No. 14-1260

IN THE
Supreme Court of the United States

SAMI ABDULAZIZ ALLAITHI, ET AL.,
Petitioners,

v.

DONALD RUMSFELD, FORMER SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

The Government attempts to cast this case as one concerning only an arcane matter of local D.C. law. It is not. Instead, it is about whether persons who are no longer properly detained by the military may be abused in the horrific ways described in the complaint without consequence because such abuse is found to be conduct of the sort defendants were assigned to do as part of their job responsibilities—that is, within the scope of their employment.

None of the plaintiffs has ever been a member of any terrorist group, and all were released from Guantánamo without being charged with any crime—yet all six were variously subjected to torture and other abuses including being held in solitary confinement, sleep deprivation, and gratuitous interference with religious practice. Three of the six were held at Guantánamo long enough to be cleared by the military Combatant Status Review Tribunals (CSRTs) created in the wake of this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004).

One of these three, university English professor Sami Allaithi, could walk when he was brought to Guantánamo, but left in a wheelchair. He was routinely beaten, his Koran desecrated, his beard shaved, and his religion mocked. He was also held for ten months *after* he was found to not be an "enemy combatant" by his military panel. Now living with family in Egypt, he remains immobilized and in great pain.

Another, Abu Muhammad, is a medical doctor and Algerian UNHCR-certified refugee who was tak-

en from his pregnant wife and five children in Pakistan in 2002, and held in Guantánamo for four years. He was eventually resettled against his will in Albania as a refugee in 2006, two years after his military panel found he was not an "enemy combatant." During those two years, he was subjected to sensory deprivation and continued disruption of religious practice.

The third, Zakirjan Hasam, an Uzbek refugee who fled religious persecution in Uzbekistan, was transferred to U.S. officials in 2002 by Afghanis, who he believes received in exchange a bounty from the U.S. government. He was subject to all of the worst abuses inflicted on Guantánamo detainees *after* he was found by a CSRT panel to not be an "enemy combatant": he was placed in solitary confinement (against a military psychologist's advice), subjected to sleep deprivation, prevented from praying, forcibly shaved, and medicated against his will. When our ally Albania agreed to take him in as a refugee, 23 months after the military panel's ruling, he was sent shackled and bound to his seat. He continues to live in poverty there.

The systematic abuse of these men by the U.S. military—found to be no longer properly held—does not raise a narrow question of D.C. law. Indeed, the question raised by this case goes far beyond the 38 men cleared by the CSRT process. In Iraq, "over 100,000 prisoners passed through the American-run detention system, most with no effective way to challenge their imprisonment."[1] Maj. Gen. Douglas Stone

[1] Watson Inst. of Brown Univ., *Costs of War: Detention* (Apr. 2015), available at

recommended releasing some 400 of the approximately 600 detainees then being held at the Bagram Theater Internment Facility in 2009,[2] yet rather than shrink, the population of the prison increased dramatically over the next two years. These practices of profiling detainees into mass detention as part of counter-insurgency programs and routinized application of conditions of detention that amount to torture appear to have become normalized among policymakers and openly accepted by many. As a result, these practices are likely to reappear in future conflicts.

Just as the issues presented in *Boumediene v. Bush*, 553 U.S. 723 (2008) were not simply relevant to the curious enclave of Guantánamo or the 780 men detained there over the years, the issues presented here are neither parochial nor lacking in significance. The D.C. Circuit "has decided … important question[s] of federal law"—the interpretation of the Westfall Act and the Religious Freedom Restoration Act (RFRA) in the context of the military detention and physical and religious abuse of innocent men—"that [have] not been, but should be, settled by this Court…." S. Ct. R. 10(c).

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http://watson.brown.edu/costsofwar/costs/social/rights/detention; *see also* Amit R. Paley, *In Iraq, "a Prison Full of Innocent Men,"* Wash. Post (Dec. 6, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120503906.html.

[2] NPR, *U.S. Gen. Urges Release Of Bagram's Detainees* (Aug. 20, 2009), *available at* http://www.npr.org/templates/story/story.Php ?story-Id=112051193.

The importance of the decision below is far out of proportion to its potential application to Guantánamo because of the rule of law the Court of Appeals announced. It bears repeating that the Court of Appeals held that the torture and religious humiliation these men endured—even after being cleared for release by the military—were incidental to the "need to maintain an orderly detention environment," "[apparently] standard for all" U.S. military detainees in Guantánamo, Iraq, and Afghanistan, and therefore "certainly foreseeable" by the master, the United States government, "because maintaining peace, security, and safety at a place like Guantánamo Bay is a stern and difficult business." App. 12a. There is nothing in that rule to distinguish the three post-CSRT detainees here from the tens of thousands of innocents detained and abused in our military's wars of the last decade or in any future conflicts our nation may engage in.

