[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 BRIEF FOR APPELLEES/CROSS-APPELLANTS

MICHAEL F. HERTZ
Acting Assistant Attorney General

ROBERT M. LOEB
MATTHEW M. COLLETTE
Attorneys, Appellate Staff
Civil Division, Room 7212
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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GLOSSARY

Bivens:	*Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)
Geneva Conventions:	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civiliams Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287
RFRA:	Religious Freedom Restoration Act
Westfall Act:	Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563

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INTRODUCTION AND SUMMARY

Pursuant to the Court's order of December 22, 2008, appellees/cross-appellants submit this supplemental brief to address "the effect, if any, of the holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), on this court's opinion in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), in light of Circuit precedent."

At the outset, we note that *Boumediene* cannot possibly change this Court's holding that plaintiffs' claims must be dismissed. Both the constitutional claims and

the RFRA claim present questions of qualified immunity. *Boumediene* – decided four years after plaintiffs' detention ended – cannot support a finding that the law was so clearly established that a reasonable official would have known that his or her conduct violated the Constitution or the RFRA statute. Because government officials are not "expected to predict the future course of constitutional law," *Procunier v. Navarette*, 434 U.S. 555, 562 (1978), decisions that post-date the conduct in question cannot be used to deny qualified immunity on the *Bivens* and RFRA claims. Accordingly, this Court can resolve this case simply by noting that the subsequent decision in *Boumediene* has no effect on the defendants' qualified immunity – already sustained by this Court – for conduct that pre-dates the decision. *See Pearson v. Callahan*, 555 U.S. __, 2009 WL 128768, at *9 (2009) (holding that "the district court and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the case at hand").

It accordingly is unnecessary for the Court to address the question whether plaintiffs have constitutional due process rights. *See Pearson,* 2009 WL 128768, at *12 (noting that deciding the merits before qualified immunity "departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel 'not to pass on questions of constitutionality * * * unless such adjudication

is unavoidable") (citations omitted). If the Court does so, however, as explained at pp. 5-7, *infra*, this Court's recent, post-*Boumediene* decision in *Kiyemba v. Obama*, __ F.3d __, 2009 WL 383618, No. 08-5424, slip op. at 8-9, 18 (D.C. Cir. February 18, 2009), holds that aliens held at Guantanamo do not have due process rights, and is controlling authority here.

The Court should also hold, in the alternative, that special factors preclude the inferring of a cause of action under *Bivens* here. Indeed, the Court could dispose of this case at the outset on that ground. There is a substantial possibility that *Kiyemba*'s constitutional holding could be subject to a petition for rehearing *en banc* or for a writ of certiorari, either in *Kiyemba* itself or in this case. In light of both the individual defendants' clear entitlement to qualified immunity and the very strong special factors that counsel hesitation in recognizing a cause of action under *Bivens* in this context (as Judge Brown concluded), the prospect of further review in regard to the question of constitutional rights possessed by the detainees at Guantanamo should not delay the final termination of this action. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[t]he entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability") (emphasis in original).

Boumediene likewise does not undermine this Court's conclusion that RFRA does not apply to plaintiffs. This Court's RFRA holding was based upon an

interpretation of the statute, guided by congressional intent, and was not a holding on the current status of constitutional law. *Boumediene* did not address this statutory interpretation question, and therefore has no relevance to the RFRA issue. Moreover, as noted above, this Court after *Boumediene* has reaffirmed that the alien detainees at Guantanamo do not have constitutional rights beyond the Suspension Clause. *See Kiyemba, supra.*

Finally, this Court's holding affirming the dismissal of plaintiffs' claims under the Alien Tort Statute (ATS) and the Geneva Conventions is unaffected by *Boumediene*. The Court's decision regarding those claims turned on the interpretation of a statute (the Westfall Act, 28 U.S.C. § 2679(b)(1)), and *Boumediene* has no bearing on the Court's holding that the alleged conduct here fell within the scope of defendants' employment under the statute.

ARGUMENT

I. THE COURT'S PREVIOUS HOLDING AFFIRMING THE DISMISSAL OF PLAINTIFFS' *BIVENS* CLAIMS IS UNAFFECTED BY *BOUMEDIENE*.

In its previous decision, this Court held that plaintiffs' constitutional claims were properly dismissed for two reasons. First, the Court held, on the basis of Supreme Court and Circuit precedent, that detainees at Guantanamo lack Fifth and Eighth Amendment rights because they are aliens without property or presence in the

United States. 512 F.3d at 663-65. Second, the Court held that, "[e]ven assuming arguendo the detainees can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to the defendants' assertion of qualified immunity" because it was not clearly established that aliens at Guantanamo possessed constitutional rights. *Id.* at 665. As we explain below, controlling Circuit precedent supports both of these holdings.

