffs	
- against -	**C.A. No. 1:04CV01864 (RMU)**
DONALD RUMSFELD, et al.,	
Defendants.	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF THEIR CLAIMS PURSUANT TO THE RELIGIOUS FREEDOM RESTORATION ACT

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Plaintiffs submit this supplemental brief in response to the Court's Order of February 6, 2006. The Order requests additional submissions from the parties addressing two questions: i) whether the Religious Freedom Restoration Act of 1993 (as amended), 42 U.S.C. § 2000bb, *et seq*. ("RFRA"), applies in the federal enclave of the Guantanamo Bay Naval Base, Cuba ("GTMO"); and ii) whether defendants are entitled to assert qualified immunity as a defense to plaintiffs' claim under RFRA.

As discussed below, plaintiffs respectfully submit in answer to the Court's first question that longstanding Supreme Court precedent requires the enforcement of RFRA at GTMO, and such enforcement is consistent with Congressional intent that RFRA apply to military conduct at bases worldwide. With respect to qualified immunity, plaintiffs respectfully submit that the defense of qualified immunity is available only to government officers who reasonably believed that they were not acting in violation of law. In this case, such a defense is untenable because RFRA's application to military conduct at GTMO and its prohibition of the acts alleged in the complaint are clear from the text of the statute, its legislative history, and long-standing Supreme Court precedent. Although the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004) confirms this, the application of RFRA at GTMO was apparent to any reasonable officer long before *Rasul* was decided. No qualified immunity should be available for this illegal conduct. There is no legal basis for the dismissal of plaintiffs' RFRA claims.

ARGUMENT

I. RFRA APPLIES AT GTMO.

Long before the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court decided another case concerning the application of US laws to military bases,

including Guantanamo. That case – *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 389-90 (1948) ("*Vermilya*") – addressed a much narrower question than *Rasul*: whether United States statutes that by their terms apply to US "territories and possessions" should be applied to military bases leased by the United States. The Supreme Court held that such statutes do apply to military bases – including, specifically, GTMO – that are under long-term lease to the US. Under *Vermilya* and its progeny, GTMO is a "possession" of the United States, and RFRA, by its terms, applies there.

But even were this precedent not controlling, this Court should find that RFRA applies to defendants' conduct as alleged in the complaint for the following reasons:

- The legislative history of RFRA manifests that Congress intended the statute to apply generally to military conduct, including conduct that occurs abroad;
- RFRA's broad language is intended to apply to federal prisoners and does not exempt any persons, even aliens, from its protection;
- Application of RFRA at GTMO poses no risk of conflict with international law or Cuban domestic law. Thus, the concerns raised by the Supreme Court in *EEOC v. ARAMCO*, 499 U.S. 244, 250-51 (1991) are not implicated; and
- RFRA clearly applies to the conduct of defendants that took place in the United States, regardless of where the effect of such conduct may be felt.

There is, accordingly, no doubt that RFRA applies at GTMO and that it provides a right of action to plaintiffs.

A. GTMO Is a "Possession" of the United States and, by Its Plain Terms, RFRA Applies to GTMO.

1. The Scope of RFRA

RFRA is intended to safeguard individual religious freedom from government intrusion. The statute has a deliberately broad reach, applying to prisoners and the military, and sets a high

standard that must be met before a government act restricting personal religious freedom will be permitted by the courts.

Specifically, RFRA precludes the federal government and federal officers, and the government or any official of any "covered entity," from infringing on any individual's religious freedom, unless the restriction is the "least restrictive means of furthering a compelling governmental interest." 42 U.S.C. § 2000bb-1(b) and 2; Sen. Rep. 103-11, at 2, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. RFRA's § 2000bb-2(2) defines the term "covered entity" as the "District of Columbia, the Commonwealth of Puerto Rico, and *each territory and possession* of the United States." 42 U.S.C. § 2000bb-2(2) (emphasis added). In restricting the conduct of the government and officials of any US territories or possession, Congress clearly brought conduct occurring within those territories and possessions within the scope of the statute. *See, e.g., Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (applying RFRA to conduct occurring in Guam).[1]

2. <u>Pursuant to Longstanding Supreme Court Precedent, GTMO Is a "Possession" of the United States</u>.

As the Court's February 6 Order states, in the absence of evidence of contrary intent, acts of Congress do not ordinarily have extraterritorial application. *See, e.g., EEOC v. ARAMCO*, 499 U.S. 244, 250-51 (1991) ("*ARAMCO*"). This doctrine, however, supports, rather than undermines the application of RFRA at GTMO. The express terms of RFRA manifest an intent by Congress that the statute have effect in all of the United States' territories and possessions, as

[1] The courts are divided on whether the application of a statute like RFRA to United States territories and possessions is technically "extraterritorial." *Compare Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985) (suggesting that *Vermilya* represented a "very modest extraterritorial" application of the FLSA to military base in Bermuda), *with Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (Court undertook no extraterritorial analysis of RFRA before applying statute to conduct occurring in Guam).

well as in each of the fifty states, the District of Columbia and Puerto Rico. These "territories and possessions" include GTMO.

