[NOT YET 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

REPLY BRIEF FOR APPELLEES/CROSS-APPELLANTS

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GLOSSARY

APA:	Administrative Procedure Act
Br.:	Brief for Appellant/Cross-Appellee
FTCA:	Federal Tort Claims Act
Guantanamo:	U.S. Naval Base at Guantanamo Bay, Cuba
RFRA:	Religious Freedom Restoration Act
RLUIPA:	Religious Land Use and Institutionalized Persons Act

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INTRODUCTION AND SUMMARY OF ARGUMENT

As we demonstrated in our opening brief, plaintiffs cannot claim rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, for two reasons.

1. First, RFRA applies only to "persons," and aliens who are captured during an armed conflict and held outside the sovereign territory of the United States are not "persons" under RFRA. Instead, as evidenced by the plain text and legislative

history of the statute, RFRA applies only to individuals who are covered by the First Amendment. Congress enacted RFRA to "*restore* the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," 42 U.S.C. § 2000bb(b)(1), and not to extend free exercise rights to aliens who never had them before.

Because RFRA is not broader in scope than the First Amendment, RFRA does not apply to plaintiffs. The courts have long recognized that aliens outside U.S. sovereign territory who lack a substantial connection to the United States, including the aliens held at Guantanamo, are not entitled to First Amendment protection. *See United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1425-27 (11th Cir. 1995). Indeed, this Court has made clear that the Guantanamo detainees lack constitutional rights altogether. In *Boumediene* v. *Bush*, 476 F.3d 981 (D.C. Cir. 2007), *pets. for cert. filed*, Nos. 06-1195, 06-1196, the Court determined that "[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States," and that this precedent "forecloses the detainees' claims to constitutional rights." *Id.* at 991, 992; *see also United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

Plaintiffs' attempt to show that Congress intended to confer rights to aliens who were never protected by the Free Exercise Clause is without merit. Plaintiffs wholly ignore Congress's express purpose, which is unambiguously stated on the face of the statute, Congress's findings, and the legislative history. Instead, plaintiffs contend only that, because "person" is construed broadly in other statutes, it should be construed broadly here as well. But the very cases plaintiffs cite confirm that the meaning of the word "person" "depends on circumstances." *See, e.g., Constructores Civiles de Centroamerica v. Hannah,* 459 F.2d 1183, 1190 (D.C. Cir. 1972). Here, in context, in light of the unambiguous purpose of the statute, "person" cannot be read to include aliens captured during wartime and detained outside the United States.

2. Second, under the well-established presumption against extra-territorial application of statutes, *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 258 (1991), RFRA does not apply to Guantanamo. Plaintiffs rely upon RFRA's language defining "government" to include a "branch, department, agency, instrumentality, and official" of "the District of Columbia, the Commonwealth of Puerto Rico, and each *territory and possession* of the United States." Pl. Br. at 33 (citing 42 U.S.C. § 2000bb-2) (emphasis added). But the most natural reading of the phrase, "territory and possession of the United States," does not include Guantanamo, where the United States exercises control but "not ultimate sovereignty." *Rasul* v. *Bush*, 542 U.S. 466,

475 (2004). First, the phrase appears in a list of places in which the United States is sovereign, specifically "the District of Columbia [and] the Commonwealth of Puerto Rico." 42 U.S.C. § 2000bb-2(2). Because a word is known by the company it keeps, the term "territory and possession" should not be read to include areas such as Guantanamo where the United States is not sovereign. Second, the definition of "government," in which the term appears, expressly contemplates that an entity must have "branch[es], department[s], agenc[ies], instrumentalit[ies], and official[s]," in order to be a "territory and possession" as that term is used in RFRA. Guantanamo does not, and hence it is not covered by RFRA.

3. Finally, any RFRA rights of aliens detained at Guantanamo were not clearly established at the time of their detention, and defendants therefore are entitled to qualified immunity. In light of the substantial case law establishing that aliens outside the United States do not have First Amendment rights, and RFRA's explicit use of the First Amendment as a benchmark for defining the scope of its coverage, a reasonable official could have believed that RFRA did not create entirely new free exercise claims for aliens outside the United States.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY ON PLAINTIFFS' CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

A. RFRA Does Not Apply To Aliens Detained At Guantanamo.

In our opening brief, we showed that RFRA does not apply to plaintiffs for two reasons. First, aliens detained outside the United States are not "persons" entitled to protection under the statute. And second, RFRA does not apply extra-territorially to Guantanamo. Plaintiffs do not provide a persuasive response to either point.

