No. _____

In The Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

RICHARD MYERS, AIR FORCE GENERAL, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Michael Ratner
Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6438

Eric L. Lewis
Counsel of Record
BAACH ROBINSON & LEWIS PLLC
1201 F Street, N.W., Suite 500
Washington, D.C. 20004
(202) 833-8900

Dated: August 22, 2008

THE LEX GROUP[DC] ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that petitioners' claim for religious abuse and humiliation at Guantánamo was not actionable under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*., because they are not "persons"?

2. Whether the Court of Appeals erred in holding that petitioners lack the right under the Constitution not to be tortured or, alternatively, that respondents are entitled to qualified immunity because petitioners' right not to be tortured was not "clearly established" at the time of their detention?

3. Whether the Court of Appeals erred in holding that the ordering of torture by the Secretary of Defense and senior military officers was within the scope of their employment?

PARTIES TO THE PROCEEDING

1. Petitioners:

   Shafiq Rasul
   Asif Iqbal
   Rhuhel Ahmed
   Jamal Al-Harith

2. Respondents:

   Former Secretary of Defense Donald Rumsfeld
   Air Force General Richard Myers
   Army Major General Geoffrey Miller
   Army General James T. Hill
   Army Major General Michael E. Dunlavey
   Army Brigadier General Jay Hood
   Marine Brigadier General Michael Lehnert
   Army Colonel Nelson J. Cannon
   Army Colonel Terry Carrico
   Army Lieutenant Colonel William Cline
   Army Lieutenant Colonel Diane Beaver

3. Intervenors:

   None

4. Amici:

   The following Amici presented their views to the Court of Appeals:

   The National Institute of Military Justice, Brigadier General (Ret.) David M. Brahms,

Lieutenant Commander (Ret.) Eugene R. Fidell, Commander (Ret.) David Glazier, Elizabeth L. Hillman, Jonathan Lurie, and Diane Mazur.

Susan Benesch, Lenni B. Benson, Christopher L. Blakesley, Arturo J. Carlllo, Roger S. Clark, Marjorie Cohn, Rhonda Copelon, Angela B. Cornell, Constance de la Vega, Martin Flaherty, Hurst Hannum, Dina Haynes, Deena Hurwitz, Ian Johnstone, Daniel Kanstroom, Bert Lockwood, Beth Lyon, Jenny S. Martinez, Carlin Myer, Noah Benjamin Novogrodsky, Jamie O'Connell, Jordan J. Faust, Naomi Roht-Arriaza, Meg Satterthwaite, Ron Slye, Beth Van Schaack, David Weissbrodt, and Ellen Yaroshefsky, The Center for Justice and Accountability, Human Rights Watch, the Allard K. Lowenstein International Human Rights Clinic, and Physicians for Human Rights.

The Baptist Joint Committee for Religious Liberty, the National Association of Evangelicals, the National Council of Churches, the American Jewish Committee, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), the General Conference of Seventh-Day Adventists, and the United States Conference of Catholic Bishops.

Charles Carpenter, Judith Brown Chomsky, George M. Clarke III, Jerry

Cohen, Joshua Colangelo-Bryan, George Daly, Jeffrey Davis, Josh Denbeaux, Mark Denbeaux, Stuart Eisenberg, Elizabeth P. Gilson, Candace Gorman, Eldon Greenberg, C. Clark Hodgson, Jr., Gaillard T. Hunt, Christopher Karagheuzoff, Ramzi Kassem, Samuel C. Kauffman, Ellen Lubell, Howard J. Manchel, Louis Marjon, Edwin S. Matthews, Brian J. Neff, Kit A. Pierson, Noah H. Rashkind, Martha Rayner, Marjorie M. Smith, Clive Stafford Smith, Mark S. Sullivan, Doris Tennant, Robert C. Weaver, Angela C. Vigil, Reprieve, CagePrisoners, and James Yee.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion below is reported as *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) (Appendix ("App.") 3a-66a).

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion on January 11, 2008. Petitioners timely filed their Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied on March 26, 2008. App. 146a, 148a. Petitioners' application to this Court to extend the time for filing a petition for writ of certiorari until August 22, 2008, was granted on June 2, 2008. App. 150a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend V.

U.S. Const. amend. VIII.

Westfall Act, 28 U.S.C. § 2679(d).

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–5.

STATEMENT OF THE CASE

This petition raises issues at the core of ordered liberty: i) whether detainees imprisoned by the United States at the Guantánamo Bay Naval Station ("Guantánamo") have a protectible right to be free from abuse and humiliation in the practice of their religion; ii) whether these detainees have a clear, protectible right to be free from torture; and iii) whether ordering torture is within the scope of employment for senior government officials. The right to worship free from abuse and the right to be free from physical torture are enshrined in the Constitution, the Geneva Conventions and the Convention Against Torture, military law and U.S.

statutes.[1] These rights are also central to the concept of human dignity that underlies our constitutional system. Yet based upon its now-overruled holding that aliens at Guantánamo possess *no* constitutional rights, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* ___U.S. ___, 128 S. Ct. 2229 (2008), the Court of Appeals held that these detainees are not "persons" entitled to protection of their right to worship under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*. ("RFRA"), and are not entitled to be free from torture under the Fifth Amendment. The Court of Appeals' rulings are not only in conflict with this Court's precedents, but are contrary to the application of the rule of law at Guantánamo that this Court has repeatedly confirmed in *Rasul v. Bush* ("*Rasul I*"), 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, ___U.S.___, 128 S. Ct. 2229 (2008). While the right to challenge confinement affirmed in those cases is of critical importance, this case presents the opportunity to recognize and enforce rights that are at least as basic and essential to human autonomy – the right to worship and the right not to be tortured.