The Supreme Court has held that the statutory language "territory or possession of the United States" includes the United States' leased military bases. *Vermilya*, 335 U.S. at 389-90. *See also Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). In *Vermilya*, employees of private contractors working on a United States military base in Bermuda brought suit under the Fair Labor Standards Act ("FLSA") to recover unpaid overtime wages. *Id*. at 378-79. Like RFRA, the FLSA applied to each "territory or possession of the United States." *Id*. Like GTMO, the base in Bermuda was leased from a foreign government, and the lease did not transfer sovereignty over the leased areas to the United States. *Id*. at 378-380. Nonetheless, the Supreme Court held that the FLSA applied at the leased base in Bermuda because the long term lease of the base, and the United States' total control of the property during its occupancy, made the base a "possession" for the purposes of the FLSA. *Id*. at 390. The same analysis is applicable to RFRA and GTMO in the instant case.

The parallel between the instant case and *Vermilya* is underscored by the fact that *Vermilya* relied on the lease of the GTMO base as evidence that both GTMO and Bermuda (whose lease was similar) were to be considered US "possessions." At the time the FLSA was enacted, the United States had not concluded the lease for the Bermuda base; therefore, the Court in *Vermilya* looked to the United States' lease over Guantanamo as an analogous circumstance because, "[t]he United States was granted by the Cuban lease substantially the same rights as it has in the Bermuda lease." *Id*. at 383. The Supreme Court concluded that, for the purposes of the FLSA, the term "possession" in the statute referred to land in which the United States has "sole power" but not sovereignty. *Id*. at 389-90. In addition to Bermuda, the Supreme Court

cited GTMO and the Panama Canal Zone as examples of such "possessions." *Id.*[2] Since it was decided in 1948, *Vermilya* has been reaffirmed, and remains a vital precedent in statutory interpretation. *See, e.g., Foley Bros., Inc.*, 336 U.S. at 285; *United States v. Spelar*, 338 U.S. 217, 221-22 (1949); *Pfeiffer v. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985); *Cruz v. Chesapeake Shipping Inc.*, 932 F.2d 218, 224 (3d Cir. 1991).

3. <u>In Extending RFRA to US Territories and Possessions, Congress Intended to Include GTMO</u>.

The explicit application of RFRA to "territories and possessions" manifests a clear Congressional intent to apply RFRA to US military bases generally and, in light of *Vermilya*, to GTMO in particular. Congress, of course, is presumed to be aware of the judicial interpretations of the language it uses. *Latimer v. United States*, 223 U.S. 501, 504 (1912); *Keene Corp. v. United States*, 508 U.S. 200, 201 (1993) (There is a "presumption that Congress was aware of the earlier judicial interpretations and, in effect, adopted them" in the current legislation.). Moreover, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Accordingly, Congress' decision to use the phrase, "territory and possession" in RFRA must be presumed to evidence an intent by Congress that RFRA's reach would extend beyond areas in which the United States has strict sovereignty, to possessions like GTMO in which it has exclusive control. *See, e.g., Latimer*, 223 U.S. at 504

[2] The Supreme Court's decision in *Vermilya* was based not only on the United States' control over the Bermuda and Guantanamo bases, but also on the Court's review of Congress' use of the term "possession" in other statutes. The Court noted that Congress had included express language in several statutes that reflected its understanding that the term "possession" included GTMO. For instance, the Longshore and Harbor Workers' Compensation Act, 42 U.S.C. § 1651 (a)(2)&(3) (1927), applies "in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba)." Similarly, the Compensation for Injury, Death, or Detention of Employees of Contractors with United States Outside United States, 42 U.S.C. § 1701 (b)(1)(c), 56 Stat. 1028 (1942) applied to "the United States or its Territories or possessions (including the United States Naval Operating Base, Guantanamo Bay, Cuba)."

("The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court.").

In this case, the presumption is more than a convenient tool of statutory interpretation. There is no question that Congress was fully aware of the Supreme Court's decision in *Vermilya*. In fact, in 1957, Congress responded to *Vermilya* and its progeny by amending the FLSA to exclude any application in Bermuda or GTMO. *See* Aug. 30, 1957, Pub. L. 85-231, § 1(1), 71 Stat. 514 (limiting FLSA's application to "the District of Columbia; Alaska; Hawaii; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act; American Samoa; Guam; Wake Island; and the Canal Zone.") (internal citations omitted); 29 U.S.C. § 213 (f). In the legislative history to this amendment, Congress explained that, prior to the Supreme Court's decision in *Vermilya*, it did not appreciate "the full scope of the possible coverage of the Fair Labor Standards Act." S. Rep. No. 85-987 (August 16, 1957) as reprinted in 1957 U.S.C.C.A.N. 1756 at 1757.

