[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

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

SAMI ABDULAZIZ ALLAITHI,
Plaintiff-Appellant,

v.

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

YUKSEL CELIKGOGUS et al.,
Plaintiffs-Appellants,

v.

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

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

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

1. *Allaithi v. Rumsfeld*, No. 13-5096 (D.C. Cir.)

a. Plaintiff in district court and appellant in this Court is Sami Abdulaziz Allaithi.

b. Defendants in district court and appellees in this Court are: Donald H. Rumsfeld; General (Retired) Richard Myers; General (Retired) James T. Hill; General (Retired) Bantz Craddock; Major General (Retired) Michael Lehnert; Major General (Retired) Michael E. Dunlavey; Major General (Retired) Geoffrey Miller; Major General (Retired) Jay Hood; Colonel (Retired) Terry Carrico; Major General (Retired) Adolph McQueen; Major General (Retired) Nelson J. Cannon; Colonel (Retired) Michael Bumgarner; and Esteban Rodriguez, all in their individual capacities.

c. There were no amici or intervenors in district court, and there have been no amici or intervenors in this Court to date.

2. *Celikgogus v. Rumsfeld*, No. 13-5097 (D.C. Cir.)

a. Plaintiffs in district court and appellants in this Court are Yuksel Celikgogus; Ibrahim Sen; Nuri Mert; Zakirjan Hasam; and Abu Muhammad.[i]

b. Defendants in district court and appellees in this Court are: Donald H. Rumsfeld; General (Retired) Richard Myers; Major General (Retired) Geoffrey Miller; General (Retired) James T. Hill; Major General (Retired) Michael E. Dunlavey; Major General (Retired) Jay Hood; Major General (Retired) Michael Lehnert; Major General (Retired) Nelson J. Cannon; Colonel (Retired) Terry Carrico; General (Retired) Bantz Craddock; Admiral Harry B. Harris, Jr.; Major General (Retired) Adolph McQueen; Colonel (Retired) Michael Bumgarner; Esteban Rodriguez; General (Retired) Peter Pace; and Colonel Wade F. Dennis, all in their individual capacities.

Defendants in district court who were named in plaintiffs' original complaint or First Amended Complaint but were not named in plaintiffs' Second Amended Complaint and thus were terminated from the case are: Lieutenant Colonel (Retired) William Cline; and Colonel Dennis Wade, both in their individual capacities.

c. There were no amici or intervenors in district court, and there have been no amici or intervenors in this Court to date.

[i] Plaintiffs Hasam and Muhammad are using pseudonyms in this litigation. *See* JA 20; Plaintiffs Zakirjan Hasam And Abu Muhammad's Motion For Continued Use Of Pseudonyms, at 2, *Celikgogus v. Rumsfeld*, No. 1:06-cv-1996 (D.D.C.), ECF No. 8.

B. Rulings Under Review

The rulings under review (issued by then-Chief Judge Royce C. Lamberth) in these cases, which were consolidated in district court, are the memorandum opinion and order filed on February 1, 2013, granting the defendants' motions to dismiss. The memorandum opinion appears in the Joint Appendix at JA 137-48; the order appears at JA 136. The official citation for the opinion is *Celikgogus v. Rumsfeld*, 920 F. Supp. 2d 53 (D.D.C. 2013); there is no official citation for the order.

C. Related Cases

These cases were not previously before this Court or any other court other than the district court. Currently pending before this Court is *Al Janko v. Gates*, No. 12-5017 (D.C. Cir.), which raises several issues that are similar or identical to those raised here. Like the cases on appeal here, *Al Janko* concerns a damages action asserted by an individual formerly detained by the military in Afghanistan and at Guantanamo against, *inter alios*, a number of government officials, in their individual capacities. Issues raised in the *Al Janko* appeal include (1) whether the individual defendants are entitled to qualified immunity with respect to the plaintiff's claims alleging violations of the Fourth and Fifth Amendments to the U.S. Constitution; (2) whether a *Bivens*[ii] cause of action should be recognized in the military-detention

[ii] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

context; and (3) whether the United States properly substituted itself for the individual defendants under the Westfall Act on the plaintiff's international-law claims. This Court held argument in *Al Janko* on October 22, 2013, but has not yet issued a decision in the case.

Counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/Sydney Foster
Sydney Foster

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GLOSSARY

AUMF	Authorization for Use of Military Force
CSRT	Combatant Status Review Tribunal
FTCA	Federal Tort Claims Act
RFRA	Religious Freedom Restoration Act

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

BRIEF FOR DEFENDANTS-APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs in each of these two consolidated appeals sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 1350, and 42 U.S.C.

§ 1985(3), and "directly under the United States Constitution." JA 29, 99. On February 1, 2013, the district court entered an order dismissing plaintiffs' complaints. JA 136. On April 1, 2013, plaintiffs filed a timely notice of appeal. *See* JA 149-52; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs are former military detainees who brought damages claims against a number of current and former high-ranking government officials, in their individual capacities, asserting violations of international law, the First and Fifth Amendments to the U.S. Constitution, 42 U.S.C. § 1985(3), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

The questions presented are as follows:

1. Whether the individual defendants are entitled to qualified immunity with respect to the *Bivens* and § 1985 claims.

2. Whether a *Bivens* cause of action should be recognized in this military-detention context.

3. Whether the United States properly substituted itself for the individual defendants under the Westfall Act on plaintiffs' claims alleging violations of international law.

4. Whether plaintiffs' Religious Freedom Restoration Act claims were properly dismissed.

PERTINENT STATUTES

Pertinent statutes—10 U.S.C. § 2734; 28 U.S.C. §§ 1350, 2679; 42 U.S.C. §§ 1985, 2000bb-1—are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs in these two consolidated appeals are six former military detainees who brought damages actions against a number of government officials, in their individual capacities. The district court consolidated plaintiffs' actions and dismissed both cases. JA 136-48. Plaintiffs in each case appealed, and this Court consolidated the appeals on May 9, 2013.

STATEMENT OF FACTS

A. Factual Background

Plaintiffs Sami Abdulaziz Allaithi, Yuksel Celikgogus, Ibrahim Sen, Nuri Mert, Zakirjan Hasam, and Abu Muhammad are foreign nationals whom the U.S. military took into custody between late 2001 and early 2002. JA 29-31, 39-40, 99-100, 107. The military detained plaintiffs first in Afghanistan and then, starting in 2002, at Guantanamo Bay. JA 39-42, 107-09. Three plaintiffs—Celikgogus, Sen, and Mert—were transferred from Guantanamo to their home country, Turkey, on dates ranging from November 2003 through April 2004. JA 51 (Celikgogus, 11/22/03); JA 56-57 (Sen, 11/22/03); JA 63 (Mert, 4/1/04); *see* JA 29-30.

Subsequently, in July 2004, the Deputy Secretary of Defense issued an order establishing military "Combatant Status Review Tribunals" ("CSRTs") to review whether then-current Guantanamo detainees were properly detained as "enemy combatants."[1] As explained in that order, each detainee whose status was to be reviewed by a CSRT "ha[d] [previously] been determined to be an enemy combatant." 7/7/04 CSRT Memo, at 1; *see also* 7/29/04 CSRT Memo, encl. 1, at 1. CSRT decisions were subject to review by a Department of Defense "Convening Authority," who was authorized to approve CSRT decisions or take certain other actions. 7/7/04 CSRT Memo, at 3; 7/29/04 CSRT Memo, at 2, encl. 1, at 9. If a CSRT determined that a "detainee shall no longer be classified as an enemy combatant," and if that determination was approved by the Convening Authority, the Secretary of State was to be informed in order "to permit [him or her] to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws." 7/29/04 CSRT Memo, encl. 1, at 9; *see also* 7/7/04 CSRT Memo, at 3-4.

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[1] *See* Memorandum for the Secretary of the Navy from Paul Wolfowitz, Re: Order Establishing Combatant Status Review Tribunal, at 1-4 (July 7, 2004) ("7/7/04 CSRT Memo"), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; Memorandum for Distribution from the Secretary of the Navy, Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, at 1 (July 29, 2004) ("7/29/04 CSRT Memo"), *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

In late 2004, CSRTs reviewed the "enemy combatant" designation of plaintiffs Allaithi, Hasam, and Muhammad. JA 114 (Allaithi CSRT held November 2004); JA 68 (Hasam CSRT held December 2004); JA 74 (Muhammad CSRT held December 2004). Each CSRT ultimately concluded that each plaintiff was no longer an "enemy combatant," *id.*, although the record does not establish when those determinations were reviewed and finalized by the Convening Authority. Allaithi was transferred to his home country, Egypt, in October 2005. JA 99-100, 114. Hasam (who is an Uzbek refugee) and Muhammad (who is an Algerian refugee) were transferred to Albania in November 2006. JA 42, 64, 69-70, 76.

