NO. 06-5222

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

SHAFIQ RASUL ET AL.,
Plaintiffs/Cross-Appellees.

v.

DONALD RUMSFELD ET AL.,
Defendants/Cross-Appellants.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF 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 AS AMICUS CURIAE IN SUPPORT OF CROSS-APPELLEES URGING AFFIRMANCE ON THE CROSS-APPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, *amici* certify the following:

A. Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in Plaintiffs-Appellants' Response and Reply Brief:

1. Instant Brief – *Amici* 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.

2. *Amici* Counsel for Guantanamo Detainees, Reprieve, and Cageprisoners.

Amici here are a diverse group of religious organizations who assisted, in various ways, with the drafting, congressional debate, and ultimate passage of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. They include the Baptist Joint Committee for Religious Liberty ("BJC"), the National Association of Evangelicals ("NAE"), the National Council of the Churches of Christ in the USA, the American Jewish Committee ("AJC"), 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 ("USCCB"). Further detail regarding *amici* is provided in the section labeled, "Interest of *Amicus Curiae*."

B. Rulings Under Review

The rulings under review were entered by the United States District Court for the District of Columbia (Urbina, J.):

February 6, 2006	Memorandum Opinion Granting in Part and Deferring Ruling in Part on Defendants' Motion to Dismiss, 414 F.Supp.2d 26 (D.D.C. 2006), App. 82, 115
July 10, 2006	Order Granting Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 54(b) and Directing Final Judgment as to Counts I-VI of the Complaint, App. 140.
July 20, 2006	Final Judgment on Counts I-VI of the Complaint, App. 141
May 8, 2006	Memorandum Opinion Denying the Defendants' Motion to Dismiss the Religious Freedom Restoration Act Claim
May 8, 2006	Order Denying the Defendants' Motion to Dismiss Religious Freedom Restoration Act Claim

C. Related Cases

Amici submit this brief pursuant to Defendants' interlocutory cross-appeal of right, Case No. 06-5222. Apart from Plaintiffs' appeal in this matter, Case No. 06-5209, *amici* are aware of no other related case pending before this Court or any other court, consistent with the statements made in Plaintiffs-Appellants' Response and Reply Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the *amici* make the following disclosure:

None of the *amici* is a publicly held entity. None of the *amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *amici*.[1]

[1] All parties have consented to the filing of this brief, pursuant to Federal Rule of Appellate Procedure 29(a).

CERTIFICATION PURSUANT TO RULE 29(D)

Pursuant to Circuit Rule 29(d), Counsel for *amici* hereby certify that, as of the date of this certification, the only other brief *amicus curiae* of which they are aware is the Brief of *Amici* Counsel for Guantanamo Detainees, Reprieve, and Cageprisoners. These two briefs could not be joined as a single brief, because the perspectives and analyses provided in each brief are completely distinct. *Amici* here are a diverse set of religious organizations who all, in various ways, played a significant role in the drafting, congressional debate, and ultimate passage of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* – and, after its enactment, have worked on issues relating to both its constitutionality and its proper interpretation. Their experience and expertise is in the general area of the law of religious liberty and the particular text of, and legislative history behind, RFRA. *Amici*'s brief is confined to those issues.

Alternatively, *Amici* Counsel for Guantanamo Detainees, Reprieve, and Cageprisoners write to provide information regarding alleged abuses at Guantanamo, and also focus on the qualified immunity issue (an issue on which the present *amici* take no position).

Thus, the two sets of *amici* have quite distinct interests, and any overlap between their briefs is insignificant. For those reasons, *amici* here do not believe that a consolidation of these two briefs would be of use to the Court.

TABLE OF AUTHORITIES

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GLOSSARY

1.	AJC	American Jewish Committee
2.	BJC	Baptist Joint Committee for Religious Liberty
3.	Compl.	Plaintiffs' Complaint
4.	Defs.' Br.	Brief for Appellees/Cross-Appellants
5.	NAE	National Association of Evangelicals
6.	Pls.' Br.	Plaintiff-Appellants' Response and Reply Brief
7.	RFRA	Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*
8.	USCCB	United States Conference of Catholic Bishops

INTEREST OF THE AMICUS CURIAE

Amici are a diverse group of religious organizations who assisted, in various ways, with the drafting, congressional debate, and ultimate passage of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. They now write to ensure that RFRA be given the broad scope that its framers intended and that its text requires.