This same lack of understanding cannot be ascribed to Congress' choice to use the term "territory and possession" when it passed RFRA more than thirty years later. In 1993, when RFRA was enacted, it was crystal clear that the United States' "territories and possessions" included not only GTMO but also similar lands controlled by the United States, regardless of their technical sovereignty. As recently as 1991 (two years before RFRA was enacted), the Third Circuit observed that, although its application of the FLSA to Bermuda and GTMO was later superseded by statute, *Vermilya* is "still instructive in that the Court analyzed the question [of extraterritorial effect of a statute] in terms of statutory interpretation." *Cruz*, 932 F.2d at 224. If Congress had not intended RFRA to apply to possessions, like GTMO, where the US has

"*complete jurisdiction and control*," Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations ("Lease Agreement"), U.S.-Cuba, Feb. 23, 1903, art. III, T.S. No. 418 (emphasis added), but not sovereignty, it would presumably have chosen different language to define RFRA's scope, or included an exemption similar to the one it added to the FLSA in 1957. Congress has demonstrated that it knows how to legislate the places where a statute applies with precision. Here Congress used the general language of "territories and possessions," which under binding Supreme Court precedent includes GTMO.

In its initial motion and reply, the government relies on *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), to support its argument that RFRA should not apply in GTMO. This reliance is misplaced. In *Sale*, the Supreme Court held that the Coast Guard's interdiction program was lawful despite immigration laws that created "domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States." *Id*. at 177. Crucial to its holding, the Court found that the protections afforded by the immigration laws did not come into effect until after the alien had physically entered the United States; as such, the statutes did not regulate the government's conduct prior to an alien's arrival on United States territory. *Id*. at 170-74. Consequently, the statutes did not proscribe the interdiction of aliens on the high seas and no extraterritorial analysis was necessary to reach the Court's holding. *Id*.; *United States v. Delgado-Garcia*, 374 F.3d 1337, 1348 (D.C. Cir. 2004) ("The statute in *Sale* . . . governed deportation proceedings. The Court, quite apart from the presumption against extraterritorial application, read this provision, by its terms, to apply only to *domestic* deportation proceedings and 'contemplated that such proceedings would be held in the country,' . . . "). No such territorial distinction exists with RFRA; unlike in *Sale*, there is no statutory basis for a claim that individuals must first enter the continental United States before

RFRA applies. Rather RFRA contains express language that extends its application into the United States' possessions – land over which the United States does not assert sovereignty.

Moreover, *Sale's* dicta that the presumption against extraterritorial application of federal statute has "special force when [courts] are construing . . . provisions that may involve foreign and military affairs," 509 U.S. at 188, is not relevant here. As discussed in detail below, Congress specifically intended for RFRA to apply to military affairs; accordingly, whatever special protection *Sale* affords the military in other circumstances, such special deference was abrogated by Congress in connection with RFRA.[3] *See* S. Rep. No. 103-111, at 12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1901; H.R. Rep. No. 103-88 (1993), 1993 WL 158058.

B. Applying RFRA at GTMO Is Consistent with Congressional Intent That RFRA Apply to Military Conduct.

Although *Vermilya* held that the term "possession" used in a statute indicates that Congress intended the legislation to apply to military bases as to which the United States exercised long-term and exclusive control, the Supreme Court's decision *Vermilya* also relied on its review of the purposes of the FLSA, and its determination that application at military bases like Bermuda and GTMO was consistent with those purposes. In *Vermilya*, the Supreme Court was cognizant that the legislative history of the FLSA did not mention Bermuda, in particular, or leased military bases, in general, 335 U.S. at 385; nevertheless, the Court held that Congress intended that the FLSA apply to such properties. *Id*. at 390. Similarly, the legislative history of RFRA does not specifically mention GTMO. Despite this, a review of RFRA's legislative history leads inexorably to the conclusion that Congress expressly intended RFRA to have a

[3] Although the Senate Report on RFRA states that "courts have always extended to military authorities significant deference," S. Rep. No. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901, this deference relates to the merits of a claim, which may require the balancing of religious freedom and military discipline. This deference does not address the legal question of whether RFRA applies to the military, a question which Congress answered conclusively in the affirmative. *Id.*

"modest extraterritorial reach," *Pfeiffer*, 755 F.2d at 558-59, including enforcement on US military bases worldwide.

Both the plain text of the statute and the legislative history of RFRA evidence that Congress intended RFRA to apply to the conduct, regulations and policies of the United States military and all military officers. 42 U.S.C. § 2000bb-2(1) (applying RFRA to all federal officials); S. Rep. No. 103-111, at 12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1901; H.R. Rep. No. 103-88 (1993), 1993 WL 158058 (discussing application of RFRA to US military). In the legislative history, Congress expressly stated that RFRA would set a unitary federal standard for religious freedom claims, including claims by and against the military, S. Rep. No. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901; H.R. Rep. No. 103-88, 1993 WL 158058, and Congress discussed at some length the existing case law and statutes governing free exercise in respect of the military. *Id*.