B. Procedural Background

1. In November 2006, the five plaintiffs in *Celikgogus v. Rumsfeld*, No. 13-5097 (D.C. Cir.)—Celikgogus, Sen, Mert, Hasam, and Muhammad—filed an action in district court contending, *inter alia*, that they were detained without reasonable cause, mistreated during their detention, and denied the ability to freely practice their religion. JA 10, 26-82. The Second Amended Complaint—the operative complaint here—was filed against Former Secretary of Defense Donald Rumsfeld, fifteen other named high-ranking Department of Defense officials, and 100 unnamed "John Does," all of whom were sued in their individual capacities.[2] JA 23-26, 31-37. The

[2] The other fifteen named defendants are former Chairmen of the Joint Chiefs of Staff Richard Myers and Peter Pace; former Commanders of the United States

complaint sought declaratory relief and money damages for alleged violations of: (1) the First and Fifth Amendments to the U.S. Constitution; (2) international law, including Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; (3) 42 U.S.C. § 1985(3); and (4) the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* JA 82-91.[3]

Plaintiffs' complaint alleged that each defendant exercised "command and control" over the military or some aspect thereof, and it further stated that plaintiffs were suing each defendant for "ordering, authorizing, condoning, creating methods and procedures for, exercising command responsibility over, conspiring with, aiding or abetting subordinates and/or directly or indirectly participating in the abuses" alleged elsewhere in the complaint. JA 31-37.

The only allegations in the complaint identifying particular actions assertedly undertaken by specific named defendants were included in two paragraphs addressing just three of the sixteen named defendants—Secretary Rumsfeld, Michael Dunlavey,

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Southern Command James Hill and Bantz Craddock; former Commander of Joint Task Force-160 Michael Lehnert; former Commander of Joint Task Force-170 and former Commander of Joint Task Force-Guantanamo Michael Dunlavey; former Commanders of Joint Task Force-Guantanamo Geoffrey Miller, Jay Hood, and Harry Harris, Jr.; former Commander of Camp X-Ray Terry Carrico; former Commanders of Joint Detention Operations Group Adolph McQueen and Nelson Cannon; former Commanders of Joint Detention Group Michael Bumgarner and Wade Dennis; and former Director of the Joint Intelligence Group Esteban Rodriguez. *See* JA 31-37.

[3] All plaintiffs asserted all claims against all defendants, with the exception of the Vienna Convention claim, which was asserted solely by plaintiffs Sen and Mert. *See* JA 82-90.

and Geoffrey Miller. JA 79-80. In those paragraphs, plaintiffs alleged that in October 2002, "Defendant Dunlavey requested permission of Defendant Rumsfeld to make interrogations in Guantanamo more aggressive" and that "Defendant Miller . . . also pushed for the use of more aggressive techniques." JA 79. The complaint alleged that "Defendant Rumsfeld thereafter approved numerous interrogation methods" that were "clearly illegal," signing a "then-classified memorandum approving" certain techniques in December 2002 but later "rescind[ing] blanket approval of these methods." JA 79. According to the complaint, in April 2003 or later, Secretary Rumsfeld "issued a new set of recommended techniques, requiring his explicit approval for four techniques that violated the Geneva Conventions and/or customary international law." JA 80.

In September 2008, the plaintiff in *Allaithi v. Rumsfeld*, No. 13-5096 (D.C. Cir.)—Allaithi—filed a substantially similar action in district court seeking declaratory relief and money damages against Secretary Rumsfeld, twelve of the fifteen other high-ranking Department of Defense officials named in the *Celikgogus* Second Amended Complaint, and 100 unnamed "John Does," all of whom were sued in their individual capacities.[4] JA 95-97, 100-05, 126-27. The counts in the *Allaithi* complaint are essentially identical to the counts in the *Celikgogus* operative complaint, except that

[4] Defendants Pace, Harris, and Dennis, sued in *Celikgogus*, are not defendants in *Allaithi*. *See* JA 95-97, 100-05.

the *Allaithi* complaint does not allege any violations of the Vienna Convention on Consular Relations. *See* JA 119-26. The complaint's allegations concerning the actions the named defendants are asserted to have taken are, word for word, virtually identical to those contained in the *Celikgogus* complaint. *Compare* JA 100-05 (*Allaithi* complaint), *with* JA 31-37 (*Celikgogus* complaint); *compare* JA 117-18 (*Allaithi* complaint), with JA 79-80 (*Celikgogus* complaint).[5]

The district court stayed each case pending resolution by this Court of *Rasul v. Rumsfeld*, Nos. 06-5209, 06-5222 (D.C. Cir.), JA 21, 131, which this Court initially decided in 2008, *see Rasul v. Myers*, 512 F.3d 644, 654-63 (D.C. Cir. 2008) ("*Rasul I*"). After the Supreme Court vacated this Court's *Rasul I* decision for further consideration in light of *Boumediene v. Bush*, 553 U.S. 723 (2008), *see Rasul v. Myers*, 555 U.S. 1083 (2008), this Court issued a new decision in 2009, reinstating its prior decision in part. *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*").

2. The district court subsequently consolidated the *Celikgogus* and *Allaithi* actions for all pretrial purposes, JA 134-35, and it dismissed both complaints, JA 136-48. As the court explained, "all of [plaintiffs'] claims are legally indistinguishable from

[5] Although the *Allaithi* and *Celikgogus* complaints sought declaratory relief and damages, plaintiffs in each case subsequently abandoned their request for declaratory relief. *See* Plaintiff Sami Al Laithi's Memorandum Of Points And Authorities In Opposition To Defendants' Motion To Dismiss, at 35 n.24, *Allaithi v. Rumsfeld*, No. 1:08-cv-1677 (D.D.C.), ECF No. 14; Plaintiffs' Memorandum Of Points And Authorities In Opposition To Defendants' Motion To Dismiss, at 40 n.28, *Celikgogus v. Rumsfeld*, No. 1:06-cv-1996 (D.D.C.), ECF No. 45.

those rejected by the D.C. Circuit" in *Rasul II* and the portions of *Rasul I* that were reinstated by *Rasul II*. JA 138.

The district court held that the individual defendants are entitled to qualified immunity on plaintiffs' *Bivens*[6] claims alleging violations of the First and Fifth Amendments and on plaintiffs' § 1985(3) claims alleging a conspiracy to deprive plaintiffs of the equal protection of the laws. JA 146-48. The court explained that here, as in *Rasul II*, it was not clearly established during plaintiffs' detention (which ended on dates ranging from 2003 to 2006) that "aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights." JA 146-47; *see also* JA 148.

The court also held that the United States properly substituted itself for the individual named defendants on plaintiffs' international-law claims under the "Westfall Act," Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679). *See* JA 141-46. The court explained that plaintiffs' international-law claims are "legally indistinguishable from those addressed by the D.C. Circuit in *Rasul I*," JA 143, which held that the defendants there were acting within the scope of their employment because "the underlying conduct—here, the detention and

[6] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in," 512 F.3d at 658.

In reaching this conclusion, the district court held that the fact that plaintiffs Allaithi, Hasam, and Muhammad were determined by CSRTs to no longer be "enemy combatants" was a "distinction without a difference." JA 144 (internal quotation marks omitted). As the court explained, "[t]he CSRTs did not change the fact [that] the plaintiffs were detainees of the U.S. military," and "[n]othing in *Rasul I*'s holding that detainee-abuse was within defendants' scope of employment indicated that this determination rested upon the outcome of any administrative procedure." JA 144-45. Accordingly, the court held that the United States properly substituted itself for the individual named defendants on the international-law claims and that those claims must be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act, 28 U.S.C. § 2675(a). *See* JA 145-46.

Finally, the district court dismissed plaintiffs' claims asserted under the Religious Freedom Restoration Act as "barred by *Rasul* [*II*]." JA 147. As the Court explained, this Court squarely held in *Rasul II* that aliens at Guantanamo are not "persons" protected by the statute. JA 147.