1. The question whether plaintiffs possess Fifth and Eighth Amendment rights is governed by this Court's recent decision in *Kiyemba v. Obama*, __ F.3d __, No. 08-5424 (D.C. Cir. February 18, 2009). *Kiyemba*, decided after *Boumediene*, reaffirmed this Court's prior holding that aliens detained at Guantanamo have no constitutional due process rights. *See id.*, slip op. at 8-9, 18.

In its prior opinion in this case, the Court relied on its decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). *See* 512 F.3d at 663-665. In *Boumediene,* this Court held that the bar to habeas corpus for detainees at Guantanamo did not violate the Suspension Clause of the Constitution because, as aliens outside the United States without property or presence in the United States, the detainees do not have any constitutional rights. The Supreme Court reversed this Court's decision in *Boumediene*, holding that the Suspension Clause does apply to detainees at Guantanamo. In doing so, the Court addressed prior cases concerning the application

of particular provisions of the Constitution outside the United States in certain contexts, rejected the contention that the absence of *de jure* sovereignty over Guantanamo Bay was a categorical bar to application of the Suspension Clause, identified factors it concluded were relevant for determining whether the Suspension Clause applied to the detainees at Guantanamo, and acknowledged that it had never previously held that noncitizens detained by the Government in territory over which another country maintains *de jure* sovereignty have any rights under the Constitution.

The Supreme Court subsequently granted the certiorari petition in this case, vacated this Court's judgment, and remanded for further consideration in light of its decision in *Boumediene*. *See* 128 S. Ct. 763. This Court then ordered the parties to address "the effect, if any, of the holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), on this court's prior opinion in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), in light of Circuit precedent." As noted above, the Supreme Court in *Boumediene* reversed this Court's holding in *Boumediene* (relied upon by the panel in this case) that the detainees at Guantanamo have no rights at all under the Constitution, and held that the detainees do have rights under the Suspension Clause. Since the Supreme Court issued its order on December 22, 2008, this Court rendered its decision in *Kiyemba*, In *Kiyemba*, the Court concluded that the Supreme Court in *Boumediene* limited its "holding" to the Suspension Clause (slip op. 18), and this

Court held that the Due Process Clause does not apply to detainees at Guantanamo Bay (slip op. 8-9). In light of that intervening "Circuit precedent" (Dec. 22, 2008, Order), there is no occasion here to consider further the extent to which the Supreme Court's holding in *Boumediene* might affect this Court's prior opinion in this case.

Thus, the controlling precedent of this Circuit supports reinstatement of this Court's prior judgment of dismissal of the constitutional claims. That is true even though the mandate in *Kiyemba* has not yet issued, and even if the plaintiffs in that case seek rehearing *en banc* or certiorari. *See United States v. Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006) ("[W]e are, of course, bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court"); *Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir.1985).

2. This Court need not resolve the underlying constitutional issue, however, because *Boumediene* does nothing to alter this Court's previous alternative holding that any constitutional rights plaintiffs may have were not clearly established, and therefore that defendants are entitled to qualified immunity. Even if the Court determines that the constitutional claims must be dismissed on the controlling authority of *Kiyemba*, the Court (as it did in its previous opinion) should hold, in the alternative, that defendants are entitled to qualified immunity, so that any further

review of the holding in *Kiyemba* does not unduly prolong the current action against the individual defendants.

At the time of petitioners' detention (between 2002 and March 2004), it was, at a bare minimum, not clearly established that the Fifth and Eighth Amendments protected aliens detained abroad by the military. To the contrary, the law of this Circuit, and of other courts of appeals, uniformly held that aliens outside the sovereign territory of the United States did not have enforceable Fifth and Eighth Amendment rights. *See Rasul*, 512 F.3d at 663-66. Indeed, there were cases that specifically addressed the lack of constitutional rights for aliens at Guantanamo. The Eleventh Circuit had held that alien refugees there had "no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995). Perhaps most telling, this Court specifically concluded—during the period of petitioners' detention—that the Fifth Amendment does not apply to aliens held at Guantanamo. *Al Odah* v. *United States*, 321 F.3d 1134, 1140-1144(D.C. Cir. 2003). Even after the Supreme Court reversed *Al Odah* on statutory grounds, *see Rasul v. Bush*, 542 U.S. 466, 476 (2004), district courts reached opposing conclusions about whether Guantanamo detainees had Fifth Amendment rights. *See Boumediene*, 128 S. Ct. at 2241 (describing district court opinions). In fact, more than four years after petitioners were released from United States custody, the Supreme 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." *Id.* at 2262.