Congress specifically considered whether such application would overly burden the military. Both the House and Senate Reports considered whether application of RFRA to the military would adversely affect military discipline. S. Rep. No. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901; H.R. Rep. No. 103-88, 1993 WL 158058. Despite these expressed concerns, Congress enacted RFRA with no exclusion or special provisions applicable to the military. In connection with the enactment of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, which amended RFRA in 2000 (before plaintiffs were detained), Senator Strom Thurmond formally objected to the continuing application of RFRA to the military, citing, as an example, that, under RFRA, soldiers stationed in Saudi Arabia might object to restrictions precluding any display of religious symbols, which restrictions were imposed in deference to Saudi Arabia's laws and religious decrees. Statement of Sen. Strom

Thurmond, Sept. 5, 2000, 146 Cong Rec S7991, S7993. This series of statements evidences that Congress specifically considered and intended RFRA to apply to the military, and did so with full awareness of the fact that the statute could and would be applied to military conduct overseas.[4]

Given this legislative history, it cannot be seriously disputed that Congress intended RFRA to extend beyond the fifty states to United States military bases worldwide. Congress is presumably aware that the United States military is an international body. When Congress legislates for the military, in the absence of express statutory language, there is no reason to presume that Congress intends for different standards to apply to bases abroad than apply domestically.[5] And no such presumption could be applied to RFRA in any case, given that the legislative history plainly evidences an intent to create a single, consistent standard applicable to the military and the federal government as a whole. Sen. Rep. 103-11, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901.

At least one court interpreting RFRA has concurred that RFRA applies to military conduct wherever it occurs. In *Veitch v. Danzig*, a Navy chaplain alleged violations of RFRA, claiming his superiors had discriminated against him on the basis of his religious belief. 135 F. Supp. 2d 32 (D.D.C. 2001). His RFRA claim covered conduct that occurred in Naples, Italy and

[4] Plaintiffs respectfully submit that it is too narrow to suggest, as does this Court's Order of February 6, 2006, that the sole purpose of RFRA was to reverse the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* Order at 33. Although reversing the *Smith* decision was certainly the initial motivation in the enactment of RFRA, *see* Sen. Rep. 103-11, at 2, 1993 U.S.C.C.A.N. at 1893, the legislative history of RFRA makes clear that Congress was also seeking to expand the protection of religious freedom in prisons by overruling legislatively the decision in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (applying "rational basis" test to prison policies that precluded Muslim prisoners from attending services), and in connection with military conduct and regulation by overruling the decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986) (affirming Air Force regulation prohibiting wearing of yarmulke while in uniform). Treatment of these cases in RFRA's legislative history evidences that the intent of RFRA was the creation and implementation of a *unitary federal standard*, as well as the legislative abrogation of the *Smith* decision.

[5] When Congress does not want a statute that applies to the military to have extraterritorial effect, Congress can and certainly knows how to limit its application. *See e.g.*, The Federal Tort Claims Act, 28 U.S.C. § 2680(k) (exception to FTCA for "[a]ny claim arising in a foreign country.").

on the high seas, as well as the Norfolk Naval Base. *Id*. at 33-34. The Court noted that plaintiff's claims raised serious concerns under RFRA, but denied his motion for preliminary injunction because it found that his own misconduct, and not his religious practices, was the cause of his voluntary resignation. *Id*. at 35-36. Nevertheless, the Court did not suggest that Veitch's RFRA claim suffered from any infirmity because it arose in part on a US naval base in Italy. Indeed, the Navy did not even raise the issue of extraterritoriality.

C. Plaintiffs Have Rights Under RFRA.

By intentionally extending the reach of RFRA to United States territories and possessions, prisons, and the military, Congress plainly intended RFRA to assure the broadest protection of a fundamental right – the right of individuals to be free of government action that burdens the exercise of their religion. The statute contains no limiting language. 42 U.S.C. § 2000bb-2(1)&(2); S. Rep. No. 103-111, at 11-12, *as reprinted in* 1993 U.S.C.C.A.N. at 1900-01. The Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), acknowledged the broad scope of the statute when it stated that "[a]ny law is subject to challenge at any time by *any* individual who alleges a substantial burden on his or her free exercise of religion." (emphasis added). Simply put, there are no restrictions on who may bring a claim under the RFRA statute – a fact that is clear from the plain language of the statute.[6]

Accordingly, by its terms, RFRA can be invoked by a prisoner at the US Disciplinary Barracks at Fort Leavenworth, Kansas, and by a prisoner incarcerated down the road at the United States' maximum-security Penitentiary at Leavenworth, Kansas. Equally, RFRA can be enforced by a soldier stationed at Fort Mead and a soldier stationed at the Yongsan Garrison in Seoul, South Korea. It could be enforced by a soldier or a civilian incarcerated at any military

[6] The fact that Congress specifically intended for RFRA to protect the rights of prisoners, who are often accused of flooding the US court system with frivolous civil rights lawsuits, evidences the deliberately broad scope of RFRA.

base. It would defy logic to argue that, although RFRA clearly and expressly restricts the conduct of both prison officials and officers of the US military, it does not apply to prisons operated by the military.