3. All six plaintiffs in *Allaithi* and *Celikgogus* appealed, and this Court consolidated the two appeals on May 9, 2013.

SUMMARY OF ARGUMENT

Plaintiffs seek damages against a number of current and former senior government officials, in their individual capacities, for harm allegedly stemming from plaintiffs' prior military detention. Plaintiffs acknowledge (Br. 4 n.4) that the claims asserted by the three plaintiffs transferred prior to the establishment of Combatant Status Review Tribunals (Celikgogus, Sen, and Mert) are materially identical to those rejected by this Court in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), and *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*").[7] They argue, however, that the claims of the remaining three plaintiffs (Allaithi, Hasam, and Muhammad) survive *Rasul II*, *Rasul I*, and related cases. That argument is without merit.

I. The district court's dismissal of plaintiffs' constitutional claims may be affirmed on two independent grounds, the first of which also provides a basis for affirming the dismissal of plaintiffs' § 1985 claims.

A. First, the district court properly held that the individual defendants are entitled to qualified immunity with respect to the constitutional and § 1985 claims. As the district court concluded, it was not clearly established during plaintiffs' detention (which ended on dates ranging from November 2003 to November 2006) that aliens in Afghanistan and at Guantanamo possessed any First and Fifth Amendment rights.

[7] *Rasul I* was vacated by the Supreme Court, *see Rasul v. Myers*, 555 U.S. 1083 (2008), but was reinstated in part by *Rasul II*. *See Rasul II*, 563 F.3d at 529, 533.

Plaintiffs do not challenge the district court's conclusion with respect to their Afghanistan-related claims. Moreover, recognizing that *Rasul II* held that it was not clearly established as of early 2004 that aliens at Guantanamo have Fifth and Eighth Amendment rights, plaintiffs make no attempt to argue that *Rasul II* is not dispositive of their Guantanamo-related claims up to early 2004. Instead, the three plaintiffs transferred in 2005 and 2006 contend that the Supreme Court's June 2004 decision in *Rasul v. Bush*, 542 U.S. 466 (2004), clearly established that they have constitutional rights. But *Rasul v. Bush* was a statutory decision and thus did not address, much less clearly establish, plaintiffs' constitutional rights.

In any event, the contours of any applicable First and Fifth Amendment rights were not clearly established during plaintiffs' detention. In addition, although this Court should not reach the question, the defendants are entitled to qualified immunity on the Fifth Amendment claims on the independent ground that this Court's binding precedent holds that aliens detained at Guantanamo do not possess Fifth Amendment rights.

B. Although the district court did not reach the issue, its dismissal of the constitutional claims can also be affirmed on the alternative ground that special factors bar the recognition of a damages action in the military-detention context, as this Court has held in *Rasul II*, *Ali v. Rumsfeld*, 649 F.3d 762, 773-74 (D.C. Cir. 2011), and *Doe v. Rumsfeld*, 683 F.3d 390, 394-97 (D.C. Cir. 2012). The three plaintiffs who

were determined by CSRTs to no longer be "enemy combatants" contend that their cases would not implicate sensitive national security decisions, but special factors bar the recognition of a *Bivens* action for the *category* of military-detention cases regardless of the specifics of a given plaintiff's case. Plaintiffs' actions seeking to hold senior government officials liable for their roles in making decisions about plaintiffs' detention, treatment, and transfer plainly implicate sensitive national security and military matters regardless of the outcome of any CSRT proceeding. In addition, as in *Doe*, a judicially created damages remedy would be inappropriate here because Congress has devoted significant attention to military detainee matters but has declined to create a damages remedy.

II. The district court correctly held that the United States properly substituted itself under the Westfall Act for the individual named defendants on plaintiffs' international-law claims because the named defendants were acting within the "scope of their employment" at the time of the incidents alleged in the complaints. That holding is controlled by *Ali* and *Rasul I*, which held that many of the same defendants (and others in the same or similar positions) were acting within the scope of their employment with respect to materially identical conduct underlying virtually identical claims alleging unlawful detention and mistreatment.

Plaintiffs attempt to distinguish these rulings by arguing that once the CSRTs determined that three of the plaintiffs were no longer "enemy combatants," the

government lacked the authority to detain those individuals, and thus the defendants' actions were outside the scope of their employment. But the question whether the government had the authority to continue to detain plaintiffs while seeking their transfer to a suitable country is not the proper focus of the Westfall Act analysis. The relevant inquiry centers on the nature of the underlying conduct. Here, as in *Rasul I*, the underlying conduct is the management of detention and interrogation in a military detention facility, and that conduct falls well within the scope of the named defendants' employment.

Plaintiffs' argument that their Vienna Convention claim should be treated differently is without merit because the conduct underlying that claim is the defendants' alleged failure to issue timely notifications to consular officers and detainees, and that conduct is clearly incidental to the defendants' employment duties managing the military detention facility. In addition, plaintiffs' argument that the named defendants' purpose in engaging in the alleged conduct was not, even in part, to serve their "master" is contradicted by plaintiffs' complaints, which do not plausibly level any such allegations against any of the named defendants.

III. The district court also correctly concluded that plaintiffs' Religious Freedom Restoration Act claims must be dismissed under this Court's binding decision in *Rasul II*. That decision held that aliens at Guantanamo are not "persons" protected by the statute, 42 U.S.C. § 2000bb-1(a), and, in the alternative, that the

defendants were entitled to qualified immunity because it was not clearly established as of early 2004 that aliens at Guantanamo were "persons" within the meaning of the statute. Plaintiffs make no attempt to distinguish their case from *Rasul II*, and thus the district court's dismissal of the Religious Freedom Restoration Act claims must be affirmed.

STANDARD OF REVIEW

The district court's grant of the motions to dismiss is subject to de novo review. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 769 (D.C. Cir. 2011).

ARGUMENT

Plaintiffs are six foreign nationals who were previously detained by the military in Afghanistan and at Guantanamo and brought damages actions against numerous government officials, in their individual capacities. Three of the plaintiffs—Celikgogus, Sen, and Mert—were transferred from Guantanamo in late 2003 or early 2004, JA 51, 57, 63, before the military instituted Combatant Status Review Tribunals to review the "enemy combatant" status of detainees. The remaining three plaintiffs—Allaithi, Hasam, and Muhammad—were transferred from Guantanamo in 2005 or 2006, after CSRTs had determined that they were no longer "enemy combatants." JA 42, 68-69, 74, 114.

As explained below, the district court properly concluded that all six of the plaintiffs' claims are foreclosed by this Court's decisions in *Rasul v. Myers*, 563 F.3d

527 (D.C. Cir. 2009) ("*Rasul II*"); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*")[8]; and related cases. Plaintiffs acknowledge as much (Br 4 n.4) with respect to the three plaintiffs who, like the plaintiffs in *Rasul II* and *Rasul I*, were transferred from Guantanamo prior to the establishment of CSRTs. Plaintiffs thus "focus[]"(Br. 4 n.4) their appeal on the three plaintiffs who were determined by CSRTs to no longer be "enemy combatants," arguing that *Rasul II* and *Rasul I* are distinguishable with respect to such plaintiffs. As explained below, however, plaintiffs point to a "distinction without a difference," and thus the district court's judgment should be affirmed, JA 144 (internal quotation marks omitted).

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CONSTITUTIONAL AND § 1985 CLAIMS.

As we explain below, the district court correctly dismissed plaintiffs' constitutional and § 1985(3) claims on the ground that the individual defendants are entitled to qualified immunity. In addition, although the district court did not reach the issue, the court's dismissal of plaintiffs' constitutional claims can be affirmed on the independent ground that special factors bar the recognition of a *Bivens* remedy in the military-detention context.

[8] As explained earlier, *Rasul I* was vacated by the Supreme Court, *see Rasul v. Myers*, 555 U.S. 1083 (2008), but was reinstated in part by *Rasul II*. *See Rasul II*, 563 F.3d at 529, 533.