When "judges thus 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). In the present case, plainly, the constitutional rights asserted by plaintiffs, which are still not established today, *see Kiyemba*, slip op. at 8, 18, were not clearly established at the time of the alleged acts in question here. Accordingly, this Court was correct in concluding that a reasonable officer would not have concluded that plaintiffs here possessed Fifth and Eighth Amendment rights while they were detained at Guantanamo.

3. Finally, there is an independent alternative basis for affirming the district court's dismissal of plaintiffs' *Bivens* claims that this Court should also reach. As we demonstrated in our earlier brief (at 35-40), and as Judge Brown determined in her concurring opinion, even assuming that the conditions of petitioners' detention at Guantanamo were governed by the Fifth and Eighth Amendments, special factors counsel against recognizing a *Bivens* remedy in this context. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007) (noting that even if there is no alternative damages remedy available to a putative *Bivens* plaintiff, the courts must "pay[] particular heed

* * * to any special factors counseling hesitation before authorizing a new kind of federal litigation") (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

Courts have been particularly careful not to intrude upon sovereign prerogatives by creating a *Bivens* remedy in contexts involving national security and foreign policy. *See United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Supreme Court has suggested that such a limitation on *Bivens* remedies would be appropriate if the Fourth Amendment were held to govern actions that the military took against aliens abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990). Moreover, this court has held that tort claims against a former National Security Advisor for summary execution and torture were nonjusticiable. *See Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190, 191,194, 197 (D.C. Cir. 2005). And this Court has previously held that no damages remedy should be available "against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

Allowing a *Bivens* action against U.S. military officials for actions taken with respect to aliens detained during wartime would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the

political branches. The prospect of individual liability increases the likelihood that officials will make decisions based upon fear of litigation rather than appropriate military policy. In light of the potential for intrusion into military, national security and foreign affairs, the Court should not imply a *Bivens* remedy.

II. THIS COURT'S DECISION THAT THE RFRA CLAIM SHOULD BE DISMISSED REMAINS VALID AFTER *BOUMEDIENE*.

This Court's decision that plaintiffs' RFRA claim must be dismissed also is unaffected by *Boumediene*. The Court held that plaintiffs are not "persons" within the meaning of the statute. In so ruling, the Court relied upon the unambiguous congressional intent "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. Judge Brown, while disagreeing with the majority's statutory construction, concluded that applying RFRA to plaintiffs would cause a result "demonstrably at odds with the intentions of its drafters," and also concluded that RFRA's application outside the sovereign territory of the United States was not clearly established. *Id.* at 675-76.

None of this reasoning is affected by the Supreme Court's subsequent decision in *Boumediene*. This Court's previous RFRA holding was not based upon an interpretation of the current status of constitutional law that might be affected by a new Supreme Court decision. Rather, the Court held that Congress intended to

incorporate the standard governing Free Exercise cases that existed before the Supreme Court's decision in *Smith*, and that it intended RFRA's application to "persons" to apply to individuals who had recognized Free Exercise rights at that time. *See Rasul*, 512 F.3d at 671. Because the application of RFRA is a statutory question about congressional intent, and not simply a determination of the current state of the Constitution's application to aliens at Guantanamo, *Boumediene* has no relevance to this Court's RFRA holding.