Any assertion that RFRA was intended to create enforceable rights only for American citizens would be in conflict with the broad language of the statute. Congress has demonstrated over and over that, where it intends to restrict standing, it knows how to include express language to this effect in a particular statute. *See, e.g.*, The Civil Rights Act of 1991, 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State . . . .") ("Title VII"); The Jones Act, 46 U.S.C. § 688 (restricting standing to "citizen or permanent resident alien of the United States at the time of the incident giving rise to the action" unless no other remedy would be available to the injured seaman); The Federal Tort Claims Act, 28 U.S.C. § 2680(k) (exception for "[a]ny claim arising in a foreign country"). Where statutory language is clear, as is the case here, this Court "must presume that Congress meant precisely what it said." *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) ("Because statutory language represents the clearest indication of Congressional intent . . . we must presume that Congress meant precisely what it said. Extremely strong, this presumption is rebuttable only in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

Given that RFRA contains no express restrictions analogous to those found in the Jones Act and Title VII, if this Court were to find such restrictions, it could do so only if it created them judicially. There is no statutory basis for such restrictions, nor is there any basis in the legislative history of the statute. The Supreme Court's treatment of the habeas statute in *Rasul v.*

Bush strongly suggests that this Court should avoid judicially creating distinctions in statutes that have none. The Court said,

> Considering that the statute 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 467-68 (internal citation omitted). No less so here. This Court should not reach out to create restrictions out of whole cloth to exclude Muslim detainees, a discrete and insular minority, from the protections of religious freedom. There is no reason to presume that Congress would have taken such a misguided step.[7]

It cannot even be reasonably argued that Congress was unaware that claims under RFRA could be brought by aliens incarcerated by the US military at GTMO. In 1993, the United States was involved in a very similar controversy concerning the rights of Haitian refugees detained by the military at GTMO. Litigation seeking application of US immigration and naturalization statutes, as well as other statutory and constitutional rights, to those detainees had been working its way through the federal courts for years. *See, e.g., Sale*, 509 U.S. 155, 161-170 (citing cases). Indeed, RFRA was debated and enacted by Congress during 1993, contemporaneous with the briefing and argument of *Sale* in the Supreme Court. In light of this timing, this Court simply cannot assume that Congress legislated in ignorance of the fact that the US military was detaining thousands of aliens at GTMO or that any one of those aliens could seek to use RFRA to enforce his or her rights, while in a US "possession," to religious freedom.

[7] Indeed, the legislative history of RFRA indicates that the rights of Muslim prisoners were part of Congress' consideration in passing the statute. The Senate Report refers critically to *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which had upheld prison restrictions that prevented Muslim prisoners from attending Friday services. RFRA was intended to overrule legislatively the *O'Lone* decision, and to extend greater protection to prisoners like the plaintiffs in that action. Given Congress' concern about the *O'Lone* decision, it would be perverse indeed to conclude, without a shred of support in the text of the statute or the legislative history, that Congress intended to exclude from RFRA's coverage Muslim detainees in a US "possession," who are seeking exactly the same protections as the *O'Lone* plaintiffs.

D. Application of RFRA at GTMO Raises No Concerns of Extraterritoriality.

1. The United States Exercises Legislative Control over GTMO.

The Supreme Court has stated that courts should be concerned about extraterritoriality when a statute is being applied "beyond places over which the United States has sovereignty *or has some measure of legislative control*." *ARAMCO*, 499 U.S. at 248 (emphasis added) (quoting *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Under the terms of its lease with the Cuban government, the United States unquestionably exercises "legislative control" over GTMO. *See Rasul v. Bush*, 542 U.S. at 475. The recently enacted Detainee Treatment Act further confirms that Congress believes it has authority to regulate conduct at GTMO. Pub. L. No. 109-148, 119 Stat. 2680, 2740-41, 2005 H.R. 2863 (to be codified at 10 U.S.C. § 801). *See also* 42 U.S.C. § 1651 (a)(2)&(3), 42 U.S.C. § 1701 (b)(1)(c), 56 Stat. 1028 (1942). "The Constitution leaves it to the political branches, not the courts, to determine the territory over which the United States enjoys legislative jurisdiction." *United States v. Corey*, 232 F.3d 1166, 1176 (9th Cir. 2000). Where, as here, Congress has concluded that the United States exercises legislative control over GTMO, *ARAMCO* neither suggests nor requires that the courts apply a presumption that US statutes do not apply there.

2. There Is No Possibility of Conflict with Cuban Law.

As the D.C. Circuit has made clear, the doctrine of extraterritoriality seeks to ensure that the federal government does not improperly regulate the conduct of foreign parties:

> Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to *establish the norms of conduct applicable to events or persons outside its borders*.

Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993) (emphasis added). RFRA, however, regulates the conduct of only the federal government and its

employees. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. 1211, 1216-17 (2006) (citing 42 U.S.C. § 2000bb-1(b)) ("Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion."). Clearly, Congress has authority to regulate the US government, wherever the government is located. *See* Const. Art. I, § 8 cl. 14 ("The Congress shall have the power to . . . make rules for the government"). Neither of the two factors that caution against extraterritorial application of federal statute – the desire to avoid international clashes of law and the presumption that Congress has primarily domestic concerns – is relevant in the context of RFRA.