The Baptist Joint Committee for Religious Liberty ("BJC") serves fourteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both Religion Clauses is essential to the cause of religious liberty. BJC chaired the Coalition for the Free Exercise of Religion, a coalition of more than fifty religious and civil liberties organizations that supported passage of the Religious Freedom Restoration Act in 1993. Since then, BJC has continued to support the constitutionality and broad interpretation of RFRA through the courts.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The National Council of the Churches of Christ in the USA, also known as the National Council of Churches, is a community of 35 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are

taken on the basis of policies developed by its General Assembly. The National Council of Churches is a member of the coalition that promoted passage of the Religious Freedom Restoration Act as a means of addressing the need for stronger protections for the free exercise of religion for member communions and other religious groups.

The American Jewish Committee ("AJC"), a national organization of over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. Recognizing that the removal of government imposed burdens on the free exercise of religion is a critical element of a democratic society, AJC played a crucial role shepherding RFRA to passage. Since its passage, AJC has filed many amicus briefs advocating for the constitutionality and applicability of RFRA, and it joins in this brief to support the applicability of RFRA to all governmental actions.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,500 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding religious liberty and state detention. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point

of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 14 million members worldwide. In the United States the North American Division of the General Conference overseas the work of more than 5,000 congregations with more than one million members. The Seventh-day Adventist church has throughout its history defended religious liberty interests for its members and other individuals of faith. The denomination was one of many religious organizations involved in the drafting and promoting passage of the Religious Freedom Restoration Act and have defended the statute in courts around the country. Further, the Seventh-day Adventist church has many members who are in the United States military both as regular service members and chaplains and as such has a strong interest in seeing RFRA applied to the military.

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the United States Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence in that regard.

SUMMARY OF ARGUMENT

This case presents an important issue of first impression regarding the applicability of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* to areas within the United States' territory, but outside its sovereignty – in this case, the military base at Guantanamo Bay.[2]

Like other Americans, *amici* have the gravest of concerns about terrorism, in this country and abroad. And certainly *amici* in no way wish to encumber the government's efforts at Guantanamo in bringing culpable parties to justice. But *amici* also highly value religious freedom, and wish to preserve the high standard that RFRA sets for the federal government in accommodating religious practice and respecting religious difference.

RFRA mandates that the federal government not "substantially burden a person's exercise of religion" unless that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b). This standard applies to the entire federal government. And it does so neither by inference nor by insinuation. Instead, RFRA itself plainly states that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a); *see also* H.R. Rep. No. 103-88 (1993), *available at* 1993 WL 158058 ("The definition of governmental activity covered by the bill is meant to be all inclusive. All

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[2] As a damages action, this case not only involves the question of RFRA's applicability to Guantanamo Bay, but also raises the question of whether the federal officers involved have qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Amici* take no position on that issue, but do remind the Court of the need to first answer the necessarily antecedent question of RFRA's applicability before addressing the qualified-immunity issue. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (explaining that this ordering will help "set forth principles which will become the basis for a holding that a right is clearly established" and thereby encourage "the law's elaboration from case to case").

governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill.")

RFRA's breadth is clearly seen in that it applies with full force to the military. RFRA, quite deliberately, responded to *Goldman v. Weinberger*, 475 U.S. 503 (1986), which had held that the compelling-interest test of the Free Exercise Clause had no application in the armed-forces context – and, by statute, reinstated that standard. And Congress drafted RFRA so that it would apply undiluted to every aspect of military life. Especially given that RFRA explicitly states that it applies to "each territory and possession of the United States," 42 U.S.C. § 2000bb-2(2), the conclusion that RFRA applies at the military base in Guantanamo – recognized as a territory in *Rasul v. Bush*, 542 U.S. 466 (2004) – seems compelling.