1. Aliens Captured During Wartime And Detained Outside the Sovereign Territory of the United States Are Not "Persons" Within The Meaning of RFRA.

It is undisputed that Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). As the plain text of the statute indicates, Congress's express purpose was to "*restore* the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1) (emphasis supplied). To that end, Congress provided "a claim or defense to *persons* whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(2) (emphasis added); *see id.* § 2000bb-1(c); *id.* §

2000bb-1(b) (providing that a "Government may substantially burden a person's exercise of religion" only if it can satisfy the *Sherbert* compelling-interest test).

a. Plaintiffs do not deny that RFRA applies only to a "person" whose religious exercise is burdened, 42 U.S.C. § 2000bb-1. Nor do they dispute that aliens held outside the United States are not "people" entitled to First Amendment protection. Indeed, as we demonstrated in our opening brief, courts have long recognized that aliens detained at Guantanamo may not assert First Amendment claims. *Cuban-American Bar Ass'n*, 43 F.3d at 1425-27. The "people" protected by the First 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*, 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").

The Supreme Court and this Court have likewise held that aliens outside the sovereign territory of the United States are not "person[s]" under the Fifth Amendment. *Verdugo*, 494 U.S. at 269; *Jifry*, 370 F.3d at 1182; *Peoples Mojahedin Org.* v. *United States*, 182 F.3d 17, 22 (D.C. Cir. 1999). And just last month, this Court confirmed that aliens detained at Guantanamo lack constitutional protection

altogether. *See Boumediene*, 476 F.3d at 987-93. After concluding that the writ of habeas corpus would not have been available to Guantanamo detainees in 1789, the Court held that the detainees' constitutional challenge to the Military Commissions Act suffered from an additional defect: "Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* at 991. The Court adopted the reasoning of *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd on other grounds sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004), and *Johnson* v. *Eisentrager*, 339 U.S. 763, 781-85 (1950), and determined that "[p]recedent in this circuit . . . forecloses the detainees' claims to constitutional rights." *Id.* (citations omitted).[1]

b. Accordingly, for plaintiffs to prevail, they must demonstrate that the term "person" as used in RFRA encompasses a larger class of individuals than those protected by the Constitution. In other words, plaintiffs must show that RFRA conferred new free exercise rights on individuals who had never had such rights, rather than merely restoring the free exercises rights recognized under pre-*Smith* case law to individuals who had been covered by that case law.

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[1] Given the clear holding that plaintiffs' Suspension Clause claim fails because aliens outside the United States lack constitutional rights, plaintiffs err in asserting (Br. 30 n.12) that this holding is *dicta*. *Cf. MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 346 n.4 (1986) (alternative holdings are not *dicta*).

Yet the purpose of the Religious Freedom *Restoration* Act is clear: Congress intended "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]," 42 U.S.C. § 2000bb(b)(1).[2] Congress unambiguously stated this purpose on the face of the statute, immediately after Congress enumerated its "findings," all of which concerned the Constitution and restoring the standard that pre-dated *Smith*. These findings begin with a statement that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." *Id.* § 2000bb(a)(1). And the findings conclude with the observation that "the compelling interest test as set forth in prior Federal court rulings" is workable and sensible. *Id.* § 2000bb(a)(5). Nowhere did Congress suggest that it was seeking to extend statutory free exercise rights to individuals who never had constitutional free exercise rights.

The statute's legislative history is equally clear. For instance, the Senate Report states that "the purpose of the act is *only* to overturn the Supreme Court's decision in *Smith*." S. Rep. No. 103-111, 103d Cong., 1st Sess. 12, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902. The Act was intended to "respond[] to the Supreme

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[2] A second purpose articulated in the statute, to "provide a claim or defense to *persons* whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b)(2), merely begs the question presented here: whether aliens abroad are "persons" whose religious exercise may not be burdened except by meeting the compelling-interest standard of pre-*Smith* jurisprudence.

Court's decision in *Smith*," *id.* at 2, 1993 U.S.C.C.A.N. at 1893, and Congress expected courts to look to cases predating *Smith* in construing and applying RFRA. *See* H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 103-111, at 9, 1993 U.S.C.C.A.N. at 1898 ("[T]he compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith.*").[3] Defendants have found no authority suggesting that anyone in Congress intended to extend rights to aliens detained outside the United States.