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[1] *See, e.g.*, 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; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 ("Convention Against Torture"); 18 U.S.C. § 2340, *et seq*.; 42 U.S.C. § 2000bb, *et seq*.; Army Reg. 190-8, Ch. 1-5(g).

The torture, abuse and religious humiliation of Muslim detainees at Guantánamo Bay stands as a shameful episode in our history. This petition enables the Court to remedy that stain on the moral authority of our nation and its laws, to overrule an obdurately insupportable exercise in statutory construction that effectively renders these petitioners, and all other detainees at Guantánamo, non-persons, and to facilitate accountability for these terrible acts. Five years ago, Shafiq Rasul petitioned this Court for the right to challenge his confinement through habeas corpus. *Rasul I*, 542 U.S. 466. Today, he seeks vindication of his statutory right to religious dignity and his right under the Constitution not to be tortured by United States government officials – universally recognized, irreducible minima that our legal system must provide to those under its control.

I. THE CLAIMS: RELIGIOUS ABUSE AND TORTURE AT GUANTÁNAMO

This case presents the question of whether senior officials of the United States Government can be held accountable pursuant to RFRA, the Constitution and customary international law for ordering the religious humiliation and torture of Guantánamo detainees. The complaint below was filed by four innocent British citizens who were detained at Guantánamo from January 2002 to March 2004, when they were released and flown home to England. App. 167a, 189a. Petitioners never took up arms against the United States, never received any military training, and have never been members of any terrorist group. App. 165a, 173a-

74a. They have never been charged with any crime. App. 167a. They were never determined to be enemy combatants. App. 167a.[2] Respondents are former Secretary of Defense Donald Rumsfeld and high-ranking military officers who ordered and supervised petitioners' incarceration and mistreatment at Guantánamo. App. 174a-79a.

Petitioners Rasul, Iqbal, and Ahmed are boyhood friends from the town of Tipton in England. App. 179a. At the time they were detained, they were 24, 20 and 19 respectively. App. 173a-74a. Iqbal had gone to Pakistan in September 2001 to get married. App. 180a. Ahmed joined him to be his best man. App. 180a. Rasul was in Pakistan studying computer science. App. 180a. All three went to Afghanistan to assist in providing relief for the humanitarian crisis that arose in 2001. App. 180a-81a. In Afghanistan they were captured by Afghan warlord Rashid Dostum, who is widely reported to have delivered prisoners to U.S. forces for the purpose of collecting a per capita bounty offered by the U.S. military. App. 165a. Dostum delivered Rasul, Iqbal, and Ahmed into U.S. custody in late 2001. App. 182a.

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[2] The complaint was dismissed on respondents' motion to dismiss. Accordingly, at this stage of the proceedings, all factual allegations of the complaint must be presumed to be true. *Bridge v. Phoenix Bond & Indem. Co.*, __ U.S. ___, 128 S. Ct. 2131, 2135 n.1 (2008)

Petitioner Al-Harith was also born and raised in England. App. 174a. He is a website designer in Manchester. App. 165a. In 2001, he traveled to Pakistan for a religious retreat. App. 165a-66a. When he was advised to leave the country because of growing animosity toward the British, he booked passage on a truck to Turkey, from which he planned to fly home to England. App. 166a. His truck was hijacked, and Al-Harith was forcibly brought to Afghanistan and turned over to the Taliban. App. 166a. He was accused of being a British spy, imprisoned in isolation, and beaten by his Taliban guards. After the Taliban fled in the wake of the U.S. invasion of Afghanistan, the British Embassy's plans to evacuate Al-Harith were preempted when U.S. forces arrived at the prison and took him into custody. App. 166a-67a.

All four petitioners were held and interrogated under appalling conditions in Afghanistan by the United States before they were transported to Guantánamo, where they were systematically tortured and abused pursuant to directives from respondent Rumsfeld and the military chain of command. App. 182a-89a. The complaint alleges that the treatment of petitioners violated clearly established legal and human rights, and that respondents were fully aware of this illegality, as would have been any reasonable person in respondents' positions. App. 212a-14a. For more than two years, petitioners were held arbitrarily and without charges at Guantánamo. While in detention, they were subjected to:

- repeated beatings (including with rifle butts, and beatings administered while petitioners were shackled and blindfolded);
- prolonged solitary confinement, including isolation in total darkness;
- deliberate exposure to extremes of heat and cold;
- threats of attack from unmuzzled dogs;
- forced nakedness;
- repeated body cavity searches;
- denial of food and water;
- deliberate disruption and deprivation of sleep;
- shackling in painful stress positions for extended periods;
- injection of unknown substances into their bodies; and
- deliberate interference with and denigration of their religious beliefs and practices, including the deliberate submersion of the Koran in a filthy toilet bucket.

App. 189a-207a.

Petitioners were deliberately prevented from fulfilling their daily obligation to pray, as prayers were frequently interrupted by shouts, taunts and the playing of earsplitting music over the camp public address system. App. 223a. The chaining of petitioners in the "short-shackling" position was not only extremely painful, but also prevented them from taking the required posture for prayer. App. 199a-200a. Forced nakedness violated the Muslim

tenet requiring modesty, particularly during prayer. App. 223a. Petitioners' beards were shaved forcibly, App. 187a, an infringement of Muslim religious practice. Desecration of the Koran was frequent and systematic, with numerous incidents of Korans being sprayed with high-power water hoses, splashed with urine and thrown in the toilet bucket. App. 223a-24a. These were calculated and illegal displays of disrespect toward the essential symbol of Islam.

The insulting of Muslims in their core beliefs was not the action of rogue guards on the night shift; it represented a clear and illegal policy choice by senior U.S. officials to exploit and denigrate detainees' Muslim beliefs and cultural practices. Department of Defense documents reveal that the Secretary of Defense himself ordered many of these practices personally.