First, RFRA cannot create the "unintended clashes between our laws and those of other nations which could result in international discord," which the presumption against extraterritorial application seeks to avoid. *ARAMCO*, 499 U.S. at 248. If the Supreme Court in *ARAMCO* had interpreted Title VII as having extraterritorial effect, "a French employer of a United States citizen in France would be subject to Title VII . . . a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Id*. at 255. As explained by the Fifth Circuit, if there is no displacement of foreign law, the *ARAMCO* analysis is irrelevant:

> In *Arabian American Oil Co.*, the question was whether Title VII applies to American corporations located in Saudi Arabia. Obviously, courts must be hesitant to apply American law when it would displace the law of the foreign forum. . . . [T]he key issue is clear: application of American law would directly *affect the sovereignty of a foreign nation*. . . . There is absolutely no issue of sovereignty in the instant case; in the absence of such an issue the concerns voiced in [*ARAMCO*] . . . are not implicated.

Mississippi Poultry Ass'n, Inc. v. Madigan, 992 F.2d 1359, 1366-67 (5th Cir. 1993) (emphasis in original).

In the instant case, unlike Title VII at issue in *ARAMCO*, there is no possibility of conflict with the laws of another sovereign. As evidenced by the Lease Agreement, no other sovereign has the right to legislate within GTMO. The government certainly does not contend that Cuban law applies at GTMO or that RFRA conflicts with an obligation arising under Cuban law. *See In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) ("American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law.").

Second, there is no potential for conflict because RFRA restricts, rather than expands, the rights and privileges of the United States government and its officials. *O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. at 1216. While foreign governments may regulate the conduct of US government officials within their territory, RFRA creates only additional obligations – not privileges or immunities – for government officials and therefore *cannot* conflict with or displace an obligation arising under foreign law. Further, RFRA does not create obligations or liabilities for foreign and/or private entities that would conflict with privileges or obligations existing under any foreign law. *See* 42 U.S.C. § 2000bb-1. Therefore, *ARAMCO's* presumption against extraterritoriality is not relevant to RFRA.

3. Regardless of Its Extraterritorial Reach, RFRA Applies to the Conduct of Washington-Based Defendants.

Even if the Court were to determine that RFRA does not apply at GTMO, which would be incorrect, RFRA clearly controls the conduct of the defendants in the United States. As this Court has recently held, "[t]he presumption [against extraterritoriality] is inapplicable . . . to federal agency actions within the United States that have extraterritorial effects." *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66 (D.D.C. 2003). "Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely

within the United States." *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

This principle was applied to RFRA in *Utah v. Evan*, 143 F. Supp. 2d 1290, 1296-97 (D. Utah 2001) (3 judge panel). Members of the Church of Latter Day Saints abroad on their religious missions challenged the policy of the federal government excluding them from the 2000 national census; they claimed that the policy "burdened the exercise of their religious practice of serving on missions abroad." *Id*. Although the effects of the policy were felt abroad, the conduct that plaintiffs challenged occurred within the United States. *Id*. The court ultimately granted summary judgment on the merits; nonetheless, the fact that the alleged effects were felt abroad presented no bar to a RFRA claim against domestic conduct. *Id*. at 1297. Here, RFRA certainly applies to the conduct of Washington-based defendants regardless of where the effects were felt.

Unlike the "headquarters doctrine" claim in *Sosa v. Alvarez-Machain*, this is not an attempt to "swallow the foreign country exception" to the Federal Tort Claims Act. 542 U.S. 692, 702-03 (2004). Contrary to the FTCA at issue in *Sosa*, no such foreign country exception exists in RFRA. Rather, RFRA restricts government conduct by "prohibit[ing] the Federal Government from substantially burdening a person's exercise of religion." *O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. at 1216. Therefore, regardless of RFRA's application extraterritorially, RFRA controls all domestic conduct even if the effects are felt abroad. Decisions made by the Secretary of Defense and the military chain of command regarding the regulation of religious practices of GTMO detainees inarguably constitute domestic conduct.

Thus, based on its text, its legislative history and long-standing Supreme Court precedent, RFRA applies at GTMO and protects the religious freedoms of detainees like the plaintiffs. The

ordinary presumptions against extraterritoriality simply do not apply to RFRA because Congressional intent to extend RFRA beyond US borders is clear, and, moreover, because the concerns giving rise to such presumptions are not present in connection with the RFRA statute. Finally, it is clear that, whatever the issues of extraterritoriality, such concerns do not affect the application of RFRA to the conduct of defendants within the United States.

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

In their initial briefing, defendants asserted that they are entitled to qualified immunity solely because, whatever the illegality of their actions in other geographic locations, according to defendants, they were not aware (and no reasonable officer could have been aware) that RFRA applied to the detainees at GTMO. This argument is both ethically unacceptable and legally specious.

It is ethically unacceptable because it requires defendants, and this Court, to ignore the fact that the conduct alleged in the Complaint was prohibited not just by RFRA, but also by US Army Regulations and two Geneva Conventions. Defendants' argument suggests that they believed that they could violate these proscriptions with impunity at GTMO, and then plead confusion about the jurisdiction of the RFRA statute. The qualified immunity doctrine is not meant to provide a safe haven to defendants who are aware that they are engaging in unlawful conduct, but hope they have constructed a legal lacuna where they may avoid accountability.