Plaintiffs contend (Br. 36) that Congress enacted RFRA for the additional purpose of applying the compelling interest test to prison inmates and military personnel, overruling cases such as *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986). But even if that is true,[4]

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[3] Indeed, the original version of RFRA defined the term "exercise of religion" to mean "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1993). Congress amended RFRA when it enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), to incorporate the RLUIPA definition of religious exercise. *See* 42 U.S.C. § 2000bb-2(4) (incorporating 42 U.S.C. § 2000cc-5). While the new definition does not explicitly refer to the First Amendment, Congress did not indicate that "exercise of religion" would have a substantially different meaning under the amended statute.

[4] Consistent with its intent to restore the pre-*Smith* legal standard, Congress indicated that RFRA was not meant to eliminate the deference owed to military and prison officials recognized in cases such as *Shabazz* and *Goldman*. *See* S. Rep. No. 103-111, at 12, 1993 U.S.C.C.A.N. at 1901 ("The courts have always recognized the compelling nature of the military's interest in these objectives in the regulation of our armed services. Likewise, the courts have always extended to military authorities

it is entirely consistent with Congress's manifest purpose of protecting and bolstering the free exercise rights of those individuals who had free exercise rights before *Smith*. Both *O'Lone* (prisoners held in the United States) and *Goldman* (a chaplain at March Air Force Base) involved individuals with recognized pre-existing First Amendment rights. Neither case involved aliens detained outside the sovereign territory of the United States, who never had free exercise rights before.

c. Unable to rebut the weight of authority demonstrating the clear restorative purpose of the statute, plaintiffs choose to ignore it. Instead, plaintiffs draw analogies to unrelated statutes that have no relevance to RFRA. All these statutes prove is something the government is freely willing to concede – the word "person" in other contexts can have a broader definition, depending upon the circumstances and purpose of the particular statute. These provisions do not demonstrate, as plaintiffs would have this Court believe (Br. at 41-42), that the word "person" *always* includes aliens outside the sovereign territory of the United States. *See, e.g.*, *Verdugo*, 494 U.S. at 269; *Jifry*, 370 F.3d at 1182; *Peoples Mojahedin*, 182 F.3d at 22.

Indeed, the cases that plaintiffs cite make this very point. In *Constructores Civiles de Centroamerica* v. *Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972), the

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significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill."); H.R. Rep. No. 103-88, at 8.

Court recognized: "[N]on-residency may be important and relevant in many contexts. *It depends upon the circumstances.*" *Id.* (emphasis added). *Hannah* involved a foreign aid program designed to provide funds to contractors to build roads in Nicaragua. The Court held that contractors in Latin America were among the intended beneficiaries of the program, and therefore that the contractor had standing under the Administrative Procedure Act (APA) to challenge a ruling by the Agency for International Development that the contractor was not a qualified bidder under the program. *Id.* at 1186-90. But the Court acknowledged that non-resident aliens might not have standing under other statutes that use the word "person." *Id.* at 1189-90.

Another case on which plaintiffs rely, *Estrada* v. *Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961), is even less helpful to them. Plaintiffs cite it for the proposition that "person" as used in the APA should be interpreted broadly, Br. at 41, but as the Eleventh Circuit recognized in *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498, 1507 n.4 (11th Cir. 1992), "*Estrada* dealt with an alien who held a valid visa and subsequently was refused entry." By contrast, "in this case the plaintiffs never reached the United States so *Estrada* is not controlling." *Id.* The court concluded that the APA did not permit aliens interdicted on the high seas and who had not presented themselves at the borders of the United States to bring an APA action. *Id.* at 1507. Thus, case law concerning the APA actually undermines plaintiffs'

argument. Although the statute might be interpreted as covering aliens who have a substantial connection to the United States (*Estrada*), it does *not* cover aliens who do not (*Haitian Refugee Center*).[5]

At any rate, plaintiffs make no effort to show that, in light of the context and purpose of RFRA, the word "person" in that statute should be construed to include aliens captured during wartime and detained outside the United States. Indeed, as explained above, plaintiffs cannot do so because the unmistakable purpose of RFRA is "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]," 42 U.S.C. § 2000bb(b)(1), and not to extend rights to aliens who never had them before. The statute and legislative history demonstrate that not everyone in the world has rights under RFRA.