Following their release, petitioners sued respondents for damages in the United States District Court for the District of Columbia. App. 161a-64a. The complaint asserted claims for torture, other mistreatment and abuse under, *inter alia*, the Fifth and Eighth Amendments to the Constitution, customary international law, the Geneva Conventions, and under RFRA based on respondents' deliberate interference with petitioners' exercise of their religion. App. 214a-25a.

II. THE TORTURE MEMOS

In the complaint, petitioners identified memoranda and reports generated, received and approved by respondents, which outlined, planned,

authorized and implemented the program of torture and abuse directed at petitioners and the other Guantánamo detainees.[3] For example, on December 2, 2002, respondent Rumsfeld approved a memorandum authorizing numerous illegal interrogation methods, including putting detainees in stress positions for up to four hours; forcing detainees to strip naked; intimidating detainees with unmuzzled dogs; interrogating them for 20 hours at a time; forcing them to wear hoods; shaving their heads and beards; incarcerating them in darkness and silence; exposing them to extremes of hot and cold; and using what was euphemistically called "mild, non-injurious physical contact." App. 171a-72a. Petitioners were subjected to all of these abusive practices – and more.

Thereafter respondent Rumsfeld commissioned a "Working Group Report" dated March 6, 2003, to address the legal consequences of authorizing these methods. App. 170a-71a.[4] That Report, entitled "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations," detailed the requirements of international and domestic law governing interrogations, including the Geneva Conventions, the Convention Against Torture, customary international law, and numerous sections of the U.S. criminal code. App. 170a-71a.

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[3] Since the filing of the complaint in 2004, numerous additional memoranda and reports have been made public further detailing respondents' direct role in petitioners' torture and abuse.

[4] A revised version of the Report was issued on April 4, 2003.

The Report acknowledged that the described interrogation techniques and conditions of imprisonment were illegal and sought to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." App. 170a. The purpose of the Report, like the other memos prepared and approved by respondents, was to assist respondents in evading recognized legal prohibitions of their intended conduct. These documents can only be seen as a shameful nadir for American law, a cynical attempt to manipulate legal language to justify the inherently unjustifiable.

In sum, respondents ordered a program of torture, humiliation and abuse with a conscious and calculated awareness that these practices were illegal. Respondents' attempts to evade scrutiny of their conduct, and their after-the-fact contortions to create an Orwellian façade of legality, manifest their knowledge that they were acting illegally and in violation of clearly established legal rights.

III. DECISIONS OF THE DISTRICT COURT

In the district court, respondents moved to dismiss the complaint, asserting, *inter alia*, that plaintiffs had no protectible rights under the Constitution. Respondents further contended they were entitled to qualified immunity with respect to the constitutional and RFRA claims and absolute immunity under the Westfall Act, 28 U.S.C. § 2679(d)(1), for any violations of international law or treaty. App. 103a-04a. The district court dismissed

petitioners' constitutional claims based on qualified immunity. In contravention of *Saucier v. Katz*, 533 U.S. 194 (2001), the district court did not reach the question of whether detainees at Guantánamo have constitutional rights. App. 134a-36a. Rather, the district court held that, regardless of whether detainees have rights protected under the Constitution, such rights could not have been clearly established until this Court decided *Rasul I*. App. 142a. The district court further held, as a matter of law, that "torture is a foreseeable consequence of the military's detention of suspected enemy combatants," and, therefore, respondents were acting within the scope of their employment and were accordingly immune under the Westfall Act. App. 120a.

The district court denied respondents' motion to dismiss petitioners' RFRA claim, holding that the complaint did allege actionable conduct. App. 71a-72a. As the court observed, "flushing the Koran down the toilet and forcing [petitioners] to shave their beards falls comfortably within the conduct prohibited … by RFRA." App. 93a-94a. The court further held that RFRA's applicability to U.S. military facilities and to U.S. civilian and military officers, including those serving at Guantánamo, was clear under the plain language of the statute and therefore well-established at the time that petitioners were abused. App. 95a-98a.

IV. DECISION OF THE COURT OF APPEALS

Respondents filed a timely notice of appeal of the district court's order denying dismissal on the basis of qualified immunity with respect to the RFRA claim. On petitioners' request, the district court certified its decision on the remaining issues pursuant to Fed. R. Civ. P. 54(b), allowing the petitioners to cross-appeal. App. 67a-69a.

Based on its now overruled opinion in *Boumediene*, 476 F.3d 981 (2007), the Court of Appeals held that petitioners had no right under the Constitution not to be tortured, noting that "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States." App. 36a. As in *Boumediene*, the Court of Appeals invoked its categorical reading of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and rejected the proposition that this Court's decision in *Rasul I* had distinguished *Eisentrager* in the context of Guantánamo. App. 38a-41a.[5] Finally, the Court of Appeals held in the alternative that, even if Guantánamo detainees had a constitutional right not to be tortured, that right was not clearly

[5] The Court of Appeals' extensive and uncritical reliance on its own decision in *Boumediene* is all the more remarkable given that the instant case was argued, and the Court of Appeals' decision was rendered, long after this Court granted the petition for writ of certiorari in *Boumediene* and after the Court of Appeals withdrew its mandate in *Boumediene*, signaling the likelihood that the decision would be amended, overturned or withdrawn. Indeed, the Court of Appeals entirely ignored the fact that it had withdrawn its mandate in *Boumediene*. App. 41a.

established and therefore respondents were entitled to qualified immunity:

> The plaintiffs argue that a reasonable person would have been on notice that the defendants' alleged conduct was unconstitutional because the "prohibition on torture is universally accepted." The issue we must decide, however, is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time of the alleged violations.