This case may be decided without "suggest[ing] that every Guantánamo detainee, such as those convicted by military commission, is entitled to compensation. But detainees who have been deemed not to be a security threat to the United States and have thereafter remained in custody for years are differently situated." Justice John Paul Stevens, *Reflections about the Sovereign's Duty to Compensate Victims Harmed by Constitutional Violations* (May 4, 2015), at 6, *available at* http://www.supremecourt.gov/publicinfo/speeches/JPS%20SpeechWashingtonDC_05-04-2015.pdf.

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This Court should grant this petition and reject the Government's efforts to minimize and marginalize the importance of this case. *First*, the Government mischaracterizes this issue as one of local significance to the District of Columbia, but the detention and treatment of those determined not to be enemy combatants—and whether they have any rights to physical protection and religious freedoms—most definitely raise federal questions. *Second*, the Government mischaracterizes the scope of employment inquiry, arguing that outrageous acts of officials may nonetheless be fairly attributed to their employer if at least some fragmentary motive to serve the interests of the United States was present. But here, the physical abuse and religious targeting of those who are not enemies of the United States cannot, *as a matter of law,* be justified on that basis. *Third*, the justification provided by the Court of Appeals is entirely unsupported by anything in the record at this stage of the proceedings. As a pleading matter, it is impermissible for the Court of Appeals to resolve in the Government's favor the deeply factual question of whether there was any justification for abusing detainees found to not be enemy combatants. *Fourth*, as to RFRA, the Government's suggestion that the drafters of the statute buried an extraterritorial limitation that does not apply to First Amendment rights within the definition of "person" must be rejected. Nor is it appropriate for this Court to consider the application of qualified immunity, *in the first instance*. The lower courts should be the first to address whether it applies here.

1. The right of individuals to be free from physical and religious abuse while detained by the U.S. military at Guantánamo raises important questions

of federal law that should be settled by this Court. *See* S. Ct. R. 10(c). Notwithstanding the Government's well-crafted attempt to downplay the significance of the petition as one involving simple "questions of state [or local] law," Pet. Opp. at 19, the Court of Appeals has decided important issues of federal law. Petitioners' claims rely on the interpretation of two federal statutes—the Westfall Act (as applied to claims under another federal statute, the Alien Tort Statute) and the Religious Freedom Restoration Act. The Court of Appeals' resolution of these questions will have ramifications far beyond the Petitioners here, impacting detainees and prisoners of war in future conflicts.

Just as the Government must treat suspects who have been exonerated differently from those adjudged guilty, the U.S. military must treat detainees found not to be enemy combatants differently than suspected or actual enemies of the United States. That obvious conclusion has been emphasized by this Court, but disregarded by the Court of Appeals. *See Hamdi v. United States*, 424 U.S. 507, 518, 524,-27 (2004) (only detention of enemy combatants is authorized). It simply cannot be the case that either Congress or this Court, in providing a means for suspected enemy combatants to challenge the propriety of their detention, intended that those persons found *not to be enemy combatants* could nevertheless continue to be held and treated *the same as actual enemies* of the United States. *See id.* at 538-39 (holding that suspected enemy combatants have the right to "rebut the Government's case against them"); *Rasul v. Bush*, 542 U.S. at 485 (reiterating that enemy combatants have the right to challenge their detentions and that the executive may not indefinitely de-

tain innocent individuals); *id.* at 488 (Kennedy, J., concurring) (emphasizing impropriety of allowing "friends and foes alike to remain in detention," and that a cleared detainee's detention may not "stretch[] from months to years" following a positive determination); *Boumediene*, 553 U.S. at 733-34, 784 (CSRT procedures designed to comply with due process requirements identified by *Hamdi*); *id.* at 772-73 (recognizing that additional delay before release would impose significant harm on individuals who were improperly detained).

The physical and religious abuse at Guantánamo of those determined not to be enemy combatants does not raise a simple question of local law; it raises fundamental federal questions that should be resolved by this Court.

2. The Government has relied upon the Court of Appeals' improper factual findings that the prolonged detentions and the physical and religious abuses of Petitioners were innocently explained by the "need to maintain an orderly detention environment," Pet. Opp. at 15, and was nothing more than "administrative bureaucracy." Pet. Opp. at 14. These inferences are completely unsupported and entirely impermissible at this stage of the proceedings. Rather than drawing all plausible inferences in favor of Plaintiffs, as required on a motion to dismiss, the Court of Appeals instead posited that Respondents prevented "cleared" detainees from praying, and desecrated their Korans, not for reasons of personal animus as Plaintiffs alleged, but rather because they wanted to maintain an "orderly environment." Regardless of what discovery may ultimately establish, based on what has been alleged, Plaintiffs are enti-

tled to a presumption of plausibility at this stage of the proceeding.

The only question before the Court of Appeals on Petitioners' Alien Tort Statute claims was whether Petitioners had plausibly alleged that defendants acted outside their scope of employment. It instead answered whether Respondents had a plausible defense, a question that was not before it.