Accordingly, plaintiffs can find no comfort in *Rasul*'s discussion of the habeas statute (prior to its recent amendment). In *Rasul*, the Supreme Court said that "there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." 542 U.S. at 480-81. But,

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[5] *O'Rourke* v. *Department of Justice*, 684 F. Supp. 716 (D.D.C. 1988), also cited by plaintiffs (Br. 41), involved an action under the Freedom of Information Act by an alien who had entered the United States and was detained within the United States for four years. *Id.* at 717-18. The court merely held that "person" as used in that statute did not exclude aliens, present on U.S. sovereign territory, who were not lawful residents of the United States. *Id.*

unlike the habeas statute, there is every reason to think that Congress intended to exclude aliens abroad, even if the statute applies to U.S. citizens abroad. The overriding purpose of RFRA was to restore pre-existing constitutional standards that did not apply to aliens abroad. Because plaintiffs do not have rights under the First Amendment, they have no rights under RFRA.

Finally, there is no merit to plaintiffs' argument that Congress could have expressly excluded aliens outside the sovereign territory of the United States if it had wanted to do so. (Br. at 41-42). By the same token, Congress could have expressly included such aliens if it had wanted to do so. All plaintiffs have shown is that Congress could have made the statute even more clear than it did. But that is true for almost all legislation, and therefore "proves very little." *Doris Day Animal League v. Veneman*, 315 F.3d 297, 299 (D.C. Cir. 2003). "Congress almost always could write a provision in a way more clearly favoring one side – or the other – in a dispute over the interpretation of a statute. Its failure to speak with clarity signifies only that there is room for disagreement about the statute's meaning." *Id.* Here, in light of Congress's manifest purpose, its express findings, and the legislative history, the Court should construe RFRA as simply restoring rights, and not bestowing rights on aliens who never had them before.

2. RFRA Does Not Apply To Guantanamo.

Indeed, if there were any doubt whether RFRA applied to aliens abroad, such doubt would be resolved by the background principal that statutes do not apply extra-territorially. As we explained in our opening brief (at 52), statutes are presumed not to operate outside the sovereign jurisdiction of the United States absent a "clear statement" to the contrary, *see, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258 (1991). RFRA contains no such statement. Nowhere in the statute did Congress provide that it was extending rights to aliens in Guantanamo, where the United States exercises control but "not 'ultimate sovereignty,'" *see Rasul*, 542 U.S. at 475.

Plaintiffs attempt to seek refuge in the statute's reference to "territor[ies] and possession[s]" (Br. 37), but that term does not provide a clear statement that RFRA applies to Guantanamo. In many contexts, that same term has been construed to encompass only areas in which the United States exercises sovereign authority. *See, e.g.*, *People of Saipan* v. *Department of the Interior*, 502 F.2d 90, 95 (9th Cir. 1974) (holding that the Trust Territory of the Pacific Islands "is not a territory or possession, because technically the United States is a trustee rather than a sovereign"); *District of Columbia National Bank* v. *District of Columbia*, 348 F.2d 808, 812 (D.C. Cir. 1965) (recognizing that "a territory or possession may not tax the instrumentality of

its sovereign without the latter's consent"); *see also Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 386 (1948) (meaning of term depends upon the "motive and purpose" of the statute"); *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (examination of a statute for extra-territorial application requires the consideration of "both contextual and textual evidence"), *cert. denied*, 544 U.S. 950 (2005).

In RFRA, the phrase "territory and possession" cannot be read expansively to cover Guantanamo. First, the phrase appears in a list of places over which the United States is sovereign, namely "the District of Columbia [and] the Commonwealth of Puerto Rico." 42 U.S.C. § 2000bb-2(2). Because a word is known by the company it keeps, *see, e.g.*, *Washington State Dept. of Social and Health Services* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (applying *noscitur a sociis)*, the term "territory and possession" does not include areas such as Guantanamo.

Moreover, the term applies only to places, like the District of Columbia and Puerto Rico, that have government structure, such as branches and departments, which are typical of territories over which the United States is sovereign. The term

appears only once in the statute and only as part of the definition of "government."[6] RFRA imposes substantive requirements on "governments," *see* 42 U.S.C. § 2000bb-1, and defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). A "covered entity," in turn, means "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." 42 U.S.C. § 2000bb-2(2). Guantanamo cannot fit within this definition. For something to be a "territory and possession" and thus a "government" subject to RFRA, Congress expected it to have its own "branch[es], department[s], agenc[ies], instrumentalit[ies], and official[s]." The statute presupposes that "territories and possessions" have such structure, but Guantanamo does not. It is simply an area controlled by the United States. Guantanamo is not a "government," and thus it is not subject to RFRA.[7]

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[6] In *Vermilya-Brown*, by contrast, Congress had used the term "possession" to "bound the geographic coverage of the Fair Labor Standards Act." 335 U.S. at 386. Rather than using the word "possession" to refer to a type of government, that statute provided that it applied to commerce "among the several States or from any State to any place outside thereof," with "State" defined to include "any Territory or possession of the United States." *Id.* at 379 (quotation omitted).