App. 42a (internal citations omitted). Because the Court of Appeals held that such rights (which it did not recognize) were in any event not clearly established at the time petitioners were tortured, petitioners' claims were precluded by qualified immunity. App. 41a.

The Court of Appeals also held that the ordering of torture and abuse was foreseeable and incidental to respondents' duties as senior U.S. officers charged with interrogating detainees. App. 29a. The Court of Appeals rejected petitioners' arguments that: i) as a matter of law, torture could never be within the scope of employment of a U.S. officer; and, in the alternative, ii) whether seriously criminal conduct is within the scope of employment is an issue of fact on which petitioners were entitled to discovery and an evidentiary hearing. App. 29a-30a, 33a-34a.

Finally, the Court of Appeals reversed the district court's ruling that denied respondents'

motion to dismiss the RFRA claims, with the panel majority holding that petitioners "do not fall with[in] the definition of 'person,'" under RFRA, App. 54a, and therefore lacked standing to invoke RFRA's protections. App. 54a. The Court of Appeals did not apply ordinary principles of statutory construction to the term "person." Instead, it reasoned that RFRA was in essence a codification of constitutional free exercise principles, and therefore the word "person" should be imbued with a constitutional construction consistent with the Court of Appeals' reading of this Court's Fourth and Fifth Amendment jurisprudence, which, the Court of Appeals concluded, categorically excluded aliens at Guantánamo. App. 52a-54a.

Judge Brown wrote a separate concurrence criticizing the majority's failure to apply ordinary principles of statutory construction, and in particular its conclusion that Guantánamo detainees are not "persons."[6] Judge Brown then observed that the panel majority's ruling on the scope of RFRA left the Court of Appeals, "with the unfortunate and

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[6] Although Judge Brown correctly reasoned that the detainees cannot be excluded from the ambit of RFRA because they are "persons" under the statute, she nonetheless would have dismissed the petitioners' suit on grounds that the petitioners' claim under the Constitution, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), was precluded by "special factors," and that RFRA does not afford rights to persons such as the Guantánamo detainees, because Congress could not have intended such a result. App. 55a-58a. Judge Brown's limitation of the scope of *Bivens* actions is inconsistent with settled law, and her interpretation of RFRA finds no support in the text of RFRA or its legislative history and runs afoul of this Court's approach to statutory construction in *Rasul I*.

quite dubious distinction of being the only court to declare those held at Guantánamo are not 'person[s].' This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human." App. 65a.

REASONS FOR GRANTING THE PETITION

Approximately 800 men and boys have been incarcerated at Guantánamo since 2002. Today approximately 265 men remain at Guantánamo, nearly all of whom are devout Muslims, for whom daily prayer and other religious observances are an important part of life. App. 262a-65a. The Court of Appeals' decision that detainees are not "persons" and that RFRA does not apply at Guantánamo leaves these men unprotected from government officials' interference and harassment in their religious practices. This is the precise harm that RFRA was enacted to address. The inviolability of religious worship is at the core of the American ideal. Not only is it enshrined in the First Amendment, but, through RFRA, this principle has been strongly reinforced and extended by Congress. RFRA mandates a broad and unitary standard applicable to the entire federal government and its officers, requiring accommodation and respect for religious worship, and creates a specific cause of action to hold federal officials liable for its violation. For the Court of Appeals to interpret a statute guaranteeing religious freedom to *all* persons as protecting the religious dignity of only *some* persons, while permitting the systematic abuse of a discrete, insular group of Muslim men at Guantánamo, is

fundamentally in conflict with the precepts of religious freedom and dignity underlying our Republic, and inconsistent with the text and purpose of RFRA.

The Court of Appeals' sweeping conclusion that Guantánamo detainees have no constitutional rights and therefore can be tortured consistent with the Constitution is abhorrent in a nation of laws and is in direct conflict with this Court's precedents. The Court of Appeals' further conclusion that officers who were aware of the illegality of their conduct under numerous sources of law can nevertheless avoid liability for their actions through a calculated reliance on purported constitutional ambiguity is equally pernicious and contrary to this Court's long-standing doctrine that qualified immunity does not protect defendants who engage in deliberately unlawful conduct. Finally, the Court of Appeals' conclusion that torture and abuse are within the scope of employment and therefore respondents are immune from liability for their conduct is fundamentally at odds with the universal principle that torture is *ultra vires* under all circumstances.

Guantánamo continues to present numerous jurisprudential challenges to the judiciary. This case provides a critical opportunity for this Court to affirm strongly the guarantee to Guantánamo detainees of an irreducible minimum of human rights. It is essential for this Court to reverse the Court of Appeals' decision, which manifests indifference to religious abuse and torture and flouts the Guantánamo jurisprudence carefully developed and expounded by this Court.

I. THE COURT OF APPEALS' DECISION THAT PETITIONERS ARE NOT "PERSONS" IS DIRECTLY CONTRARY TO THIS COURT'S CONSTITUTIONAL AND STATUTORY JURISPRUDENCE.

RFRA provides a cause of action to any "person" whose religious exercise has been substantially burdened by the government. App. 157a (42 U.S.C. § 2000bb-1(c)). It precludes the federal government or any of its officers from infringing on a person's exercise of religion, unless the restriction is the "least restrictive means of furthering [a] compelling governmental interest." App. 157a (42 U.S.C. § 2000bb-1(b)(2)). An "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." App. 158a, 160a (42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A)). As the district court recognized, RFRA on its face provides a cause of action for petitioners in the circumstances presented here. The complaint alleged that respondents deliberately infringed on petitioners' religious exercise by, *inter alia*, interfering with their prayer, shaving their beards, forcing nudity and desecrating their Korans. App. 187a-88a, 206a, 223a.