3. The Government also asserts that Petitioners do not challenge the district court's dismissal of their claims asserted against the "Doe Defendants." Pet. Opp. at 11 n.7. That is incorrect. Under the Westfall Act, a district court may dismiss only claims against defendants whom the Attorney General certifies are acting within the scope of employment. *See* 28 U.S.C. § 2679(d)(1). But the Attorney General never certified that the Doe Defendants were acting within the scope of employment, and the United States was never substituted as a defendant for these individuals—primarily prison guards conducting the actual abuse of Petitioners. As a result, Petitioners' claims against these Defendants were not foreclosed by the Westfall Act and should not have been dismissed without a valid substitution.

This raises an important issue of law under the Westfall Act that should be addressed by the Court.

4. If left to stand, the Court of Appeals decision would mean that human beings detained in Guantánamo are *not* persons enjoying any rights under RFRA but, according to this Court decision in *Hobby Lobby*, corporations are. That would be a surprising result indeed and "a most regrettable holding." *Rasul*

v. Myers, 512 F.3d 644, 676 (D.C. Cir. 2008) ("*Rasul I*") (Brown, J., concurring in the result).

This Court should grant the petition to resolve the question of whether these detainees have RFRA rights. There is no statutory basis for finding otherwise. The plain language of RFRA itself defines "government" as including a "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." By the statute's own words, RFRA's restrictions on government are broadly defined, and apply to governmental acts in places that are under the United States' complete possession and control. *See also Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 45 (D.D.C. 2006) (Guantánamo is a "territory over which the U.S. exercises plenary and exclusive authority," and thus "presumably *all* United States law applies there," including RFRA.).

Nor should the Court determine*, in the first instance*, that qualified immunity applies here. This issue was never considered, let alone decided, by the courts below. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), which the Government relies upon, did not involve plaintiffs who had obtained a CSRT determination that they were not enemy combatants. And they were released from Guantánamo *before* either *Rasul v. Bush* or *Hamdi* was decided by the Court.[3] That is a distinction that Petitioners

[3] In *Rasul v. Rumsfeld* this Court vacated a ruling that no constitutional protections attached to noncitizens held at Guantánamo even though those plaintiffs were released in March 2004, prior to the *Rasul v. Bush* decision. See *Rasul I*, 512 F.3d

submit is determinative and, at a minimum, should be addressed by the courts below. Where there is no record supporting a qualified immunity defense, it should not bar this Court from granting certiorari on the underlying issues.[4]

But qualified immunity would not bar Petitioners' RFRA claims in any event. It was clearly established during Petitioners' detention that RFRA applied to their situation, despite the fact that they were held in Guantánamo.

Respondents attempt to characterize Petitioners' situation as a "detention" of "enemy combatant[s]" by the military "in connection with an ongoing armed conflict." Opp. at 23. But Petitioners were not enemy combatants. They had been cleared of wrongdoing in CSRT proceedings, but continued to be wrongfully detained in an area where the United States maintains *de facto* sovereignty and "complete jurisdiction and control." *Boumediene v. Bush*, 553 U.S. 723, 753 (2008).

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at 663-67 (citing panel decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) for the holding that no Constitutional rights protect foreign nationals in Guantánamo), and *id.* 671-72 (holding that meaning of "person" in RFRA should be interpreted in line with extent of constitutional protections), *vacated*, 555 U.S. 1083 (2008) (remanding "for further consideration in light of *Boumediene v. Bush*, 553 U.S. 723 (2008).").

[4] A strict application of qualified immunity would prevent the Court's purpose of "clarify[ing] constitutional rights without undue delay." *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) (quoting *Bunting v. Mellen*, 541 U.S. 1019, 1024 (2004) (dissenting, Scalia, J.)). While lower courts may prefer to leave constitutional questions "for another day," "this day may never come" and qualified immunity sometimes "threatens to leave standards of official conduct permanently in limbo." *Id.* at 2031.

As early as 2004 (well before the three CSRT-cleared Petitioners were released, in late 2005 and 2006), the Court explicitly recognized that Guantánamo detainees accrue some fundamental rights by virtue of being in the United States' complete control and custody. In *Rasul v. Bush,* the Supreme Court recognized that accused enemy combatants at Guantánamo accrued limited due process rights simply by virtue of being in the United States' complete control and custody. 542 U.S. at 483-84. As the Court stated,

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.

Id. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) and citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein). This Court made clear that, unlike a camp for prisoners of war set up during ongoing conflict, the "indefinite lease of Guantánamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950) (nonresident

enemy aliens in German war camp did not enjoy constitutional rights)).

Courts have long recognized that some fundamental rights apply to persons residing in areas under the United States' complete control. The fundamental rights of Guantánamo detainees include the right to practice religion freely, without gratuitous interference by officials or religious-themed torture. And Respondents should have known that their abhorrent acts would not be insulated from liability simply because they occurred offshore in Guantánamo.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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