[NOT SCHEDULED FOR ORAL ARGUMENT]

Nos. 06-5209, 06-5222

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

SHAFIQ RASUL, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

DONALD RUMSFELD, ET AL.,

Defendants-Appellees/Cross-Appellants.

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

SUPPLEMENTAL REPLY BRIEF FOR APPELLEES/CROSS-APPELLANTS

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INTRODUCTION AND SUMMARY

In our initial supplemental brief, we explained that *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), cannot possibly change this Court's holding that plaintiffs' claims must be dismissed. Simply stated, *Boumediene*, decided at least four years after the defendants' alleged actions, cannot retroactively supply "clearly established" law that would defeat qualified immunity in this action. Plaintiffs' supplemental brief, which argues that existing Circuit precedent is wrong and that this Court's previous decisions have been abrogated by *Boumediene*, merely serves to confirm this point.

Plaintiffs acknowledge that this Court's decision in *Kiyemba v. Obama*, __ F.3d __, 2009 WL 383618 (D.C. Cir. February 18, 2009), holds, even after *Boumediene*, that the aliens detained at Guantanamo have no constitutional due process rights. While plaintiffs argue that *Kiyemba* was wrongly decided, that ruling is binding Circuit precedent and requires rejection of plaintiffs' *Bivens* claims here.

In any event, there is no need to decide the underlying constitutional question in light of defendants' unambiguous entitlement to qualified immunity. Plaintiffs argue that this Court's most recent ruling in *Kiymeba* in incorrect, and that this Court's past precedent, reaffirmed in *Kiyemba,* should instead be deemed abrogated, while at the same time insisting that a reasonable federal official would have known this Court's controlling precedents were incorrect all along. But individual federal officers may not be subjected to monetary liability because they failed "to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). The fact that this Court has held, both before and after *Boumediene*, that detainees at Guantanamo lack the constitutional rights they assert demonstrates that the law was not clearly established. Moreover, as Judge Brown recognized, the claims should also be dismissed based upon special factors that preclude the recognition of a *Bivens* action. *See Rasul v. Myers*, 512 F.3d 644, 672-673 (D.C. Cir. 2008) (Brown, J. concurring).

Plaintiffs' contention that *Boumediene* requires reversal of this Court's previous decision with respect to the Religious Freedom Restoration Act (RFRA), reflects a fundamental misunderstanding of this Court's previous holding. As we discussed in our initial briefs, this Court's RFRA holding was not based upon an interpretation of the current status of constitutional law, but upon the interpretation of a statute that was designed to provide a right to persons who had previously been recognized as possessing First Amendment Free Exercise rights. Nothing in the subsequent decision in *Boumediene* changes that ruling. Moreover, as with the constitutional claims, the individual defendants are clearly entitled to qualified immunity on the RFRA claim as well.

ARGUMENT

1. As we explained in our opening supplemental brief, this Court can and should decide this case on the basis of defendants' clear entitlement to qualified immunity, and need not address the underlying constitutional issue. *See Pearson v. Callahan*, 129 S.Ct. 808, 818-821 (2009). If the Court does address the issue, however, *Kiyemba* is dispositive and mandates rejection of plaintiffs' *Bivens* claims here. *Kiyemba*, decided after *Boumediene*, reaffirmed this Court's prior holding that aliens detained at Guantanamo have no constitutional due process rights. *See Kiyemba*, slip op. at 8-9, 18. Plaintiffs acknowledge (Pl. Supp. Br. at 7) that *Kiyemba*

controls here, and devote much of their supplemental brief arguing that *Kiyemba* was wrongly decided. *See, e.g.,* Pl. Supp. Br. 7-13. *Kiyemba* is, however, controlling circuit precedent and mandates rejection of plaintiffs' *Bivens* claims. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel * * * does not have the authority to overrule another three-judge panel of the court").

2. In any event, the defendants are clearly entitled to qualified immunity. As this Court previously explained in this case, the immunity inquiry is not, as plaintiffs suggest, whether the "prohibition on torture is universally accepted," but rather "whether the rights the plaintiffs press under the Fifth and Eighth Amendments were clearly established at the time of the alleged violations." *Rasul*, 512 F.3d at 666. Given *Kiyemba*'s holding regarding due process rights, the constitutional rights asserted by plaintiffs are not clearly established even today, and they certainly were not clearly established at the time of the alleged acts at issue here (*i.e.*, between 2002 and March 2004). Plaintiffs' merits argument rests upon the proposition that *Kiyemba*'s due process holding is incorrect (Pl. Supp. Br. 7, 13), and that pre-existing Circuit precedent, reaffirmed in *Kiyemba*, should instead be deemed abrogated by *Boumediene* (Pl. Supp. Br. 12). Yet, plaintiffs make no attempt to explain why individual defendants should be subject to monetary liability for failing

to discern, at the time they acted, that this Court's controlling precedent was incorrect.