A. The Defendants Are Entitled To Qualified Immunity On Plaintiffs' Constitutional And § 1985 Claims.

Qualified immunity shields a government official from civil liability if his conduct "does not violate clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also, e.g.*, *Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1984) (qualified immunity applies to § 1985 claims). To qualify as a "clearly established" right, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

Under *Pearson v. Callahan*, 555 U.S. 223 (2009), courts have discretion to determine whether a particular constitutional right was "clearly established" without first determining whether there was a constitutional violation. *See id.* at 233-43. Where, as here, the "clearly established" issue is "one that [this Court] can 'rather quickly and easily decide,'" this Court has held that it should "follow the 'older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Rasul II*, 563 F.3d at 530 (quoting *Pearson*, 555 U.S. at 239, 241) (alteration in original). Indeed, this Court held in *Rasul II* that it is appropriate to decide whether it was "clearly established" that aliens at Guantanamo possessed Fifth and Eighth Amendment rights as of 2004 before reaching the underlying constitutional questions. *Id.*; *see also Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011)

(same, for aliens detained in Iraq and Afghanistan). That same approach should be followed in the materially identical circumstances present here.[9]

1. The district court correctly held that the individual defendants are entitled to qualified immunity on plaintiffs' *Bivens* and § 1985(3) claims because the relevant constitutional rights asserted—First and Fifth Amendment rights[10]—were not clearly established during their detention, which ended on dates ranging from November 2003 to November 2006, *see* JA 42, 51, 57, 63, 69, 114. *See* JA 146-48. That conclusion follows from this Court's decisions in *Rasul II* and *Ali*. *Rasul II* held that it was not clearly established that alien military detainees held at Guantanamo had any Fifth or Eighth Amendment rights as of early 2004, when the detainees at issue in *Rasul II*

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[9] Plaintiffs' Statement of Issues (Br. 2) lists as an issue presented "[w]hether the District Court erred in dismissing [plaintiffs' constitutional and § 1985 claims] by first considering the question of whether such rights were 'clearly established' and declining to reach the substantive constitutional questions." However, plaintiffs' brief offers no argument that the district court erred in this regard, and thus this argument has been waived. *See Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003).

[10] Plaintiffs do not challenge the district court's conclusion that if the relevant underlying constitutional rights—here, the First and Fifth Amendments—were not clearly established during plaintiffs' detention, it follows that plaintiffs' § 1985 rights were likewise not clearly established. *Cf. United Bros. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 833 (1983) (holding that § 1985(3) "provides no substantial rights itself" and that the "rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere" (internal quotation marks omitted)). In any case, plaintiffs' complaints fail to adequately plead a conspiracy with the requisite intent in violation of § 1985(3), *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-78 (1993). In the event that this Court reverses the dismissal of the § 1985 claims in plaintiffs' complaints, it should remand to the district court for consideration of this issue in the first instance.

were transferred. 563 F.3d at 528, 530-32; *id.* at 530 n.2. *Ali* reached the same conclusion with respect to aliens detained by the military in Afghanistan (and Iraq) in 2004 and before. *See* 649 F.3d at 770-73.

As *Rasul II* explained, "[a]t the time of [the plaintiffs'] detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had *any* constitutional rights—under the Fifth Amendment, the Eighth Amendment, or otherwise." 563 F.3d at 530 (footnote omitted and emphasis added). Instead, *Rasul II* stated that "[*Johnson v.*] *Eisentrager*[, 339 U.S. 763 (1950)], and [*United States v.*] *Verdugo-Urquidez*[, 494 U.S. 259 (1990),] were thought to be the controlling Supreme Court cases on the Constitution's application to aliens abroad." 563 F.3d at 531. As *Rasul II* explained, *Eisentrager* held that German nationals imprisoned at a military base abroad did not possess any Fifth Amendment rights, 339 U.S. at 781-85, and *Verdugo-Urquidez* "concluded that the Fourth Amendment did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States." *Rasul II*, 563 F.3d at 531. Moreover, *Rasul II* emphasized that "the law of this circuit also holds that the Fifth Amendment does not extend to aliens or foreign entities without presence or property in the United States." *Id.* (collecting cases).

Applying this precedent to Guantanamo, the Eleventh Circuit ruled in *Cuban American Bar Ass'n v. Christopher* that aliens at Guantanamo did not possess any First or

Fifth Amendment rights, 43 F.3d 1412, 1428 (11th Cir. 1995), and this Court reached a similar conclusion concerning Fifth Amendment rights in *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd on other grounds sub nom. Rasul v. Bush*, 542 U.S. 466, 475-85 (2004). Accordingly, *Rasul II* concluded that "there was no authority for—and ample authority against—plaintiffs' asserted rights at the time of the alleged misconduct [in early 2004 and before]." 563 F.3d at 532.

Plaintiffs make no attempt to rebut *Ali*'s holding that controls their Afghanistan-related claims, and they likewise make no attempt to distinguish *Rasul II* with respect to the Guantanamo-related claims of plaintiffs Celikgogus, Sen, and Mert, all of whom were transferred before or around the same time as the detainees at issue in *Rasul II*. *See* JA 51, 57, 63. Instead, plaintiffs contend that *Rasul II* is distinguishable only with respect to plaintiffs Allaithi, Hasam, and Muhammad because they were transferred from Guantanamo in 2005 or 2006, *see* JA 42, 69, 114, after the detainees at issue in *Rasul II*. In making this argument, plaintiffs suggest (Br. 37-38) that the Supreme Court's June 2004 decision in *Rasul v. Bush*, 542 U.S. 466 (2004), clearly established that aliens at Guantanamo possess First and Fifth Amendment rights.

Plaintiffs' argument is meritless because, as this Court has recognized, *Rasul* was based on statutory, not constitutional grounds. *See Rasul II*, 563 F.3d at 531. *Rasul* limited its inquiry to whether aliens detained at Guantanamo have a right to judicial

review under the habeas statute, 28 U.S.C. § 2241, and other statutory provisions, and did not address whether detainees possess any constitutional rights. *See* 542 U.S. at 470-85. The footnote in *Rasul* on which plaintiffs rely (Br. 37)—which noted that the allegations of the detainees there described "'custody in violation of the Constitution or laws or treaties of the United States,'" 542 U.S. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3))—is not to the contrary because the footnote did not identify which, if any, constitutional provision may have been at stake. *Rasul* itself lays to rest any doubt on the scope of the decision, explaining in no uncertain terms that "[w]hat is presently at stake is *only* whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 485 (emphasis added). The Court "[a]nswered" that limited question "in the affirmative" and remanded to the district court "to consider *in the first instance* the merits of [the detainees'] claims." *Id.* (emphasis added).[11]

Moreover, even after *Rasul*, district courts split over whether alien military detainees at Guantanamo possess any Fifth Amendment or other constitutional rights,[12] and it is binding precedent in this Court to this very day that "the due process

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[11] *See also Rasul*, 542 U.S. at 475 ("The question now before us is whether the habeas statute confers a right to judicial review . . . ."); *id.* at 470 (characterizing the question presented as "whether United States courts lack jurisdiction to consider challenges to the legality of the detention of [alien Guantanamo detainees]").

[12] *Compare Khalid v. Bush*, 355 F. Supp. 2d 311, 320-23 (D.D.C. 2005) (no), *with In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454-64 (D.D.C. 2005) (yes).

clause does not apply to aliens" detained at Guantanamo who have no "property or presence in the sovereign territory of the United States." *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("*Kiyemba I*"), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010); *see also Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011); *cf. Hamad v. Gates*, 732 F.3d 990, 1005 (9th Cir. 2013) (holding that, even after *Boumediene v. Bush*, 553 U.S. 723 (2008), "the Supreme Court has not determined whether the Fifth Amendment's protections even apply to" aliens at Guantanamo). The fact that a district court and this Court concluded, after *Rasul*, that aliens at Guantanamo lack Fifth Amendment rights conclusively demonstrates that a reasonable official could have arrived at the same conclusion concerning plaintiffs' First and Fifth Amendment rights as well. *See Wilson v. Layne*, 526 U.S. 603, 617-18 (1999); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[13]

Furthermore, even if one could argue that it was clearly established that plaintiffs Allaithi, Hasam, and Muhammad possessed some form of First and Fifth Amendment rights after *Rasul*, the contours of those rights were not clearly

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Khalid and *In re Guantanamo Detainee Cases* were later vacated by this Court on other grounds in *Boumediene v. Bush*, 476 F.3d 981(D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008).