When Congress enacted RFRA, it had long been established that aliens outside U.S. territorial jurisdiction who lacked a substantial connection to the United States are not entitled to First Amendment protection. *See, e.g., United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); *see also Verdugo-Urquidez*, 494 U.S. at 265. Applying these principles, the Eleventh Circuit held that aliens at Guantanamo may not assert First Amendment rights. *Cuban-American Bar Ass'n*, 43 F.3d at 1425-27. The courts also had made clear that the "people" protected by the Fourth Amendment are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265; *see Turner*, 194 U.S. at 292 (an excludable alien is not entitled to First Amendment rights because the alien "does not become one of the people to whom these things are secured by our Constitution by

an attempt to enter, forbidden by law"). Moreover, the courts had uniformly held that aliens outside the sovereign territory of the United States are not "person[s]" under the Fifth Amendment. *Verdugo-Urquidez*, 494 U.S. at 269; *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *Peoples Mojahedin Org.* v. *United States*, 182 F.3d 17, 22 (D.C. Cir. 1999). And, as discussed above, this Court after *Boumediene* has reaffirmed that the alien detainees at Guantanamo do not have constitutional rights beyond the Suspension Clause. *See Kiyemba*, *supra.*

But even if *Boumediene*'s Suspension Clause holding could be extended 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*. In short, the subsequent holding in *Boumediene* cannot retroactively change the clear intent of Congress that enacted the statute many years ago.

Finally, even if one concluded, on the basis of recent case law, that RFRA applies to aliens detained at Guantanamo, dismissal of the RFRA claim would be required here because defendants are entitled to qualified immunity. At the time plaintiffs were detained (between 2002 and March 2004), a reasonable official could have doubted, at a minimum, that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war. As explained above, a reasonable official could have concluded from

RFRA's text and legislative history that the statute was designed merely to restore the legal standard governing pre-existing free exercise rights. *See, e.g.*, S. Rep. No. 103-111, 103d Cong., 1st Sess. 12, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 ("[T]he purpose of this act is only to overturn the Supreme Court's decision in *Smith*.") (emphasis added); *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 638 (1999) ("Through RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith*").

Moreover, a reasonable official would have been justified in relying on prior case law establishing that aliens outside the United States in general—and aliens at Guantanamo in particular—did not enjoy First Amendment rights. *See, e.g., Verdugo-Urquidez*, 494 U.S. at 265; *Cuban Am. Bar Ass'n*, 43 F.3d at 1429-1430. Accordingly, nothing in *Boumediene* undermines this Court's previous decision that the RFRA claims against the individual defendants must be dismissed.

III. NOTHING IN *BOUMEDIENE* AFFECTS THIS COURT'S PRIOR HOLDING THAT PLAINTIFFS' INTERNATIONAL LAW CLAIMS WERE PROPERLY DISMISSED PURSUANT TO THE WESTFALL ACT.

This Court's holding that plaintiffs' claims under the ATS and the Geneva Conventions must be brought, if at all, against the United States under the FTCA remains unaffected by *Boumediene*. That holding was based on District of Columbia tort law, applicable through the Westfall Act. *Boumediene* addresses neither the

Westfall Act nor District of Columbia Tort law. Indeed, in their petition for certiorari, plaintiffs did not contend that this Court's decision dismissing the ATS and Geneva Conventions claims was inconsistent with *Boumediene*. Accordingly, there is no basis for altering this Court's previous decision on the applicability of the Westfall Act.

CONCLUSION

For the foregoing reasons, 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,

MICHAEL F. HERTZ
Acting Assistant Attorney General

ROBERT M. LOEB
(202) 514-4332
MATTHEW M. COLLETTE
(202) 514-4214
Attorneys, Appellate Staff
Civil Division, Room 7212
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2009, I served the foregoing Supplemental Brief for Appellees/Cross-Appellants upon counsel of record by causing two copies to be hand delivered (as noted), and mailed to:

Eric L. Lewis **[by hand delivery]**
Anne Katherine Toomey
Sarah L. Knapp
Elizabeth A. Wilson
Baach, Robinson & Lewis
1201 F Street, N.W.
Suite 500
Washington, DC 20004-1225

William C. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 02101

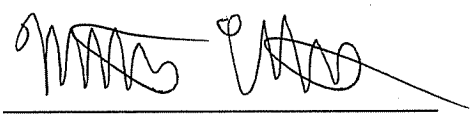
Sidney S. Rosdeitcher
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064

Jerome A. Hoffman
Christopher C. Lund
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104

Michael Ratner
Jennifer M. Green
Shayana Kadidal
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Paul Hoffman
Schonbrun, DeSimone, Seplow
Harris & Hoffman
723 Ocean Front Walk
Venice, CA 90201

K. Hollyn Hollman
Baptist Joint Committee
for Religious Liberty
200 Maryland Ave., N.E.
Washington, DC 20002



MATTHEW M. COLLETTE
Attorney