The Court of Appeals rejected this straightforward application of RFRA. Instead, it held that, because Guantánamo detainees have no constitutional rights (a blanket proposition rejected by this Court in *Boumediene*, 128 S. Ct. 2229), they

also have no rights under RFRA. This approach to statutory interpretation is in direct conflict with this Court's decision in *Rasul I*, which squarely held that a statute is *not* limited by the scope of analogous constitutional provisions, but must instead be construed and given effect according to its own terms. As the Court expressly held with respect to the application of the federal habeas statute to detention of these petitioners:

> Considering that [§ 2241] draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Rasul I, 542 U.S. at 481 (footnote omitted). No less so here. RFRA, like the habeas statute, draws no distinction between citizens and aliens, and nothing in RFRA suggests any variance in its geographical reach based on a plaintiff's citizenship.

By its express terms, RFRA protects all "persons" from government interference with their exercise of religion. As Judge Brown noted in her concurrence, the majority's construction of the term "persons" to exclude petitioners contradicts the "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." App. 59a. Where an unambiguous word is undefined in a statute, it must be construed "in

accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). Given its "ordinary or natural meaning," "person" is a broad term that encompasses human beings regardless of their place of residence or citizenship. *Cf. Rasul I*, 542 U.S. at 480 (where statute draws no distinction between aliens and citizens, courts should not imply one). Where Congress intends to limit the term "person" by citizenship or residence, it knows how to do so. Indeed, Congress has done so clearly in other broad remedial contexts. For example, in Sections 1981 and 1983, Congress limited the class of "persons" who may state claims to persons "within the jurisdiction" of the United States. 42 U.S.C. §§ 1981, 1983. No such limitation exists in RFRA.

This Court has expressly instructed that exceptions are not to be judicially implied into a statute unless the absence of the exception would lead to an absurd result. *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied."). The Court of Appeals ignores this instruction and, as it did in *Rasul I*, fashions its own Guantánamo exception to a statute that includes no such condition or qualification.

The Court of Appeals' ruling conflicts as well with this Court's construction of the scope of RFRA. As this Court observed in *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA's "restrictions apply to

every agency and official …. [and] to all federal and state law, statutory or otherwise." *Id*. at 532. Contrary to the Court of Appeals' conclusion, RFRA was not enacted merely to be co-extensive with the First Amendment, which would have been duplicative and rendered the statute a nullity. Rather, it was enacted to supplement the First Amendment by extending protection to religious practices that this Court had expressly held were *not* protected by the First Amendment. App. 155a-56a (42 U.S.C. § 2000bb); *see* S. Rep. 103-111, at 4, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. Prior to the passage of RFRA, this Court had held that the First Amendment did not protect the religious practice of using illegal drugs against the effect of a law of neutral application, *Employment Div. v. Smith*, 494 U.S. 872 (1990), that it did not protect the rights of military officers to wear yarmulkes while in uniform, *Goldman v. Weinberger*, 475 U.S. 503 (1986), and that it did not protect the rights of Muslim prisoners to attend Friday services, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). With its deliberately broad and unconditional language, RFRA protects these (and many other) practices. It applies in prisons; it applies to the military; it applies to all government officers wherever situated; it applies to all territories and possessions of the United States. Far from simply duplicating constitutional protections, RFRA expressly supplements and extends protection to religious practices that may not be covered by the Constitution. This construction of RFRA has been adopted by the United States, which has urged it in this Court. *See* Brief of the United States as Amicus Curiae, *City of Boerne v. Flores*, 1997 U.S. S. Ct. Briefs LEXIS 185

at *70-71 & n.40 (Jan. 10, 1997) (citing cases). And the language of the statute iterates an even broader purpose, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." App. 157a (42 U.S.C. § 2000bb(b)(2)). The Court of Appeals' conclusion that RFRA "did not expand the scope of the exercise of religion beyond that encompassed by the First Amendment," App. 49a, is thus demonstrably incorrect and entirely at odds with the purpose, effect and express language of RFRA.

Having wrongly concluded that RFRA merely codifies the Constitution, the Court of Appeals then compounded its error by limiting RFRA's meaning based on its incorrect (and now overruled) construction of Fourth and Fifth Amendment jurisprudence. Based on its decision in *Boumediene,* the Court of Appeals held that, because nonresident aliens are not "persons" under the Fourth or Fifth Amendments, they have no *statutory* rights under RFRA. App. 54a. As this Court stated in *Rasul I,* and reaffirmed in *Boumediene*, the Court of Appeals was plainly wrong in holding categorically that Guantánamo detainees have no enforceable statutory or constitutional rights. With respect to constitutional rights, this Court in *Boumediene* followed the analysis of the *Insular Cases*, *e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. United States*, 195 U.S. 138 (1904), and their progeny, concluding that the applicability of a constitutional provision outside the sovereign territory of the United States "depends upon the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it

and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous." *Boumediene,* 128 S. Ct. at 2255 (internal quotations omitted). This Court reaffirmed its prior finding that Guantánamo "is under the complete and total control of our Government" and, accordingly, the constitutional right to habeas corpus applies there. *Id*. at 2262. Although a statutory right is at issue here, because the Court of Appeals based its holding on constitutional construction, it is important to note that the Court of Appeals' categorical denial of constitutional rights to aliens at Guantánamo has been definitively overruled. Thus, even under the Court of Appeals' incorrect bootstrapping of constitutional reasoning into RFRA, its analysis would fail because under the Court's reasoning in *Boumediene*, the right to be free from official religious abuse at Guantánamo would certainly not be "impracticable and anomalous." *Id.* at 2255.

Certiorari is warranted here not simply because a lower court fundamentally misconstrued a statute, even an important statute like RFRA. Rather the Court of Appeals has once again, directly and obdurately in conflict with this Court's jurisprudence, rejected the proposition that detainees have even the most basic of rights and that government action at Guantánamo is constrained by law and the Constitution. Since detentions at Guantánamo commenced in 2002, the Court of Appeals has been faced with numerous cases asserting rights on behalf of detainees. In each instance, the Court of Appeals has held that detainees do not possess the right being asserted.