[13] *See also Al Janko v. Gates*, 831 F. Supp. 2d 272, 280 n.13 (D.D.C. 2011) (holding that it was not clearly established that an alien detained at Guantanamo until 2009 possessed Fourth or Fifth Amendment rights), *appeal pending*, No. 12-5017 (D.C. Cir.); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 107, 112 n.5 (D.D.C. 2010) (same for Fifth and Eighth Amendment claims asserted by aliens detained at Guantanamo until 2006), *aff'd on other grounds sub nom. Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012).

established. *See Padilla v. Yoo*, 678 F.3d 748, 762 (9th Cir. 2012) (it was not clearly established between 2001 and 2003 that a U.S. citizen possessing constitutional rights and detained as an "enemy combatant" was "entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal"); *cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (although citizens detained as "enemy combatants" retain their due-process rights, "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting"). Therefore, the district court correctly held that the defendants are entitled to dismissal of the constitutional and § 1985 claims based on qualified immunity.

2. As explained *supra* on pages 17-18, this Court should not reach the question whether plaintiffs' complaints assert violations of the First and Fifth Amendments because this Court has held that it should avoid passing on such constitutional questions where, as here, the qualified-immunity issue can be resolved based on the "clearly established" analysis alone. *See Ali*, 649 F.3d at 772-73; *Rasul II*, 563 F.3d at 530. If this Court were to reach the constitutional issues, however, the law of the Circuit is clear with respect to plaintiffs' Fifth Amendment claims. After the Supreme Court's decision in *Boumediene*, this Court held that the binding law of the Circuit

remains that nonresident aliens detained outside of the United States have no constitutional due process rights. *See supra* pp. 21-22.[14]

For all of the reasons just identified *supra* on pages 17-24, plaintiffs' *Bivens* and § 1985(3) claims were properly dismissed based on qualified immunity.[15]

B. A *Bivens* Action Should Not Be Recognized In This Military-Detention Context.[16]

1. A *Bivens* action is a judicially created cause of action, and because the power to imply a new constitutional action for damages is "not expressly authorized by

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[14] As for the First Amendment claims, as already explained, the district court relied on the "clearly established" prong of the qualified-immunity analysis to resolve this case (as this Court should do here as well), JA 146-47, and the issue of whether the Free Exercise Clause of the First Amendment applies to aliens at Guantanamo was not fully briefed in the district court, *see* Reply In Further Support Of Defendants' Motion To Dismiss, at 8 n.5, *Allaithi v. Rumsfeld*, No. 1:08-cv-1677 (D.D.C.), ECF No. 15; Reply In Further Support Of Defendants' Motion To Dismiss, at 8 n.5, *Celikgogus v. Rumsfeld*, No. 1:06-cv-1996 (D.D.C.), ECF No. 46. Thus, in the event that this Court determines that it cannot resolve this case on the "clearly established" prong of the qualified-immunity analysis and must instead affirmatively reach the issue of whether the Free Exercise Clause applies to aliens at Guantanamo, it should remand to the district court for consideration of that issue in the first instance.

[15] The individual defendants argued in district court that they were also entitled to qualified immunity on the independent ground that plaintiffs' complaints failed to allege that they personally participated in any constitutional violation, as required by *Ashcroft v. Iqbal*, 556 U.S. 662, 675-87 (2009). The district court did not reach these arguments in light of its ruling for the individual defendants on other grounds. In the event that this Court reverses the dismissal of plaintiffs' *Bivens* claims, the district court should consider the defendants' personal-participation arguments in the first instance.

[16] The district court did not reach the question whether a *Bivens* remedy is precluded in this context, but this Court may affirm the district court's judgment on any ground that supports it. *See, e.g.*, *Nattah v. Bush*, 605 F.3d 1052, 1058 (D.C. Cir. 2010).

statute," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001), "[t]he implication of a *Bivens* action . . . is not something to be undertaken lightly," *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). Where for a category of cases "'special factors counsel[] hesitation in the absence of affirmative action by Congress' or if Congress affirmatively has declared that injured persons must seek another remedy, courts should not imply a cause of action where none exists." *Id.* at 393 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)).

The "special factors" counseling hesitation in recognizing a common-law damages action "relate not to the merits of the particular remedy, but 'to the question of who should decide whether such a remedy should be provided.'" *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). Where an issue "'involves a host of considerations that must be weighed and appraised,' its resolution 'is more appropriately for those who write the laws, rather than for those who interpret them.'" *Id.* (quoting *Bush*, 462 U.S. at 380). In any such legislation, Congress could "tailor any remedy" and take steps to reduce the possible harmful effects of such civil damages claims. *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

In *Rasul II* and *Ali*, this Court addressed the category of military-detainee claims and held that special factors—including "[t]he danger of obstructing U.S. national security policy"—barred recognition of a *Bivens* action brought by foreign

nationals alleging that they were illegally detained and mistreated by the military at Guantanamo (*Rasul II*) and in Afghanistan and Iraq (*Ali*). *Rasul II*, 563 F.3d at 528, 532 n.5; *Ali*, 649 F.3d at 764-66, 773-74. Subsequently, in *Doe v. Rumsfeld*, this Court held that special factors precluded a *Bivens* action by a U.S. citizen who was formerly detained by the U.S. military in Iraq. 683 F.3d at 393-97. Among the "special factors" the Court identified were that the case would (1) "require a court to delve into the military's policies regarding the designation of detainees as 'security internees' or 'enemy combatants,' as well as policies governing interrogation techniques"; (2) "implicate the military chain of command" because it would require consideration of, *inter alia*, a former Secretary of Defense's "control over the treatment and release of specific detainees"; and (3) "hinder our troops from acting decisively in our nation's interest for fear of judicial review of every detention and interrogation." *Id.* at 395-96.

Doe also held that "evidence of congressional inaction" in the context of military detention "support[ed] [the Court's] conclusion that this is not a proper case for the implication of a *Bivens* remedy." *Id.* at 397. As *Doe* explained, Congress has legislated on military detainee matters by enacting, *inter alia*, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44. But "[n]either in that Act nor any other has Congress extended a cause of action for detainees to sue federal military and government officials in federal court for their treatment while in detention." *Doe*, 683 F.3d at 397. The Court thus concluded that

"[i]t would be inappropriate for this Court to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview." *Id.*

The Fourth and Seventh Circuits have likewise held that courts must look to Congress and cannot on their own provide a damages action in the military-detention context. *See Vance v. Rumsfeld*, 701 F.3d 193, 197-203 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013); *Lebron v. Rumsfeld*, 670 F.3d 540, 547-56 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012).[17]

2. a. Under *Rasul II*, *Ali*, and *Doe*, special factors plainly preclude a court from creating a damages remedy for claims relating to military detention. Plaintiffs' sole retort in district court and in this Court (Br. 38) is that *Rasul II* is distinguishable because three of the plaintiffs here—Allaithi, Hasam, and Muhammad—were determined by CSRTs to no longer be "enemy combatants," JA 68, 74, 114.[18] According to plaintiffs, entertaining a damages action asserted by such plaintiffs would not "interfere with 'core' executive functions," "chill military effectiveness on

[17] In addition, the Supreme Court has emphasized that it has never held that a common law *Bivens* remedy is available for alleged violations of First Amendment rights. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (noting that the Supreme Court has "not found an implied damages remedy under the Free Exercise Clause"); *see also Reichle*, 132 S. Ct. at 2093 n.4 ("We have never held that *Bivens* extends to First Amendment claims.").

[18] Plaintiffs thus do not dispute that *Rasul II* controls the resolution of the claims asserted by plaintiffs Celikgogus, Sen, and Mert, who, like the detainees at issue in *Rasul II*, were transferred prior to the date CSRTs were established, JA 51, 57, 63.

the battlefield," or "call into question judgments made by the political branches regarding national security and military affairs." Br. 38.

The "special factors" counseling against recognition of a *Bivens* remedy in the military-detention context do not, however, concern the specifics of any given plaintiff's case. Instead, as the en banc Seventh Circuit has explained, special factors bar a damages action in the category of military-detention claims because "Congress and the Commander-in-Chief (the President), rather than civilian judges, ought to make the essential tradeoffs" implicated by an action in this unique context, "not only because the constitutional authority to do so rests with the political branches of government but also because that's where the expertise lies." *Vance*, 701 F.3d at 200. If Congress wishes to provide a civil money damages remedy for claims relating to military detention during an armed conflict and to subject the government officers performing delicate military and national security functions to a damages action, it could attempt to carefully craft such legislation while taking steps to reduce the possible harmful effects of such civil damages claims. But, by its nature, this is an area where it is inappropriate for the judiciary to create money damages remedies against government officials on its own. *See Wilkie*, 551 U.S. at 562.