The defendants' principal argument challenges the right of these plaintiffs to invoke RFRA's protections. The defendants argue that these particular plaintiffs are beyond RFRA's protections because of their alien status, in conjunction with their physical location outside the technical sovereignty of the United States. But this argument has no anchor in the statutory text; RFRA makes no distinctions between the rights of citizens and the rights of aliens. In fact, RFRA does not exclude any group of putative plaintiffs – instead, the right to invoke RFRA is extended to all "persons." And RFRA does not belabor that point at all; it spends most of its verbiage delineating all the parties bound by RFRA's provisions, not narrowing at all who has the right to invoke them. *See* 42 U.S.C. § 2000bb-1(a) ("*Government* shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.") (emphasis added); 42 U.S.C. § 2000bb-2(1) & (2) (defining the scope of the term "government").

The defendants frame this case as the issue of what entitles alien plaintiffs to bring claims under RFRA. But the real question presented here is what would entitle the defendant federal officials to escape RFRA's obligations. Ultimately, the defendants have no persuasive answer to that question, and thus the conclusion of the district court that RFRA applies to governmental actions at Guantanamo Bay, and can be properly invoked by Plaintiffs here, should be affirmed.

ARGUMENT

I. RFRA SETS A UNITARY STANDARD FOR THE PROTECTION OF RELIGIOUS OBSERVANCE THAT IS BINDING ON THE FEDERAL GOVERNMENT.

Passed in 1993, RFRA set out a general obligation on the part of the federal government to protect private religious observance. Under it, "[g]overnment shall not substantially burden a person's exercise of religion" unless that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b).

The scope of RFRA is, as the Supreme Court put it, "sweeping." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). It applies broadly to "government," which is defined to include any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . .[as well as] the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." 42 U.S.C. § 2000bb-2(1) & (2).

As RFRA itself states, it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [its enactment date]." 42 U.S.C. § 2000bb-3(a); *cf. Boerne*, 521 U.S. at 509 ("[RFRA's] restrictions apply to every government agency and official . . . and to all statutory or other law."). The House Report on RFRA put the point plainly, "The definition of governmental activity covered by the bill is meant to be all inclusive. All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill." H.R. Rep. No. 103-88 (1993), *available at* 1993 WL 158058; *see also Boerne*, 521 U.S. at 509 ("Any law is subject to

challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.").[3]

A. RFRA's Protection of Prisoners.

As the House Report reflects, RFRA lays out a unitary standard to which all federal officials are subject, and by which all federal actions are judged. RFRA has no exceptions – it does not itself demarcate any area of federal action where it does not apply, and it does not exclude any set of putative plaintiffs from its protections. Indeed, RFRA is perhaps most frequently invoked by what some consider the *least* deserving class of plaintiffs – federal prisoners. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 585 (1998) ("RFRA's most significant impact has been in prison.").

Before RFRA, of course, claims of prisoners were addressed under a deferential rational-basis standard. *See O'Lone v. Estate of Shabazz,* 478 U.S. 342 (1987). But RFRA statutorily changed the standard that would be applied to prisoner cases henceforth, and thus it now protects federal prisoners' religious exercise with the same compelling-interest standard that applies more generally. *See* H.R. Rep. No. 103-88 (1993), *available at* 1993 WL 158058 ("Pursuant to the Religious Freedom Restoration Act, the courts must review claims of prisoners . . . under the compelling governmental interest test."); S. Rep. No. 103-111 (1993), *available at* 1993 WL

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[3] The scope and depth of RFRA stood behind the Supreme Court's conclusion that it was beyond Congress's power to impose on the states under Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Yet, of course, Congress is perfectly free to regulate the conduct of the federal government, and RFRA remains intact as to federal law. *See Gonzales v. O Centro Espírita Beneficente União Do Vegetal,* 546 U.S. 418 (2006) (confirming Congress's intention to protect religious rights through RFRA); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) ("The amendments [to RFRA] remove the doubt expressed in our opinion . . . that the portion of RFRA remaining after *City of Boerne v. Flores* . . . survived the Supreme Court's decision striking down the statute as applied to the States.").

286695, at *10 ("The intent of the Act is to restore traditional protection afforded to prisoners' claims prior to *O'Lone*.").

The analogy to prisoners is, of course, strong here. The United States alleges that the Guantanamo detainees have committed grave acts.[4] And the military base at Guantanamo in many ways does indeed now act as a prison for enemy combatants captured abroad. *See Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) (explaining how the Guantanamo base resembles a prison, as it is "far removed from any hostilities" and the average prisoner's "period of detention [has been stretched] from months to years").