E.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Hamdan v. Rumsfeld,* 415 F.3d 33 (D.C. Cir. 2005); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007*)*. On certiorari, this Court has reversed each of these decisions and affirmed that the detainees possess cognizable rights under the laws of the United States and under the Constitution. *Rasul I,* 542 U.S. at 466; *Hamdan*, 548 U.S. at 625-26; *Boumediene*, 128 S. Ct. at 2262. Nevertheless, despite this Court's guidance, the Court of Appeals ignored both the principles of statutory construction that should have resolved this case in petitioners' favor and the clear line of this Court's jurisprudence rejecting the Court of Appeals' blanket repudiation of detainee rights. Petitioners respectfully submit that an unequivocal affirmation of the gravamen of this Court's Guantánamo holdings to provide definitive guidance to the lower courts – particularly regarding torture and religious abuse – is another critical reason for the Court to grant review in this case.

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT DETAINEES IN U.S. CUSTODY AT GUANTÁNAMO CANNOT BE TORTURED AND THAT OFFICIALS WHO DO SO ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Whatever euphemisms are applied, whatever abstractions are invoked, petitioners were deliberately tortured at the behest and direction of the former Secretary of Defense and senior officers in the chain of command. The torture and abuse were not the acts of a rogue guard or interrogator

but, as has now been made public, were part of a specific plan memorialized through written instructions. Respondents conceived and implemented their program of torture and abuse in violation of the express policy statements of the President, applicable military regulations, the Constitution, U.S. and international law, and any pretense of honor or decency. Not only should respondents (or any reasonable officers serving in respondents' positions) have known of the illegality of their conduct, the complaint is replete with allegations that respondents in fact *did know*. They requested, wrote and received memorandum after memorandum, all detailing the various ways in which their conduct and orders were violations of applicable law. App. 72a. It was for this very reason that each report or memorandum tried also to concoct a *post hoc* legal justification for respondents' unconstitutional and illegal acts. In holding that petitioners had no rights, the Court of Appeals appeared to accept that the Constitution does not prevent official torture and abuse of detainees at Guantánamo, but in any event the right not to be tortured was not clearly established when petitioners were detained. This Court should make clear that officials cannot take refuge in constitutional ignorance or ambiguity when they are attempting to circumvent rather than comply with the law.

Respondents argued below that they are entitled to qualified immunity because, whatever the illegality of their conduct under U.S. criminal statutes, the Uniform Code of Military Justice, and U.S. treaty obligations, the law was unclear whether detainees were entitled to constitutional protections,

and thus petitioners' *constitutional* right not to be tortured and abused was not clearly established at the time of their detention. Both the district court and the Court of Appeals accepted this argument and dismissed petitioners' constitutional claims on the basis of respondents' qualified immunity.[7] Indeed, the Court of Appeals held that petitioners have no constitutional protection from torture in any event.

The Court should grant review of these holdings because i) it should not let stand the Court of Appeals' conclusion that Guantánamo detainees can be tortured and abused; and ii) they are in conflict with this Court's decision in *United States v. Lanier*, 520 U.S. 259, 271 (1997), and this case presents an opportunity for the Court to make clear the applicability of *Lanier*, which was decided in the criminal due process context, to cases in which qualified immunity is directly at issue.

In *Boumediene*, 128 S. Ct. 2229, this Court definitively rejected the Court of Appeals' conclusions that the Constitution does not apply at Guantánamo and that detainees have no rights

[7] This Court has previously held in the *Bivens* context that a government official is not entitled to qualified immunity if he or she has violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). The test for qualified immunity is one of "objective legal reasonableness." *Harlow*, 457 U.S. at 819.

under the Constitution. To the contrary, the Court held not only that the Suspension Clause of the Constitution applies at Guantánamo, but also that, like the rights guaranteed under the Suspension Clause, "the substantive guarantees of the Fifth and Fourteenth Amendments" apply to foreign nationals, like petitioners, "who have the privilege of litigating in our courts." 128 S. Ct. at 2246. Following its decision in *Boumediene*, the Court should grant review in the instant case to make crystal clear that a fundamental right guaranteed by the Fifth and Fourteenth Amendments – the right not to be tortured while in custody – also applies at Guantánamo. It is critical that this Court not let stand the Court of Appeals' contrary ruling – that respondents' conduct at Guantánamo was unconstrained by the Constitution and, accordingly, they were free to torture and abuse petitioners without risk of personal liability.

This Court held in *Lanier* that, regardless of whether the constitutional parameters of a particular right have been established clearly by previous case law, qualified immunity is not available if the illegality of the conduct would be obvious to any reasonable person, even if there were no case law directly on point establishing that the Constitution applied to the conduct. *Lanier*, 520 U.S. at 271. *Lanier* addressed a criminal defendant's substantive due process defense that he had insufficient notice that his crime constituted a constitutional violation that could be prosecuted under 18 U.S.C. § 242. Although the Court relied on the qualified immunity standard in holding that the defendant in *Lanier* had sufficient notice of the

unconstitutionality of his conduct, it has not yet considered the holding of *Lanier* in the context of a claim of qualified immunity for seriously illegal conduct. This case presents this Court with the opportunity to confirm what *Lanier* rightly suggests – that officials who deliberately violate law that they know (and any reasonable official would know) prohibits their conduct cannot claim qualified immunity on the basis that they were unaware that the conduct rises to a constitutional violation or that a court had yet to rule precisely on the issue.

