UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE IN FURTHER SUPPORT OF THEIR CLAIMS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

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Plaintiffs submit this response to the defendants' Supplemental Brief in support of their motion to dismiss plaintiffs' RFRA claims. In their Supplemental Brief, defendants make two principal arguments: 1) that the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004) ("*Rasul*"), does not require the application of RFRA to their activities at GTMO; and 2) even if *Rasul* does dictate such a result, defendants could not have known that RFRA prohibited their acts at the time they were undertaken. Thus, defendants assert, they are entitled to qualified immunity in connection with their conduct that substantially infringed plaintiffs' religious observances. In making these arguments, defendants rely on two fundamentally mistaken assumptions – first that the Supreme Court's decision in *Rasul* was the first and only court decision relevant to the application of RFRA to GTMO, and second that a right or obligation cannot be clearly established for the purpose of qualified immunity until it is specifically addressed by the Supreme Court. Neither of these propositions is correct, and, accordingly, defendants' brief does not provide a basis for dismissing plaintiffs' claims under RFRA.

I. Long Before *Rasul*, the Supreme Court Held that Statutes Like RFRA Apply to GTMO.

Defendants argue that the Supreme Court's decision in *Rasul* was based on unique characteristics of the federal habeas statute, and that *Rasul* does not stand for the proposition that all US statutes, including RFRA, have effect at GTMO. In addition, they assert that, regardless of *Rasul's* analysis, the Court should not apply RFRA to GTMO.

Like the federal habeas statute, 28 U.S.C. § 2241, RFRA creates distinct statutory rights to supplement Constitutional protections. RFRA does not alter the scope of the First Amendment; rather it creates a distinct statutory right to be interpreted and applied by the Courts, separate and apart from any individual plaintiff's rights under the Constitution. *See Brief for the*

Unites States, City of Boerne v. Flores, 1997 U.S. Briefs LEXIS 207 at *70 & n. 40 (citing cases).

But RFRA differs, as well, from the federal habeas statute, and this difference fundamentally undermines defendants' reliance on the Supreme Court's decision in *Rasul* as dispositive in the instant case. The federal habeas statute is *silent* as to its application in areas like GTMO, where the US has exclusive control, but not sovereignty. Not so RFRA, which includes *express language imposing restrictions on the government officers acting in US territories and possessions*, thus evidencing a Congressional intent that RFRA apply to conduct within those territories and possessions. Congress' intent to give RFRA a "modest extraterritorial" reach is clear. And, although a court could find that the reach of the federal habeas statute was arguably subject to dispute at the time of the Supreme Court's *Rasul* decision, the reach of statutes like RFRA had been settled for more than fifty years. *See Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377 (1948) ("*Vermilya*"); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

Defendants' Supplemental Brief suggests that the Supreme Court's decision in *Cutter v Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005), left open the question of whether RFRA applied to US territories and possessions. Def. Supp. Br. at 4 n. 3. Defendants' assertion misstates the Supreme Court's passing comment in *Cutter*. *Id.* at 2118 n. 2. In fact, the comment from *Cutter* cited by defendants simply acknowledges (in the context of a case concerning RFRA's sister statute RLUIPA) that, following *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court had not had an opportunity to rule on the constitutionality of RFRA as applied to the federal government. *Id.* Of course, after *Cutter* was decided (and more than a month before defendants filed their brief in this case), the Supreme Court did in fact rule on this

issue when it decided *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. 1211, 1216-17 (2006) ("*Espirita*"). In *Espirita*, the Supreme Court held that RFRA applied to the federal government's threatened criminal prosecution of church members who drank a narcotic-based tea as part of their religious observances.

II. No Qualified Immunity is Available to Defendants.

Defendants' brief argues that the fact that the Supreme Court has not specifically addressed the applicability of RFRA to GTMO is dispositive of the qualified immunity issue in the instant case. Defendants' reliance is misplaced. Defendants cannot violate plaintiffs' religious freedoms with impunity, and then retreat behind qualified immunity simply by asserting that such well-established legal principles as freedom of religion have not yet been applied to the specific facts at bar. The Supreme Court has long held that plaintiffs need not demonstrate that "the very action in question has previously been held unlawful…" *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged School Dist*., 239 F.3d 246, 251 (2d Cir. 2001). Nor need they identify legal precedent arising from "materially similar" facts to the case at bar. *Hope v. Pelzer*, 536 U.S. at 730, 739 (2002). Plaintiffs need only show that in light of pre-existing law, the official had "fair warning" that the conduct in question was unlawful. *Id*. at 739-40. Moreover, *Hope* further clarified that "general statements of law are not inherently incapable of giving fair and clear warning"…. *Id*. at 741; *see also Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("Thus, we do not just compare the facts of an instant case to prior cases to determine if a right is 'clearly established;' we also assess whether the facts of the instant case fall within statements of general principle from our precedents.") (citation omitted).