The fact that plaintiffs Allaithi, Hasam, and Muhammad were determined by CSRTs to no longer be enemy combatants does not diminish the force of these precedents. Quite to the contrary, damages actions by these detainees would still

require courts to "delve into" delicate military and national security judgments and policies concerning the designation of individuals as "enemy combatants" and the interrogation of military detainees. *Doe*, 683 F.3d at 396. Such actions would likewise "implicate the military chain of command" because they would require consideration of the control of the supervisory defendants in this case over the "treatment and release of specific detainees." *Id.* Accordingly, such actions run the very real risk of "hinder[ing] our troops from acting decisively in our nation's interest for fear of judicial review of [the] detention and interrogation" of individuals who initially appeared to the government to be lawfully detained but who were eventually determined not to be lawfully detained based on the most current and updated evidence. *Id.*

Furthermore, the challenges asserted by plaintiffs Allaithi, Hasam, and Muhammad to the speed of their transfer after their CSRT decisions plainly implicate additional sensitive matters concerning deliberations over the country to which plaintiffs should be transferred and any diplomatic discussions with foreign countries that were required in conjunction with such a transfer. *See* 7/29/04 CSRT Memo, encl. 1, at 9 (noting where, as here, a CSRT decision approved by the Convening Authority concluded that an individual is no longer an "enemy combatant," the Secretary of State was to be informed in order to permit him or her "to coordinate the transfer of the detainee with representatives of the detainee's country of nationality

for release or other disposition consistent with applicable laws"); 7/7/04 CSRT Memo, at 3-4 (similar); *cf. Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) ("*Kiyemba II*").

Here, plaintiff Allaithi was transferred to his home country of Egypt, JA 99-100, 114, but plaintiffs Hasam and Muhammad were refugees from their home countries and were transferred to Albania, JA 64, 69-70, 76. All three transfers thus plainly implicated additional sensitive matters, and Hasam's and Muhammad's transfers implicated particularly delicate matters because they required diplomatic negotiations with a third-party country. Adjudicating damages actions like plaintiffs' could thus require the court to examine the diplomatic measures taken by Executive Branch officials and to determine whether those measures were sufficient and whether plaintiffs could have been transferred earlier.

Just as in *Rasul II*, *Ali*, and *Doe*, it would be inappropriate for a court to create a damages action here as a matter of common law. In the context of military detention, whether a plaintiff was released prior to a CSRT adjudication or after a CSRT determination that an individual is no longer an "enemy combatant" has no bearing on whether to grant the former detainee a damages remedy for matters relating to the prior military detention. *See Vance*, 701 F.3d at 196, 198-203 (holding that special factors barred damages action by former military detainees who were eventually deemed "innocent" by a "Detainee Status Board"). "Congress is in a far better

position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (internal quotation marks omitted).

b. As in *Doe*, the conclusion that a judicially created damages remedy would be inappropriate here is also supported by Congress's failure to provide a damages remedy to military detainees in its extensive legislation on detainee matters. *See Doe*, 683 F.3d at 396-97; *see also Vance*, 701 F.3d at 200-02; *Lebron*, 670 F.3d at 551-52. Indeed, the case against the judicial recognition of a damages remedy is even stronger here than in *Doe* (which concerned a citizen detained in Iraq) because Congress has legislated specifically on the remedies that should be made available to aliens detained at Guantanamo. *See, e.g.*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. at 2740-44; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2190, 2574-2614. Although Congress has provided Guantanamo detainees with certain mechanisms for obtaining recourse for alleged violations of law, it has not provided for a private right of action for money damages.

In addition, "'any alternative, existing process for protecting' the plaintiff's interests" raises the inference that "Congress 'expected the Judiciary to stay its *Bivens* hand.'" *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) (quoting *Wilkie*, 551 U.S. at 550, 554). Congress has addressed the remedies alien

military detainees should be afforded in the Foreign Claims Act, which permits inhabitants of foreign countries held by the U.S. military to seek monetary redress for claimed injuries through a discretionary administrative claim process. *See* 10 U.S.C. § 2734. As the Seventh Circuit explained in *Vance*, Congress's enactment of the Foreign Claims Act establishes that "Congress has decided that compensation [for injuries caused by the military] should come from the Treasury rather than from the pockets of federal employees" and that former detainees like plaintiffs "do not need a common-law damages remedy in order to achieve some recompense for wrongs done them." 701 F.3d at 201.

II. THE UNITED STATES PROPERLY SUBSTITUTED ITSELF FOR THE INDIVIDUAL DEFENDANTS ON PLAINTIFFS' INTERNATIONAL-LAW CLAIMS.

Plaintiffs' complaints alleged that a former Secretary of Defense and fifteen other named senior Department of Defense officials subjected plaintiffs to "prolonged arbitrary detention," "torture," and "cruel, inhuman or degrading treatment or punishment" in violation of customary international law. JA 82-85, 119-22. Plaintiffs additionally alleged that they were "held arbitrarily, tortured and otherwise mistreated" in violation of the Third and Fourth Geneva Conventions,[19] JA

[19] *See* Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

85-86, 122-23, and two plaintiffs alleged violations of Article 36 of the Vienna Convention on Consular Relations,[20] JA 86-87. All of plaintiffs' international-law claims were asserted under the Alien Tort Statute, 28 U.S.C. § 1350. JA 82-87; 119-23.[21]

The district court held that the United States properly substituted itself for the named individual defendants under the Westfall Act on all of these international-law claims because the defendants were acting within the scope of their employment at the time of the incidents alleged in the complaints. JA 141-46. That ruling was correct and must be affirmed under this Court's controlling decisions in *Rasul I* and *Ali*.

A. Under the Westfall Act, the Federal Tort Claims Act ("FTCA") remedy against the United States is generally "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Where, as here, the Attorney General or his designee certifies that an employee was acting within the scope of employment at the time of the relevant alleged incident, the employee is "dismissed from the action and the United States is substituted as defendant." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); *see* 28 U.S.C. § 2679(d)(1); JA 132-33. The Attorney General's scope-of-employment certification is

[20] *See* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[21] In addition, plaintiffs asserted their treaty claims under 28 U.S.C. § 1331. *See* JA 85-87, 122.

entitled to "prima facie effect," and it is the plaintiff's burden to show that the defendant was not acting within the scope of his employment. *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994) (internal quotation marks omitted); *Rasul I*, 512 F.3d at 655. Unless the plaintiff carries that burden, "[the] plaintiff's only recourse is to proceed against the federal government under the Federal Tort Claims Act." *Haddon v. United States*, 68 F.3d 1420, 1422-23 (D.C. Cir. 1995). That is true regardless of whether defenses under the FTCA would preclude judgment against the United States. *United States v. Smith*, 499 U.S. 160, 166 (1991); *see* 28 U.S.C. § 2679(d)(4).

In *Rasul I*, former Guantanamo detainees brought an individual-capacity damages action against a number of high-ranking Department of Defense officials, including eight of the defendants here. *See* 512 F.3d at 649 & n.1, 650-51; JA 23-26, 31-37, 95-97, 100-05. The *Rasul I* plaintiffs asserted international-law claims that were nearly identical to those asserted here, except the *Rasul I* plaintiffs did not assert a Vienna Convention claim.[22] The Court applied D.C. respondeat superior law, which looks to the Restatement (Second) of Agency (1958) ("Restatement"). *Rasul I*, 512 F.3d at 655. Under the Restatement, the "'[c]onduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs

[22] *See Rasul I*, 512 F.3d at 654, 662 (noting that the plaintiffs brought (1) claims alleging "prolonged arbitrary detention," "torture," and "cruel, inhuman or degrading treatment" in violation of customary international law, and (2) Geneva Conventions claims alleging that they were "held arbitrarily, tortured and otherwise mistreated during their detention" (internal quotation marks omitted)).

substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master[;] and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.'" *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) (quoting Restatement § 228(1)).

The only Restatement factor at issue in *Rasul I* was the first factor, and the Court held that it was satisfied because "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct the defendants were employed to engage in." 512 F.3d at 658. In *Ali*, this Court followed *Rasul I*, holding that similar defendants against whom former military detainees asserted similar international-law claims were acting within the scope of their employment. *See Ali*, 649 F.3d at 764 & n.1, 766, 774.

B. Plaintiffs do not dispute that the second and fourth Restatement factors are satisfied here but contend (Br. 27-34) that the first and third Restatement factors are not satisfied. Plaintiffs' arguments are meritless.