[7] The fact that "branch[es], department[s], agenc[ies], instrumentalit[ies], and official[s]" of the United States are included in the definition of "government" is irrelevant. The actions of the United States in Guantanamo are not subject to RFRA unless RFRA applies extra-territorially to Guantanamo.

Plaintiffs ignore the context of the statute, and they fail even to address the many contexts (cited in our opening brief, at 57) in which the phrase "territory and possession" is construed narrowly to refer only to areas in which the United States exercises sovereign authority. Instead, plaintiffs rely upon *Vermilya-Brown*, which involved the application of the Fair Labor Standards Act to a leased military base on Bermuda. But, as plaintiffs admit (Br. 34), the Court in that case held that the meaning of "territory and possession" varies from statute to statute, depending upon the congressional "motive and purpose." *Id.* at 388.

As shown, the context in which "territory and possession" appears in RFRA confirms that Congress did not intend to vest that term with extra-territorial scope. Congress intended RFRA to apply to areas over which the United States is sovereign, such as the District of Columbia and the Commonwealth of Puerto Rico, where individuals have possessed First Amendment rights. Congress's "motive and purpose" was to restore pre-*Smith* free exercise rights. Because sovereignty, and not mere jurisdiction and control, has been the benchmark for determining the geographical reach of constitutional rights, *Verdugo*, 494 U.S. at 269; *Boumediene*, 476 F.3d at 992; *Cuban-American Bar Ass'n*, 43 F.3d at 1425, the phrase "territory and possession" in RFRA does not constitute a clear statement of extra-territorial application.

Lacking a secure textual basis for extra-territorial application of RFRA, plaintiffs attempt to invoke the statute's legislative history. Yet even if legislative history could ever be sufficient to provide a clear statement, *but see Delgado-Garcia*, 374 F.3d at 1345 (examination turns on "contextual and textual evidence"), RFRA's legislative history is not. Plaintiffs seize upon one line in the Senate Report referring to a "unitary standard" under RFRA. S. Rep. No. 103-111, at 12, 1993 U.S.C.C.A.N. at 1901. Yet neither plaintiffs nor *amicus* explains how the existence of a particular standard (here the compelling interest test) implies an intent to expand the scope of the statute beyond our Nation's borders. At most, this reference merely shows that Congress intended to apply the same standard to all claims within the reach of the statute. And, even if plaintiffs are correct that Congress intended RFRA to apply to prison inmates (Br. 36), there is nothing in this intent that implies, let alone provides a clear statement, that Congress intended the statute to apply to prison inmates outside the sovereign territory of the United States.

The same is true with respect to RFRA's application to the military. While plaintiffs contend that the legislative history discussed "at some length" the case law and statutes governing the free exercise rights of military personnel (Br. 34), plaintiffs offer nothing demonstrating an intent to apply RFRA extra-territorially. The best plaintiffs can do is a floor statement made by a member of Congress seven years after

the enactment of RFRA, during debates over the Religious Land Use and Institutionalized Persons Act (RLUIPA), which included some minor amendments to RFRA. *See* 145 Cong. Rec. S7991, 7993 (Statement of Sen. Thurmond). And even that statement merely expressed a concern about RFRA's application to the military, citing a pre-RFRA incident at a foreign military base, involving religious restrictions on U.S. military personnel. *See id.* A post-enactment statement by one Senator (whose objection did not carry the day) simply does not support plaintiffs' assertion that "Congress intended to cover United States military bases worldwide" (Br. 25). *See Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 484 (1997); *see also United States* v. *Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").[8]

Recognizing that they cannot overcome the presumption against extra-territorial application, plaintiffs half-heartedly suggest (Br. 37-38) that the presumption does not apply here because there is no conflict with the laws of another sovereign nation. But the Supreme Court has twice rejected precisely this argument, holding that the presumption applies even when there is no danger of conflict with

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[8] Moreover, even if RFRA permits free exercise claims by military personnel stationed outside the United States, there is nothing in the statute to suggest that the statute applies to aliens captured and held outside the United States, and there is no reason to believe that Congress contemplated such a result. *See* pp. 7–14, *supra*.

the laws of other nations. *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993) ("the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations."); *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993) ("the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind.").