B. RFRA's Protection of Military Servicemembers.

RFRA's breadth is also clearly seen in the fact that Congress intended it to apply in full force to another group of people who often have been held to lack constitutional rights (although for obviously quite different reasons) – namely military servicemembers. Before RFRA was passed in 1993, the Supreme Court had issued a number of decisions largely exempting the military from the constraints of the Free Exercise Clause. *See Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting the constitutional claim that a Jewish serviceman was entitled to wear a yarmulke while in uniform); *see also Chappell v. Wallace*, 462 U.S. 296 (1983) (holding that enlisted personnel cannot bring damage actions for constitutional violations against their superior officers). And despite the fact that the particular result in *Goldman* had already been overturned by statute, *see* 10 U.S.C. § 774 (enacted Dec. 4, 1987) (providing the right to religious apparel

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[4] It must be noted, however, that the plaintiffs here allege that they were innocent and that they were released without charge in May 2004 to return to their homes in the United Kingdom, never having been convicted of any crime by any court, commission, or tribunal. *See* Pls.' Compl. ¶ 5.

while in uniform), Congress deliberately chose to make RFRA the vehicle to overturn altogether *Goldman*'s doctrine of deferential review.[5]

Indeed, RFRA does not just apply to the military – it applies to every aspect of military life and governance with undiminished force. The same compelling-interest standard that RFRA applies to religious exercise outside the military governs religious exercise within the military. *See* H.R. Rep. No. 103-88 (1993), *available at* 1993 WL 158058 ("Pursuant to the Religious Freedom Restoration Act, the courts must review claims of . . . military personnel under the compelling governmental interest test."); S. Rep. No. 103-111 (1993), *available at* 1993 WL 286695, at *8-*9 ("Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test.").

The defendants point to the traditional canon that "'unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" Brief for Appellees/Cross Appellants ("Defs.' Br.") at 55 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). But, as the above discussion makes perfectly clear, the Congress here *did* specifically provide otherwise – this intent is written all over the House and Senate Reports, and inscribed in the broad language of the statute itself. Indeed, this point is well acknowledged even by those who oppose RFRA's incursion into the sphere of military affairs. *See, e.g.*, Proceedings and Debates of the 106th Congress, 146 Cong. Rec. S7991-02, *available at* 2000 WL 1250992 (statement of Sen.

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[5] To the defendants, RFRA had only one purpose – overruling the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). As the district court below recognized, this is not quite correct. It is indeed true that the Senate Report says at one point that the "purpose of [RFRA] is only to overturn the Supreme Court's decision in *Smith*." S. Rep. No. 103-111 (1993), *available at* 1993 WL 286695, at *12. But, just pages earlier, that same Report discusses how RFRA was also intended to change the standards that had applied in the pre-*Smith* decisions of *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). *Id.* at *9-*12.

Thurmond) ("The R.F.R.A. entirely rejected [*Goldman*'s] approach. It put the courts in the business of deciding what religious activities should be permitted in the military . . . The R.F.R.A. does not in any way recognize the special circumstances of the military. This is a serious mistake.").

C. While RFRA Protects the Rights of Individuals, its Chief Focus is on the Obligations of the Federal Government.

As the above sections make clear, RFRA was a deliberate extension of the compelling-interest standard to evaluate governmentally imposed burdens on all persons, including both prisoners and members of the armed forces. It is significant to note that, in fact, RFRA does not exclude *anyone* from its protection. Any "person" whose religious liberty is burdened can bring suit. *See* 42 U.S.C. § 2000bb-1(a).

Indeed, this reveals an important insight into the statute and the Congress that drafted and enacted it. RFRA generally speaks not in terms of affirmative creation of rights, but in terms of prohibitions against what the government may do. *See* 42 U.S.C. § 2000bb-1(a) ("*Government* shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.") (emphasis added); 42 U.S.C. § 2000bb-1(b) ("*Government* may substantially burden a person's exercise of religion only if it demonstrates [a compelling government interest pursued by the least restrictive means].") (emphasis added).