1. ***First Restatement Factor.*** Under *Rasul I* and *Ali*, the district court's scope-of-employment ruling regarding the first Restatement factor must be affirmed. The claims, defendants, and conduct at issue in those cases are materially identical to the claims, defendants, and conduct present here.

a. Plaintiffs do not dispute that *Rasul I* controls with respect to the claims of unlawful detention and mistreatment asserted by the three plaintiffs who, like the plaintiffs in *Rasul I*, were transferred from Guantanamo prior to the establishment of CSRTs—Celikgogus, Sen, and Mert, *see* JA 51, 57, 63; *see also Rasul I*, 512 F.3d at 651 (noting the plaintiffs there were transferred in March 2004). Moreover, even with respect to the three plaintiffs who were determined by CSRTs to no longer be "enemy combatants," Allaithi, Hasam, and Muhammad, JA 68, 74, 114, plaintiffs appear not to dispute that the defendants' actions *prior to* the relevant CSRT decisions were within the scope of their employment under this Court's binding decision in *Rasul I*. *See, e.g.*, Br. 25, 29, 30.

Plaintiffs' argument (Br. 27-31) instead appears to be that the named defendants' work supervising and managing plaintiffs' detention and treatment at Guantanamo ceased to be within the scope of the defendants' employment once the plaintiffs were determined by CSRTs to no longer be "enemy combatants." Plaintiffs contend (Br. 27) that this result follows because plaintiffs' detention after their CSRT determinations was not authorized by the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001), or any other law; *cf. Al-Bihani v. Obama*, 590 F.3d 866, 872-74 (D.C. Cir. 2010) (adopting detention standard that is sufficient under the AUMF).

The question whether the government had the authority to continue to detain plaintiffs while seeking their transfer to a suitable country, however, is irrelevant to the scope-of-employment analysis. The defendants' conduct—detaining plaintiffs until they could be transferred—is precisely what the defendants were employed to do and thus was within their scope of employment. *Cf.* 7/29/04 CSRT Memo, encl. 1, at 9 (noting where, as here, a CSRT decision approved by the Convening Authority concluded that an individual is no longer an "enemy combatant," the Secretary of State was to be informed in order to permit him or her "to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws"); 7/7/04 CSRT Memo, at 3-4 (similar). The conclusion that the lawfulness of plaintiffs' detention is irrelevant follows from *Rasul I*, which held that materially identical conduct of materially identical defendants was within the scope of employment without inquiring into whether the government had the authority under the AUMF to detain the plaintiffs there, whom the Court referred to as "suspected enemy combatants," 512 F.3d at 658, 660, 662. *Id.* at 656-60. Indeed, contrary to plaintiffs' suggestion (Br. 17), *Rasul I* did not base its scope-of-employment analysis on the AUMF at all. *See* 512 F.3d at 656-60.

Moreover, *Rasul I* explained that even conduct that is unlawful or "seriously criminal"—such as alleged torture that the *Rasul I* plaintiffs argued "was never

authorized" and "has long been condemned by the United States," *id.* at 656 (alteration and internal quotation marks omitted)—is not per se outside of the scope of employment. *Id.* at 659; *see also Ali*, 649 F.3d at 774-75 & n.20. Indeed, this Court has repeatedly rejected arguments that unlawful conduct is necessarily outside the scope of employment, explaining that such arguments "'rest[] on a misunderstanding of D.C. scope-of-employment law (not to mention the plain text of the Westfall Act), which directs courts to look beyond alleged intentional torts themselves' to the underlying conduct in determining whether that conduct was within the scope of employment." *Wilson v. Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008) (quoting *Ballenger*, 444 F.3d at 664); *cf. Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (observing in related context that "if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be completely abrogate[d]" (internal quotation marks omitted)).

Thus, for example, this Court has held that a mattress deliveryman acted within the scope of employment when assaulting and raping a customer during a delivery-related dispute. *Lyon v. Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976). Similarly, the D.C. Court of Appeals has held that a laundromat employee acted within the scope of employment when shooting a customer in a dispute over missing shirts. *Weinberg v. Johnson*, 518 A.2d 985, 988-89 (D.C. 1986). *See also Wilson*, 535 F.3d at 711-12 (holding

that the disclosure of an undercover CIA agent's identity was within the employees' scope of employment "regardless of whether it was unlawful" because it occurred in work-related discussions with the press); *Harbury v. Hayden*, 522 F.3d 413, 421-22 (D.C. Cir. 2008); *Bancoult v. McNamara*, 445 F.3d 427, 437-38 (D.C. Cir. 2006).

Here, the "underlying conduct" of the defendants that is the proper focus of the scope-of-employment inquiry is the same as the conduct at issue in *Rasul I*—the management by high-level Department of Defense officials of "plaintiffs' detention in a military prison and . . . the interrogations conducted therein." *Rasul I*, 512 F.3d at 658 (internal quotation marks omitted). As *Rasul I* held, that conduct is precisely the type of work the defendants were employed to perform, *id.*, and thus this Court must affirm the district court's conclusion that the named defendants here were acting within the scope of their employment with respect to all of the conduct alleged in the complaints.[23] *Cf. Al Janko v. Gates*, 831 F. Supp. 2d 272, 276, 282 n.15 (D.D.C. 2011) (holding that the same or similar defendants were acting within their scope of employment with respect to similar claims asserted by a former Guantanamo detainee

[23] Although two of the plaintiffs specifically allege that they were mistreated after their CSRT determinations, *see* JA 68-69, 74-75, *Rasul I* made clear that the supervision and implementation of such alleged mistreatment is within the scope of employment because it stems from the supervision and management of detention and interrogation in a military prison. *See Rasul I*, 512 F.3d at 658. Moreover, at least some of the mistreatment alleged here was the result of disciplinary actions by the government, JA 69, and such actions are plainly within the scope of the defendants' employment.

who was eventually determined by a habeas court not to be lawfully detained), *appeal pending*, No. 12-5017 (D.C. Cir.).

b. Plaintiffs suggest (Br. 29-30 n.13) that the scope-of-employment inquiry should be shaped by whether the outcome reached would ultimately benefit the victim of the alleged tort, emphasizing the "unfairness" of concluding that a government employee was acting within the scope of his employment in circumstances where a remedy against the United States under the FTCA would be unavailable. As this Court has explained, however, the Westfall Act "incorporate[s] the relevant state's [*respondeat superior*] test," *Harbury*, 522 F.3d at 422 n.4; *see also Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 876 (9th Cir. 1992). Accordingly, this Court may not depart from that statutorily mandated test based on any perceived injustice worked on any given plaintiff.

Moreover, to the extent that plaintiffs argue (Br. 35-36) that substitution under the Westfall Act should not occur where, as here, the FTCA would bar recovery against the United States, that argument is foreclosed by *Smith*, 499 U.S. at 166. *See also Harbury*, 522 F.3d at 417. Arguments such as these should be addressed to Congress, not the courts.

c. Plaintiffs contend (Br. 2, 15 n.7, 40-42) that the district court never addressed the Vienna Convention claim asserted by plaintiffs Sen and Mert, *see* JA 86-87. That argument, however, ignores the district court's Westfall Act holding, which

correctly concluded that *all* of plaintiffs' international-law claims were properly converted into claims against the United States and must be dismissed for failure to exhaust administrative remedies. *See* JA 141-46. Indeed, the district court specifically listed the Vienna Convention claim as one of the international-law claims encompassed by its Westfall Act ruling. *See* JA 144 n.2.

Plaintiffs appear to argue (Br. 40-42) that *Rasul I* does not control the disposition of their Vienna Convention claim because there was no Vienna Convention claim in *Rasul I*. But *Rasul I*'s rationale still controls here. Plaintiffs' Vienna Convention claim contends that once Sen and Mert requested to meet with officials from their home country, JA 53, 63, the named defendants should have ensured that the relevant consular officers were promptly notified, *see* JA 86-87. Plaintiffs further assert that that the named defendants should have done more to ensure that Sen and Mert were notified of the availability of consular notification. *See* JA 86-87. The underlying conduct at issue is the defendants' management and supervision of subordinates with respect to the government's obligations to notify consular officers and detainees of particular information. That conduct is plainly the type of work the defendants were employed to do and stems from defendants' jobs managing the detention facility at Guantanamo. *See Rasul I*, 512 F.3d at 658.