A. Any Reasonable Officer Would Know that Torture and Deliberate Abuse Are Illegal Under All Sources of Law.

It is remarkable that in 2008 it can be seriously contended that the Constitution does not prohibit official torture of persons in custody. The principle that government officials cannot torture prisoners is not new. As long ago as 1936, this Court considered whether the right not to be tortured was "fundamental" for the purpose of imposing it on the States under the Due Process Clause of the Fourteenth Amendment. *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, the Court held that torture is inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id*. at 286. Thus, the right not to be tortured was protected by the Fourteenth Amendment, and torture was banned as state as well as federal practice.

Torture is "universally condemned" under international law as well. *Sosa v. Alvarez Machain*,

542 U.S. 692, 762 (2004) (Breyer, J., concurring). U.S. courts have recognized for more than twenty-five years that no sovereign has the authority to order torture. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), cited with approval by this Court in *Sosa*, 542 U.S. at 738 n.29, the Second Circuit held that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." *Filartiga*, 630 F.2d at 881. "[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Id*. at 890. The United States is a signatory to the Convention Against Torture. 2 U.S. Dep't of State, Treaties in Force at 182 (2007), *available at* http://www.state.gov/documents/organization/89668.pdf. The United States Government has repeatedly, officially and publicly condemned torture in any and all circumstances and acknowledged that:

- the prohibition on torture applies to the U.S. military;
- torture "cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer"; and
- "a commanding officer who orders such punishment would be acting outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm."

App. 228a, 231a. The United States Government could not have been more clear in articulating the scope and nature of its obligations:

> The United States is unequivocally opposed to the use and practice of torture. No circumstances whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for *or defense to committing torture*. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government. All components of the United States Government are obliged to act in compliance with the law, including all United States *constitutional*, statutory and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate or condone torture, or other unlawful practices by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States *and in other parts of the world.*

App. 237a-38a (emphasis added).

The prohibition against torture is not only deeply embedded as a matter of policy and customary international law, it is a bedrock norm of constitutional law. As the Court noted in *Brown*, torture "offends some principle of justice so rooted in

the traditions and conscience of our people as to be ranked as fundamental." 297 U.S. at 285. From the *Insular Cases* to *United States v. Verdugo-Urquidez,* 494 U.S. 259, 277-78 (1990) (Kennedy, J. concurring), to *Rasul I*, to *Boumediene*, this Court has adopted a functional analysis of what rights may be applied to aliens and citizens outside the United States. That analysis is premised on the concept that "fundamental" rights apply where they can practicably be enforced. And as *Brown* teaches, few if any rights are more "fundamental" than the right of a prisoner not to be tortured. As Justice Scalia recognized in dissent in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a case decided the year before petitioners were sent to Guantánamo, this norm is so obvious that, even in the case of aliens who may be entitled to only minimal constitutional protection, it is certain that "they cannot be tortured." *Id*. at 704 (Scalia, J. dissenting). In sum, it has been long established that there is an irreducible constitutional minimum that government officials owe to human beings under their control – whether citizens or aliens – and that minimum necessarily includes the prohibition of torture.

B. The Court Should Make Clear that Officials who Order Torture Are Not Entitled to Qualified Immunity.

Respondents knew, as any civilized person would know, that torture and deliberate abuse are wrong and violate fundamental rights wherever they occur. They brought detainees to Guantánamo rather than to a detention facility in the U.S. in a calculated attempt to circumvent the constitutional

provisions that forbid torture. Their memos evidence, however, that they were aware that other sources of law forbidding torture, including U.S. criminal law and the Uniform Code of Military Justice, expressly prohibited torture and did apply at Guantánamo. App. 170a-71a. Defendants' gamble that Guantánamo might be recognized as a haven for torture – where torture was concededly illegal, but possibly not unconstitutional – is not the kind of conduct that the doctrine of qualified immunity is intended to protect.

The Court of Appeals relied on the absence of any constitutional ruling directly on point that prohibits torture and deliberate abuse at Guantánamo. But this Court has made clear that the lack of a directly applicable precedent does not insulate egregious conduct. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court unambiguously rejected the proposition that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." 483 U.S. at 640. For a right to be clearly established, it is enough that "the contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. … [I]n light of pre-existing law, the unlawfulness must be apparent." *Id*. There can be no doubt that the unlawfulness of torture and abuse was clear to the Secretary of Defense and senior military officers.

In *Hope v. Pelzer,* 536 U.S. 730 (2002), prison guards shackled prisoners to a hitching post on a hot day, conduct very similar to the "short-shackling" of

petitioners. App. 199a. The guards defended the claims against them on the ground that there had been no decision establishing that the Constitution prohibited the practice. The Court held that the "obvious cruelty inherent" in the use of the hitching post and treatment "antithetical to human dignity" under circumstances that were both "degrading and dangerous" were sufficient to put the guards on notice of the constitutional violation. *Id*. at 745-46. In addition, in *Hope*, the Court noted that defendants knowingly violated their own regulations, which put defendants on notice and precluded their reliance on qualified immunity. The fact that the specific practice had never been addressed by the courts did not afford the defendants in *Hope* an escape into qualified immunity. That respondents here were senior government officials rather than prison guards in no way changes the analysis.

Similarly, in *United States v. Lanier*, 520 U.S. 259 (1997), a state court judge was charged with criminal constitutional violations pursuant to 18 U.S.C. § 242. Lanier argued that he was not on notice that the Constitution was implicated in his criminal conduct – sexual assault of five women who worked in the courthouse – even though he was aware that state criminal statutes prohibited such behavior. In essence, his position was that although he knew his conduct was wrongful, and even illegal, he could not have known it was unconstitutional because there was no precedent on point. This Court summarily rejected Lanier's defense because the illegality of his conduct, if not its unconstitutionality, was obvious. Analogizing Lanier's due process

defense to an assertion of qualified immunity, the Court stated, "the easiest cases don't even arise. There has never been a … section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. at 271 (internal citations omitted). The teaching of *Lanier* is clear: the torturer, like the hypothetical child slaver, cannot rely on the absence of a case on point.