To be sure, RFRA provides a cause of action for aggrieved individuals, *see* 42 U.S.C. § 2000bb-1(a), as again Congress never intended to exclude anyone from RFRA's coverage. But what is also clear is that RFRA is just as much about forcing the federal government to maintain a uniform and universal standard of conduct as it is about providing entitlements to putative plaintiffs.

II. RFRA IS APPLICABLE TO THE MILITARY BASE AT GUANTANAMO.

A discrete issue in this case is whether RFRA is applicable to the military base at Guantanamo Bay. Two factors strongly support that conclusion. The first is the simple language of the statute. RFRA, again, defines government to include any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . .[as well as] the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." 42 U.S.C. § 2000bb-2(1) & (2). As plaintiffs discuss in more detail in their merits brief, *see* Plaintiff-Appellants' Response and Reply Brief ("Pls.' Br.") at 32-36, the Supreme Court has now made it apparent that Guantanamo Bay falls within that definition. *See Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377 (1948); *Rasul v. Bush*, 542 U.S. 466 (2004).

The other factor relates to Congress's intent in passing RFRA. As explained above, RFRA was deliberately crafted to provide protection for religious observance in the military, and nothing in its text differentiates between domestic and foreign military bases. Similarly, there is no evidence in the legislative history that Congress sought to create differing standards for the two domains – and such a distinction would be inconsistent with the uniform and universal nature of its coverage. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (noting the "Act's universal coverage . . . under which RFRA applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise").

Moreover, RFRA has already been applied to acts of the armed forces that occur abroad, *see Veitch v. Danzig*, 135 F.Supp.2d 32 (D.D.C. 2001), and its detractors see RFRA's application abroad as a basis on which to oppose the Act. *See, e.g.*, Proceedings and Debates of the 106th Congress, 146 Cong. Rec. S7991-02, *available at* 2000 WL 1250992 (statement of Sen.

Thurmond) (arguing that RFRA seems to apply to military bases in Saudi Arabia and fearing the likely consequences).

Because RFRA was written to apply to "territories and possessions," and because it was intended to provide protection for military personnel wherever they served, it seems hard to escape the conclusion that RFRA applies at Guantanamo, a long established military base within United States territory. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (calling it a "territory over which the United States exercises plenary and exclusive jurisdiction"); *id. at* 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory."). To deprive American service personnel of the protections of RFRA simply because they are on an American military base within the territory of the United States, but within the technical sovereignty of Cuba, would contravene RFRA's unambiguous text as well as Congress's intent in enacting it.[6]

III. RFRA'S APPLICABILITY IS NOT BOUNDED BY THE LIMITATIONS OF THE FREE EXERCISE CLAUSE.

At points in their brief, the defendants seem to acknowledge that RFRA might apply to Guantanamo Bay, at least in the sense that American armed forces at Guantanamo Bay could invoke its protections. But the defendants then argue that, in any event, the particular plaintiffs here are not entitled to RFRA's protections, because of their alien status (in conjunction with their physical location outside the technical sovereignty of the United States).

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[6] In its brief, the defendants rely heavily on the presumption against the extraterritorial application of statutes. *See* Defs.' Br. at 52-53. But that canon has no place here. For, as was held in both *Vermilya-Brown* and *Rasul*, Guantanamo Bay is in fact a territory of the United States. Thus, by definition, this case does not involve the extraterritorial application of RFRA. *See Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (holding that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application" to statutes as they apply to places "within the territorial jurisdiction of the United States," including the "Guantanamo Bay Naval Base").

This argument runs into an obvious difficulty. For, like the statute in *Rasul*, RFRA's text makes no distinction between citizen and aliens. *See Rasul v. Bush*, 542 U.S. 466, 481 (2004) ("Considering that the statute 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.").