Congress plainly had "domestic concerns in mind" when it enacted RFRA. Acting against a backdrop of case law holding that aliens outside the United States are not entitled to constitutional protections, Congress enacted a statute designed to restore previously-recognized constitutional protections, ensuring that a particular standard (the compelling interest test) would govern those claims. Absent a specific reason to believe that Congress intended to extend the statute's reach to aliens with no substantial connection to the United States, the presumption against extra-territorial application of statutes applies with full force.

Finally, plaintiffs contend (Br. 39) that even if RFRA does not apply to Guantanamo, they can bring a RFRA action in this case because the statute "clearly controls the conduct of the defendants in the United States." This contention reflects a misunderstanding of the "outside effects" exception recognized in *Environmental Defense Fund* v. *Massey*, 986 F.2d 528 (D.C. Cir. 1993). In that case, this Court held

that "[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extra-territoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." *Id.* at 531.

However, nothing in *Massey* suggests that a statute is not extra-territorial merely because a person can allege that conduct outside the United States is the result of a policy formulated within the United States. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 702-12 (2004) (rejecting the "headquarters doctrine" under the foreign country exception to the Federal Tort Claims Act). In *Massey*, the court declined to apply the presumption against extra-territorial application to the National Environmental Policy Act (NEPA) because the act "imposes no substantive requirements which could be interpreted to govern conduct abroad." 986 F.2d at 533. In fact, NEPA imposed no substantive requirements at all, since it was designed to "control the decisionmaking process of U.S. federal agencies, not the substance of agency decisions." *Id.* at 532.

This case, however, is not a simple matter of a decision made and carried out in the United States having "effects" outside the country. Here, the alleged violations themselves occurred at Guantanamo, and allegations that those violations were the result of the policies or failures of officials in the United States provide no basis for

abandoning the traditional presumptions governing extra-territorial application of statutes.

B. Any Application Of RFRA To Aliens At Guantanamo Was Not Clearly Established.

Even if this Court concludes that RFRA applies to detainees held at Guantanamo, defendants are entitled to qualified immunity because reasonable officials could have doubted that RFRA granted rights to aliens captured on foreign soil during wartime and held at a facility outside the United States. A reasonable official could conclude from RFRA's text and legislative history that the statute was designed merely to restore the legal standard governing pre-existing free exercise rights. Indeed, as noted, the legislative history stated that "the purpose of this act is *only* to overturn the Supreme Court's decision in *Smith*." S. Rep. No. 103-11, at 2, 1993 U.S.C.C.A.N. at 1902 (emphasis supplied).

Moreover, a reasonable official would have been justified in relying upon case law establishing that aliens outside the United States in general – and Guantanamo detainees in particular – did not have the previously-recognized constitutional rights addressed by RFRA. If there were any doubt as to the reasonableness of that view, this Court dispelled it in *Boumediene*. As discussed above, the Court in that case reaffirmed the decisions in *Al Odah*, 321 F.3d at 1144, and *Eisentrager* that "the

Constitution does not confer rights on aliens without property or presence within the United States." 476 F.3d at 991-92. Moreover, the court recognized that "Cuba – not the United States – has sovereignty over Guantanamo Bay," citing with approval the Eleventh Circuit's decision in *Cuban-American Bar Ass'n*, which held that Guantanamo detainees do not have First Amendment rights. *See id.* at 992.

Plaintiffs' contention (Br. 43) that the defendants had "fair warning" of RFRA's application to Guantanamo is without merit. Plaintiffs can only cite case law generally applying RFRA to the military and to prisons, relying, for instance, upon cases brought by military chaplains or by prisoners held in the United States. *See, e.g., Rigdon* v. *Perry*, 962 F. Supp. 150, 152-53 (D.D.C. 1997) (military chaplains); *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003). On the basis of these distinguishable cases, a reasonable official need not have predicted that RFRA would be construed to apply outside sovereign U.S. territory and to create entirely new free exercise claims for aliens who had never had rights under the Free Exercise Clause.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the decision of the district court denying the motion to dismiss with respect to the RFRA claim should be reversed.

Respectfully Submitted,

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Reply Brief for Appellees/Cross-Appellants complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

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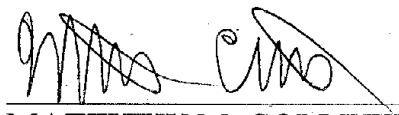

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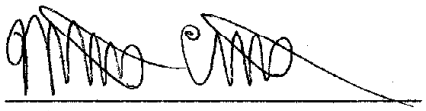

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