Here, defendants had more than "fair warning." The applicable legal principles were well established by the very terms of the statute to be applied. RFRA provides that it applies to conduct in the United States' territories and possessions, and further that it applies to the military. *Vermilya* established more than 50 years ago that GTMO is a U.S. "possession." And GTMO is indisputably a military base. The fact that the Supreme Court has not been faced with the precise question of whether to apply RFRA at GTMO in no way undermines the clarity of the statutory terms or the Supreme Court's precedent. Moreover, the general legal principle, that government officers cannot engage in deliberately discriminatory conduct, is beyond question and has been for many years.

Finally defendants suggest that the applicability of RFRA to *intentionally* discriminatory conduct was not clearly established at the time the conduct asserted in the complaint took place. This interpretation is contradicted by the plain text of the statute, which prohibits burdening free exercise "*even if* the burden results from a rule of general applicability." Defendants' argument would twist the broadening language "*even* if" into narrowing language equivalent to "*only* if." Plaintiffs respectfully submit it was not the intent of Congress to eliminate remedies for the most egregious forms of intentional discrimination while broadening remedies for more subtle disparate impact discrimination.

Defendants also argue that although they may have known that they were not permitted to enforce neutral policies or regulations that could inadvertently infringe on the plaintiffs' religious beliefs and practices, they thought, or a reasonable officer would have thought, that it was perfectly acceptable to do so deliberately. Plaintiffs respectfully submit that such a belief would have been inherently unreasonable. Defendants' argument also ignores the fact that the distinction between so-called neutral regulations and deliberate discrimination is largely specious

in a situation like GTMO – where virtually all of the detainees are Muslim. Policies and procedures like forced shaving and recreation periods that interfere with prayer times may reflect policies that appear neutral, but given that virtually all of the detainees are Muslims, for whom, for instance, beards are part of their religious observance, the institution of these policies constituted an unmistakable and deliberate infringement of the detainees' religious beliefs.

Defendants' argument that it was not clearly established that RFRA applied to all forms of religious discrimination, whether deliberate or incidental, is also belied by the fact that a number of courts applied RFRA to policies that discriminated specifically against Muslim religious practice long before plaintiffs were detained. *See e.g., Crocker v. Durkin*, 159 F. Supp. 2d 1258, 1269-1270 (D. Kans. 2001) (refusing to permit Ramadan fast); *Saunders-El v. Tsoulos*, Case No. 96 C 915, 1997 US Dist. LEXIS 2973, *10-11 (ED Ill. March 12, 1997) (prohibiting inmate from participating in Ramadan program).

The cases relied on by the defendants – *Larsen v. United States Navy*, 346 F. Supp. 2d 122 (D.D.C. 2004), *Omar v. Casterline*, 414 F. Supp. 2d 582 (W.D. La. 2006) and *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) – are not to the contrary. First, *Larsen* and *Omar* are irrelevant to this analysis because they were decided after plaintiffs were released from GTMO. Second, defendants do not even suggest that they agree with the distinction made in these cases between deliberate and incidental infringement on religious practices. Indeed, defendants' brief, which states that "the issue here is not whether the *Omar* and *Larsen* decisions are correctly decided…," Def. Supp. Br. at 11, suggests the contrary, that defendants understand that RFRA applies to both types of infringement, as do plaintiffs.

Third, none of the cases cited by the defendants stands for the proposition that RFRA does not apply to actions involving allegations of intentional discrimination. As recognized by

the Court in *Omar*, RFRA, on its face, applies to actions for deliberate discrimination. *Omar* states,

> The statute arguably does technically apply to all government actions, even those that are not neutral laws of general applicability. This is because it states that it is applicable "even if the burden results from a rule of general applicability." The use of the word "even" suggests that it applies in other circumstances as well.

Omar, 414 F. Supp. 2d at 594 (citation omitted). Rather, each of the cases cited by defendants stands for the proposition that RFRA tends to be *irrelevant* in proceedings alleging deliberate discrimination because: 1) the standard for an action for deliberate discrimination under the Constitution has always required the government to show a compelling state interest and the least restrictive alternative, thus an action under RFRA and an action directly under the Constitution have the same standard in respect of the government's conduct; *but* 2) to establish standing under RFRA, a plaintiff must show a "substantial burden" on his or her religious exercise, which is not a requirement in actions brought directly under the First Amendment. *See Hartmann*, 68 F.3d at 978-79 and nn. 3 & 4. Thus, in most cases, the court need not reach RFRA to decide a case alleging deliberate discrimination. This does not mean that RFRA does not *apply* to those proceedings, nor would a reasonable officer draw that conclusion. Rather, because the courts can resolve these cases under a less rigorous factual standard under the Constitution, the courts need not reach the question of whether a plaintiff's free exercise has been substantially burdened.

Thus, long before *Rasul*, it was clear that RFRA applied to defendants' conduct at GTMO. Whether the Court looks at the status of GTMO as a possession, or the fact that RFRA applies at all U.S. military bases, the inescapable conclusion is that RFRA prohibited the conduct at issue in this case, and that this was plain from the face of the statute. No more is required.

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

Respectfully submitted,

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/s/ A. Katherine Toomey

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