It is specious because defendants have no rational basis for their argument. As discussed above, RFRA is a short, plain statute. It contains broad language and no technical exclusions or conditions. It clearly applies both to the military and to GTMO. Any reasonable officer would have recognized that the conduct alleged in the complaint, which both interfered with and denigrated plaintiffs' religion, facially violated RFRA.

A. Qualified Immunity Standard

The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), established the qualified immunity standard. The Court held that government officials generally would be entitled to claim qualified immunity from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* In order to be clearly established, the contours of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). Plaintiffs need not however, demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001). Nor need they identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Plaintiffs need only show that in light of pre-existing law the official had "fair warning" that the conduct in question was unlawful. *Id*. at 739-40. Moreover, *Hope* further clarified that "general statements of law are not inherently incapable of giving fair and clear warning." *Id*. at 741; *see also Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("Thus, we do not just compare the facts of an instant case to prior cases to determine if a right is 'clearly established;' we also assess whether the facts of the instant case fall within statements of general principle from our precedents.") (citation omitted).

The test for qualified immunity is one of "objective reasonableness," which is "measured by reference to clearly established law." *Harlow*, 457 U.S. at 818. Accordingly, "[i]f the law was clearly established, the immunity defense ordinarily should fail, *since a reasonably*

competent public official should know the law governing his conduct." *Id*. at 818-19. (emphasis added). Explaining the significance of this test, *Harlow* explained that:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Id. Notably, qualified immunity also does not protect officials from liability for conduct that is "so egregious" that any reasonable person would know it was illegal without guidance from courts. *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992).

B. Defendants' Conduct Violated RFRA by Substantially Burdening Plaintiffs' Exercise of Their Religion, and Any Reasonable Officer Would Have Been Aware of This.

Under RFRA, government interference with the free exercise of religion is prohibited unless the government demonstrates both a compelling interest and that the burden on plaintiff's religious practice is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1(a) & (b). Once a plaintiff establishes a substantial burden on religious exercise, the burden of demonstrating compelling interest and least restrictive means shifts to the defendant. 42 U.S.C. § 2000bb-1(b).

At the time that defendants deliberately and substantially burdened plaintiffs' practice of their Muslim religion, any reasonable person in defendants' position would have known that such egregious conduct violated clearly established statutory rights. Given the plain language of the RFRA statute, the legislative history and relevant case law, defendants were on notice that that the statute applied to the actions of military officers regardless of where they were stationed,

that GTMO detainees had rights under the RFRA statute, and that their rights were violated by defendants' conduct.

First, defendants had to have been on notice that RFRA applies to the military. The statute broadly defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color or law) of the United States, or a covered entity." 42 U.S.C. § 2000bb-2. The statute also provides that "[t]his Act applies to all Federal law, and *the implementation of that law*, whether statutory or otherwise and whether adopted before or after the enactment of this Act." 42 U.S.C. § 2000bb-3 (emphasis added). The legislative history confirms what is clearly stated in the text of the statute. *See* S. Rep. No. 103-111, at 11-12 (1993). Thus, it has been clearly established since the statute was enacted in 1993 that RFRA applies to the military and, more specifically, to the actions of military officers. In the 13 years since it was passed, RFRA has also been repeatedly invoked to preclude, or obtain remedies for, acts, regulations and policies of the military and of military officers. *E.g.*, *Veitch*, 135 F. Supp. 2d 32; *Rigdon v. Perry*, 962 F. Supp. 150, 152-53 (D.D.C. 1997); *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002). Accordingly, defendants were, and any reasonable officer would have been, aware that the military was subject to RFRA.

Second, it was clearly established that RFRA applies to the actions of military officers *regardless of where they were stationed, including GTMO*. RFRA simply does not include a "GTMO exclusion." When a statute applies to the military all over the world, that includes GTMO. Defendants have no good faith basis for suggesting that they believed there was an unstated exception for GTMO. Any such belief would have been inherently unreasonable. In addition, as discussed above, Supreme Court precedent dating back to the 1940s stood for the

proposition that a statute applicable to the United States' territories and possessions would be enforced at military bases like GTMO. *Vermilya*, 335 U.S. 377, 389-90 (1948).

The fact that RFRA had not previously been applied at GTMO does not entitle the defendants to qualified immunity. As the Second Circuit recently held, "the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established." *Johnson*, 239 F.3d at 251. At the time the conduct at issue occurred, it was clearly established that RFRA would be applied to the actions of military officers stationed in GTMO. That is all that is required to defeat a claim of qualified immunity.

Third, it was well established that plaintiffs had enforceable rights under RFRA. The text of the statute contains no restrictions on who can sue to enforce it. Rather, it is open to *any* person "whose religious exercise has been burdened" . . . may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1. Unlike the Jones Act, or Title VII of the Civil Rights Act, RFRA did not restrict standing to bring an action under the statute to US citizens or residents, or to persons injured in the United States. Rather, Congress deliberately went out of its way to write a statute of enormous breadth – protecting the free exercise of religion in areas, including prisons and the military, where courts had traditionally been quite deferential. Again, there is no good faith basis for any individual officer or branch of government to infer an exception to RFRA for which there is no textual support.