Like the defendant in *Lanier*, the Court of Appeals approached the question of qualified immunity with a single, narrow question – was there a case holding torture at Guantánamo violated specific provisions of the Constitution? Because the court answered this question in the negative, it held that respondents could not be held liable, regardless of the illegality of their conduct under other applicable laws. This is precisely the approach that the Court rejected in evaluating Lanier's substantive due process defense. If the Court of Appeals had applied the standard enunciated in *Lanier*, which would have required it to accept that, irrespective of a constitutional precedent on point, any reasonable officer would know that torture was prohibited by every other source of law, it would have rejected respondents' qualified immunity defense.

While the standard is an objective one, good faith remains at the heart of qualified immunity; indeed, the terms qualified immunity and "good faith immunity" are often used interchangeably. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Such immunity is not intended to protect defendants who

engage in deliberately unlawful conduct. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Respondents knew, as the prison guards knew in *Hope*, that they were violating their own regulations. Moreover, as in *Hope*, the "obvious cruelty inherent" in torture put respondents on notice of their violations of law. They knew, as any reasonable officer would, that torture violated U.S. criminal and military law. They knew, as any reasonable officer would, that torture in a prison setting was unconstitutional. *Brown*, 297 U.S. at 285-86. They knew that even those who believe that aliens in detention have few or no constitutional rights know that aliens surely "cannot be tortured." *Zadvydas*, 533 U.S. at 704 (Scalia, J. dissenting). Nevertheless, respondents ordered and supervised the torture and abuse of petitioners and numerous others at Guantánamo. Respondents' calculated legalistic machinations aimed at circumventing the laws prohibiting their conduct make them more rather than less culpable than the casually cruel prison guards in *Hope*.

As the Court made clear in *Lanier*, officials are not free to act in a deliberately wrongful manner so long as there is no constitutional precedent specifically addressing and prohibiting their conduct. *Lanier*, 529 U.S. at 271. "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet a license for lawless conduct – a license to torture, abuse and humiliate – is precisely what respondents sought at Guantánamo. In granting review, this Court has the opportunity to revoke that "license," extending a minimum

guarantee of dignity and decency to the hundreds who remain in detention at Guantánamo.

Respondents selected Guantánamo as plaintiffs' detention facility in a cynical attempt to avoid accountability for conduct that had long been held unconstitutional when it occurred in U.S. prisons. But Guantánamo is not a Hobbesian enclave where defendants could violate clear prohibitions on their conduct imposed by statute and regulations and then point to a purported constitutional void as a basis for immunity. It is of critical importance that this Court strongly affirm that torture is unequivocally beyond the pale for officials of the United States, wherever they may be operating.

III. THIS COURT SHOULD MAKE CLEAR THAT TORTURE CAN NEVER BE WITHIN THE SCOPE OF AN OFFICIAL'S EMPLOYMENT.

This case further presents an important opportunity to draw a clear line between the permissible functions of a U.S. government official in conducting interrogations of detainees in custody and the use of torture. The district court and the Court of Appeals erased that line, holding that torture was "foreseeable," App. 29a, 124a, and "incidental to the defendants' legitimate employment duties." App 26a. The courts held that respondents were therefore immune from personal liability under the Westfall Act, 28 U.S.C. § 2679(d)(1). This Court has recognized that torture violates the most basic norms of civilized conduct and law. *Brown*, 297 U.S.

at 285-86. Yet the decisions below finding torture and abuse to be "incidental" to the task of interrogation can only be construed as acceptance of the repellent proposition that torture is expectable in the context of authorized interrogation and that senior U.S. military officials who order it should be immunized. Torture is not incidental to military operations; it is directly contrary to military law, training and tradition. Left in place, the Court of Appeals' holding cloaks the torturer with absolute immunity under the Westfall Act.

Numerous cases involving foreign dictators, officials and military officers have made clear that torture can never be authorized as an official act. *See Nuru v. Gonzalez*, 404 F.3d 1207 1222-23 (9th Cir. 2005); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Filartiga*, 630 F.2d 876; *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995). It is also so repugnant to all civilized norms that it can never be deemed incidental to a public official's duties. Nor can it be seen as foreseeable or expectable that the Secretary of Defense and senior officers of the military would deliberately order and supervise torture and abuse. Military law since the founding of the Republic has made clear that prisoners are *not* to be tortured. Torture is never incidental to proper military interrogation; it cannot be authorized. App. 208a-09a, 228a. The U.S. State Department has made clear that torture is always condemned, always unauthorized and that "a commanding officer who orders [torture] *would be acting outside the scope of his or her position* and would be individually

liable for the intentional infliction of bodily and emotional harm." App. 231a (emphasis added).

The Court of Appeals' decision creates a conflict between extensive jurisprudence in numerous Courts of Appeals establishing that foreign officials can never authorize torture and this case, which immunizes American officials who order torture in the course of interrogation. Not only is there uncertainty about whether officials can order torture, there is hypocrisy as well, where foreign torture is piously condemned and foreign commanders and officials are held accountable in the U.S. courts, but American officials claim complete immunity. The Court should grant review in the instant case to confirm that American officials, as well as foreign officials, will be held accountable when they cynically violate the universal prohibition against torture.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

/s/

MICHAEL RATNER
SHAYANA KADIDAL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6438

ERIC L. LEWIS
(Counsel of Record)
BAACH ROBINSON & LEWIS PLLC
1201 F Street, NW
Suite 500
Washington, DC 20004
(202) 833-8900

August 22, 2008