To the contrary, under the qualified immunity doctrine, if "officers of reasonable competence" could have disagreed at the time as to whether the constitutional right invoked was violated, "immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A competent official, acting at the time of the events in questions, could have relied on this Court's precedent, as well as the decisions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995), to have formed the reasonable belief that aliens held at the military base in Guantanamo Bay, Cuba, did not possess any constitutional due process rights. The fact that the Supreme Court reversed this Court's ruling in *Boumediene*, while relevant to the state of the law today, does not provide a basis for imposing liability here. As the Supreme Court has held, "[when judges] disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Plaintiffs assert (Pl. Supp. Br. 14) that the law was clearly established because *Boumediene* relied upon longstanding principles such as the *Insular Cases*, which

have been "established law for more than a century." It is not enough, however, that the recent case gleans its ruling from general principles discussed in past case law – that is the norm in virtually every major constitutional decision. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"). In this context, as this Court and the district court recognized, there is no authority "supporting a conclusion that military officials would have been aware, in light of the state of the law at the time, that detainees should be afforded the [constitutional] rights they now claim." *Rasul*, 512 F.3d at 666 (quoting *Rasul v. Rumsfeld*, 414 F.Supp.2d 26, 44 (D.D.C. 2006)).

Finally, plaintiffs' argument is belied by *Boumediene* itself. There, the Court recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Boumediene*, 128 S. Ct. at 2262 (emphasis added). In light of the Supreme Court's own recognition of the novelty of its ruling,

plaintiffs cannot credibly argue that the constitutional rights they now invoke in this *Bivens* action were clearly established at the time of the alleged acts at issue.

Thus, the entitlement to qualified immunity here is unambiguous and plainly dispositive of the *Bivens* claims. Indeed, as noted above, the pellucid right to immunity here obviates the need to even address the question of whether detainees at Guantanamo possess constitutional rights, beyond the right to petition for habeas corpus. *Pearson*, 129 S.Ct. at 818-821. At a minimum, the Court should, as it did before, reach the qualified immunity issue regardless of whether it decides to rule on the underlying constitutional question, and conclude that the *Bivens* claims must be dismissed on that ground. Further, as we detailed in our opening supplemental brief (9-12), the Court should also hold, in the alternative, that dismissal is required because it would not be appropriate to recognize a *Bivens* action in this context. *See Rasul*, 512 F.3d at 672-673 (Brown, J. concurring).[1]

These alternative rulings would make crystal clear that this action has no grounds to proceed further against these individual defendants. As the Supreme Court has often stated, "[t]he entitlement [to qualified immunity] is an *immunity from suit*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996); *Hunter v. Bryant*, 502 U.S. 224, 227

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[1] Because plaintiffs did not address this issue in their supplemental brief, we do not address it further in this reply brief.

(1991) (per curiam). Here, given the right to immunity, this action should be terminated at the earliest stage possible. A ruling from this Court rendering clear holdings that plaintiffs' *Bivens* claims are barred by qualified immunity and by special factors counseling against recognition of a *Bivens* claim in this context would further the purposes of immunity doctrine by assisting in the prompt and final disposition of these unfounded claims for personal liability.

4. Plaintiffs' RFRA argument fares no better. Contrary to plaintiffs' contention, this Court's previous RFRA holding did not rest upon "principles of constitutional rather than statutory construction" that now must be decided on the basis of the *Boumediene*'s "functional analysis" (Pl. Supp. Br. 11). The Court did not purport to rule on the current state of constitutional law, but rather interpreted the *statute* to effectuate the intent of Congress "to restore what, in the Congress's view" was the right free exercise of religion as understood prior to the decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). *See Rasul*, 512 F.3d at 671. As discussed in our initial supplemental brief (at 12-13), even if one concluded, contrary to the controlling authority in *Kiyemba*, that *Boumediene* extends beyond the Suspension Clause and applies to the First Amendment, that would not change the fact that Congress enacted RFRA with the intent to limit its statutory entitlement to persons who had First Amendment rights

before *Smith*. The subsequent holding in *Boumediene* cannot retroactively change the clear intent of Congress that enacted the statute many years ago.

In addition, for the same reason the individual defendants are entitled to qualified immunity on the constitutional claims, they are entitled to qualified immunity on the RFRA claim. Congress gave no indication when it enacted RFRA that it intended to extend Free Exercise rights to those for whom such rights had not been recognized, and the constitutional case law prior to *Boumediene* uniformly held that aliens outside the sovereign territory of the United States did not have such rights. *See, e.g., Cuban Am. Bar Ass'n*, 43 F.3d at 1428. Thus, even if plaintiffs were to succeed in challenging *Kiyemba* before this Court *en banc* or the Supreme Court, that would not provide a basis for altering this Court's previous holding that the RFRA claims against the individual defendants must be dismissed.

CONCLUSION

For the foregoing reasons and those stated in our initial supplemental brief, this Court should reinstate its previous decision and hold that the district court correctly dismissed Counts I through IV of the complaint and incorrectly denied the motion to dismiss with respect to the RFRA claim.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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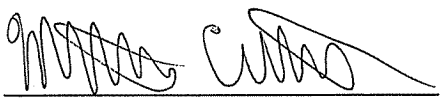

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