Fourth, there is no question that defendants' conduct violated RFRA. Defendants' actions, which included throwing a copy of the Koran in the toilet bucket, prohibiting prayer, deliberately interrupting prayers, playing loud music to interrupt prayers, withholding the Koran without reason or as punishment, forcing prisoners to pray with exposed genital areas,

withholding prayer mats and confining plaintiffs under conditions where it was impossible or infeasible for them to exercise their religious rights, Compl. ¶ 206, interfered repeatedly with the free exercise of plaintiffs' religion. Far from being narrowly tailored responses to compelling government interests, defendants' acts were gratuitously broad and invasive, and were utterly without justification. Moreover, although defendants seek here to exploit what they view as a legal loophole, there is little doubt that defendants knew that their acts violated RFRA at the time they committed them.

As the plaintiffs pointed out in their opposition brief, at the time they invaded plaintiffs' rights at GTMO, the acts of the defendants had already been determined by courts all over the country to violate RFRA. *See*, *e.g.*, *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (recognizing potential RFRA claim related to grooming policies requiring shaving and short hair as applied to Rastafarian and Sunni Muslim prisoners); *Taylor v. Cox*, 912 F. Supp. 140 (E.D. Pa. 1995) (seizure of Koran stated a claim under RFRA); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), *on remand* 151 F.3d 1033 (7th Cir. 1998) (Table) (right to participate in Ramadan observances covered by RFRA). In addition, as the legislative history makes clear, one of the purposes of RFRA was to overrule legislatively the Supreme Court's *O'Lone* decision, which upheld prison regulations prohibiting Muslim prisoners from attending Friday congregational services. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Thus, defendants cannot assert that they were unaware that Muslim religious practices, including the specific religious practices at issue here, were protected under RFRA.

Moreover, in addition to violating RFRA, defendants' conduct violated the terms of the Geneva Conventions as well as Army Regulation 190-8, both of which require the United States

to permit free exercise of religion by detained persons. Geneva POW Convention Art. 34 and Geneva Civilian Convention Art. 93; Army Reg. 190-8 1-5(g) (Ex. 5 to plaintiffs' opposition to the motion to dismiss) ("Enemy Prisoners of War and Retained Persons will enjoy latitude in the exercise of their religious practices") and 6-7(d)(1) ("Civilian Internees will enjoy freedom of religion"). Courts have recognized that defendants who are aware, or should have been aware, that their conduct violated other laws and regulations are on notice that their conduct is illegal for purposes of the qualified immunity defense. *Hope*, 536 U.S. at 743-44; *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002). Defendants' motion to dismiss does not even attempt to assert a compelling interest in interfering with plaintiffs' religious expression or that their approach was the least restrictive alternative available. They could not, but in any event, at this stage of the pleadings, plaintiffs have alleged a *prima facie* claim under RFRA, which cannot be dismissed.

As the discussion above makes plain, in order to prevail on their qualified immunity defense, defendants would have to successfully argue that a reasonably competent officer would: 1) ignore the plain language of RFRA, its legislative history and Supreme Court precedent; 2) ignore the other regulations and laws prohibiting the same conduct; 3) read into RFRA a geographic exclusion of GTMO that appears nowhere in its text; and/or 4) read into RFRA a restriction on standing, excluding aliens detained by the military, which also appears nowhere in the statute. These arguments provide for no basis for a defense of qualified immunity, and none should be recognized by this Court.

CONCLUSION

GTMO is not a lawless enclave, where defendants were entitled to engage in conduct that they knew to be illegal and antithetical to their obligations as federal officers, with the assumption that they would be able to rely on qualified immunity to give them "one free strike." *Rasul v. Bush* is not the first, or the only, Supreme Court case applicable to GTMO, and defendants, who include a cabinet officer and very senior military personnel, including GTMO camp commanders, must be presumed to know the other law that applies to GTMO and to their own conduct. Although plaintiffs respectfully submit that none of their claims is properly dismissed on grounds of qualified immunity, dismissal of the RFRA claim would be particularly inapposite. Defendants could have been under no illusion that harassing and denigrating Muslims in their worship was lawful – whether at GTMO or elsewhere.

It is thus evident that under any objective standard, a competent officer would have known that the actions asserted in the complaint violated RFRA and could give rise to precisely the sort of claims asserted by the plaintiffs in this action. Defendants cannot claim here, as they do elsewhere that, "until *Rasul*, we didn't know that it was wrong to deny detainees fundamental rights and basic human dignity." Given the statutory language and legislative history of RFRA, and in light of the clear guidance of *Vermilya*, the scope of RFRA and its application at GTMO were well settled long before the *Rasul* decision. Defendants simply cannot invoke their loophole defense here to shield otherwise atrocious and inhumane behavior.

WHEREFORE, for the reasons stated herein and the reasons set forth in their opposition, plaintiffs respectfully request that the defendants' motion to dismiss their claims under RFRA be denied.

ORAL ARGUMENT REQUESTED

In view of the complicated and important issues raised, plaintiffs respectfully suggest that the Court could be aided by oral argument of this matter and respectfully request it.

Respectfully submitted,

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/s/ A. Katherine Toomey

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