To the extent that plaintiffs contend (Br. 41) that the defendants' alleged actions (or lack thereof) were not within the scope of employment because they

assertedly violated the Vienna Convention and related regulations, that argument fails because, as explained *supra* on pages 37-40, the proper focus of the scope-of-employment inquiry is on the nature of the underlying conduct, not whether the actions in question were lawful. Here, plaintiffs contend that the named defendants did not do their job of notifying consular officials and detainees of certain information, and such claims that defendants did not do their job are quintessentially within the scope of employment.

Plaintiffs contend (Br. 40-41) that Article 36 of the Vienna Convention confers individually enforceable rights and cite *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007), for support of that proposition. Plaintiffs ignore, however, the five other circuits reaching the opposite conclusion. *See Earle v. District of Columbia*, 707 F.3d 299, 304 (D.C. Cir. 2012) (collecting cases and expressly declining to decide the issue). Moreover, even if the Vienna Convention created a privately enforceable right, no court has held that such a right may be enforced against federal officials by way of a damages action. *See Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (noting "background presumption . . . that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts" (internal quotation marks and brackets omitted)); *cf. Jogi*, 480 F.3d at 835-36 (holding remedy against county officials provided by 42 U.S.C. § 1983).

This Court, however, need not decide whether the Vienna Convention creates individually enforceable rights or whether a damages remedy is available here because the resolution of those questions is irrelevant to the scope-of-employment inquiry. As explained *supra* on pages 37-40, the proper focus of that inquiry is instead on the conduct underlying the asserted violation of the right. *Cf. Rasul I*, 512 F.3d at 662-63 (holding that defendants' actions were within the scope of their employment with respect to Guantanamo detainees' Geneva Convention claims without addressing whether the Geneva Conventions create privately enforceable rights that may be pursued in a damages action).

2. ***Third Restatement Factor.*** Finally, plaintiffs contend (Br. 31-33) that the named individual defendants' conduct does not satisfy the third Restatement factor, which requires that the conduct be "actuated, at least in part, by a purpose to serve the master." Restatement § 228(1)(c). Most of the allegations in the complaints upon which plaintiffs rely (Br. 32-33), however, do not even address the named plaintiffs here. *See* JA 54-55 ¶ 88, 61 ¶ 114, 69 ¶ 143, 75 ¶ 167, 113 ¶ 61. The two remaining allegations that plaintiffs cite (Br. 32-33) are virtually identical to each other and assert that "[a]t all relevant times, the named Defendants and the Doe defendants did act . . . with the intent to punish and/or disadvantage the plaintiffs because of their religion." JA 81 ¶ 187; *see also* JA 119 ¶ 86. But the general assertion that *all* named defendants were acting at *all* times with this intent amounts to a "naked assertion[] devoid of

further factual enhancement" that the Supreme Court has held is "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009) (internal quotation marks omitted); *Jacobs v. Vrobel*, 724 F.3d 217, 221 (D.C. Cir. 2013) (noting the relevance of the *Iqbal* standards in the Westfall Act scope-of-employment context).

Moreover, the remaining allegations in the complaints that do more specifically address the named defendants make clear that the defendants' purpose in engaging in the alleged conduct was, at least in part, to serve their "master." *See, e.g.*, JA 79 ¶ 182 (alleging that "Defendant Dunlavey requested permission of Defendant Rumsfeld to make interrogations in Guantanamo more aggressive"); JA 79 ¶ 182 (alleging that "Defendant Rumsfeld signed a then-classified memorandum" authorizing certain techniques); *cf., e.g.*, JA 32 ¶ 15 (alleging that defendant Richard Myers "possessed and exercised command and control over the U.S. military and the U.S. detention facilities at Guantanamo Bay"). Thus, treating all of the adequately pled allegations in plaintiffs' complaints as true, it follows that the named defendants had at least a partial desire to serve their "master." *See Ballenger*, 444 F.3d at 665 ("even a *partial* desire to serve the master is sufficient").

* * *

The district court thus correctly concluded that the named defendants were acting within the scope of their employment at the time of the incidents alleged in the complaints. To the extent that plaintiffs contend (Br. 14, 25, 34) that the scope-of-

employment issue cannot be decided without discovery, that argument is meritless because the district court decided the issue based on the facts alleged in plaintiffs' complaints. Thus, here, as in *Rasul I*, "nothing would be gained by an evidentiary hearing," and the district court properly decided the scope-of-employment issue "as a matter of law." 512 F.3d at 659-60.

Because the United States properly substituted itself for the individual defendants on the international-law claims, those claims were correctly "'restyled as [claims] against the United States that [are] governed by the [FTCA]'" and dismissed for failure to exhaust administrative remedies. *Id.* at 660-61 (alterations in original) (quoting *Ballenger*, 444 F.3d at 662). Plaintiffs do not challenge the district court's ruling that their international-law claims must be dismissed after substitution based on exhaustion, and thus any such challenge has been waived. *See, e.g., AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

III. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIMS.

This Court's decision in *Rasul II* controls the district court's conclusion that plaintiffs' Religious Freedom Restoration Act ("RFRA") claims must be dismissed, *see* JA 147.

Under the RFRA provision at issue here, the "Government shall not substantially burden a person's exercise of religion," except if certain conditions are

satisfied, 42 U.S.C. § 2000bb-1(a). In *Rasul II*, this Court concluded that the statutory term "person" in § 2000bb-1(a) must be "read consistently with similar language in constitutional provisions, as interpreted by the Supreme Court at the time Congress enacted" the statute. 563 F.3d at 533. Because the Supreme Court had interpreted those constitutional provisions not to extend to nonresident aliens, *Rasul II* concluded that alien detainees at Guantanamo are not "persons" within the meaning of the statute. *Id.* (reinstating *Rasul I*'s judgment on the RFRA claim). In the alternative, *Rasul II* held that the defendants there were entitled to qualified immunity on the RFRA claim because it was not clearly established during the plaintiffs' detention (which ended in early 2004, *id.* at 530 n.2) that § 2000bb-1(a) protected aliens at Guantanamo. *See id.* at 533 n.6 (relying on *Rasul I*, 512 F.3d at 676 & n.5 (Brown, J., concurring)).

Rasul II is dispositive of plaintiffs' RFRA claims and mandates both the conclusion that plaintiffs are not "persons" protected by § 2000bb-1 and also the conclusion in the alternative that the defendants here are entitled to qualified immunity on plaintiffs' RFRA claims. Plaintiffs attack (Br. 39-40) this Court's holding in *Rasul II* that the statutory term "person" does not include Guantanamo detainees. But, as plaintiffs appear to recognize (Br. 39 n.17), that ruling and the Court's alternative qualified-immunity ruling, which plaintiffs do not attack, are binding and cannot be revisited by a three-judge panel of this Court. Plaintiffs offer no argument

that *Rasul II* is distinguishable, and thus the district court's dismissal of plaintiffs' RFRA claims must be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,402 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, 14-point Garamond font.

s/Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2013, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. On or before November 14, 2013, I will cause eight paper copies to be delivered to the Court via hand delivery. I also hereby certify that the participants in the case will be served via the CM/ECF system.

s/Sydney Foster
Sydney Foster

ADDENDUM

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10 U.S.C. § 2734. Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for—

> (1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;
>
> (2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or
>
> (3) personal injury to, or death of, any inhabitant of a foreign country;
> if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(b) A claim may be allowed under subsection (a) only if—

> (1) it is presented within two years after it accrues;
>
> (2) in the case of a national of a country at war with the United States, or of any ally of that country, the claimant is determined by the commission or by the local military commander to be friendly to the United States; and

(3) it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

(c) The Secretary concerned may appoint any officer or employee under the jurisdiction of the Secretary to act as an approval authority for claims determined to be allowable under subsection (a) in an amount in excess of $10,000.

(d) If the Secretary concerned considers that a claim in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 31.

(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(f) Upon the request of the department concerned, a claim arising in that department and covered by subsection (a) may be settled and paid by a commission appointed under subsection (a) and composed of officers of an armed force under the jurisdiction of another department.

(g) Payment of claims against the Coast Guard arising while it is operating as a service in the Department of Homeland Security shall be made out of the appropriation for the operating expenses of the Coast Guard.

(h) The Secretary of Defense may designate any claims commission appointed under subsection (a) to settle and pay, as provided in this section, claims for damage caused by a civilian employee of the Department of Defense other than an employee of a military department. Payments of claims under this subsection shall be made from appropriations as provided in section 2732 of this title.

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in

a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim

pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

> (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for

lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.