In response, the defendants argue that the plaintiffs should be excluded from RFRA's protections because of Congress's likely intent in passing that statute. That is, the defendants argue that Congress's only purpose in RFRA was to undo the effects of the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Thus, Congress must have intended RFRA only to protect those who had constitutional Free Exercise rights before *Smith* – and the defendants claim that the plaintiffs here, as non-resident aliens, have always lacked such rights under the doctrine of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

This is an extraordinarily convoluted argument, and there are several irremediable problems with it. First, and most obviously, there is absolutely no evidence suggesting that Congress intended to limit RFRA's applicability to those who had Free Exercise rights pre-*Smith*. Indeed, as was explained above, RFRA was meant to undo the effects of not just the decision in *Smith*, but the decisions in *O'Lone* and *Goldman* as well, which again had held that prisoners and military officers generally did not have constitutional rights under the Free Exercise Clause. Thus, Congress clearly meant for RFRA's scope of application to be broader than the pre-*Smith* constitutional standard's scope of application.

Moreover, RFRA's text demonstrates that it was designed to have broader *geographic* applicability than either the pre- or post-*Smith* views of the Free Exercise Clause. It is, of course, unclear whether the citizens of Puerto Rico and Guam have rights under the Free Exercise

Clause – the general rule is that "federal constitutional rights do not automatically apply to unincorporated territories." *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *see also Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904). But such citizens emphatically do have RFRA rights. RFRA could be no more explicit in its application to Puerto Rico, *see* 42 U.S.C. § 2000bb-2(2) (RFRA's scope includes "the Commonwealth of Puerto Rico"), and RFRA reaches Guam as well, *see Guam*, 290 F.3d at 1218 (applying RFRA to Guam). Thus, the defendants' claim that RFRA was designed only to protect those who would have had demonstrable constitutional rights under pre-*Smith* caselaw is flawed at its core.[7]

Again, the plain fact is that RFRA created a uniform obligation for the federal government to respect private religious observance – one that binds federal officials in all conceivable circumstances, even those not specifically foreseen by Congress. *See* 42 U.S.C. § 2000bb-3(a) (stating that RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [its enactment date]"). It simply has no exceptions. And the defendants' attempt to override RFRA's plain text by reference to an inference – an inference not about what Congress actually intended (which could be discerned by the statute or, barring that, the legislative history), but what it *must have* or

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[7] To be sure, citizens of Guam and Puerto Rico now have Free Exercise-like rights, in the sense that Congress has vested them with the statutory equivalent of such rights. *See* 48 U.S.C. § 1421(b) ("No law shall be enacted in Guam, respecting an establishment of religion or prohibiting the free exercise thereof . . ."); PUERTO RICO CONST. ART. II, § 3 ("No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof."). But the Bill of Rights does not of its own force necessarily reach those areas; the longstanding rule is that "[a]n act of Congress is required to extend constitutional rights to the inhabitants of unincorporated territories." *Guam v. Guerrero*, 290 F.3d 1210, 1214 (9th Cir. 2002).

should have intended – is merely a way of evading the statute through creative interpretation. Such an effort should not be countenanced by this Court.[8]

IV. THE SUCCESS OF PLAINTIFFS' RFRA CLAIM IS NOT CONTINGENT ON ANY OF THEIR CONSTITUTIONAL CLAIMS

Finally, nothing urged by *amici* presumes that the aliens in question have any constitutional rights. As was the case in *Rasul*, the claim here is purely statutory. While plaintiffs allege that they also have certain constitutional rights that can be vindicated in federal court, plaintiffs' RFRA claim is in no way contingent on such an allegation. Unique facts about RFRA's text and the legislative history behind it justify including plaintiffs within RFRA's ambit, whether or not plaintiffs have any other viable statutory, constitutional, or international law claims.

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[8] As a final note, what truly damns the defendants' position is that this whole argument was rejected in *Rasul*. In *Rasul*, again, the Supreme Court was faced with the general habeas statute, 28 U.S.C. § 2241, which like RFRA drew no distinctions between citizens and aliens. The Court considered the possibility that, because aliens and citizens may have different *constitutional* entitlements to habeas corpus, perhaps the statutory right should be interpreted along the same lines. *See Rasul v. Bush*, 542 U.S. 466, 502 (2004) (Scalia, J., dissenting) (discussing "the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay . . . because of their constitutional circumstances"). Yet the Court did not adopt that approach. Although aliens and citizens perhaps had different levels of constitutional protection regarding habeas corpus in *Rasul*, that did not justify excluding aliens from the protections of a statute that did not specifically leave them out. *See Rasul*, 542 U.S. at 481 (majority opinion) ("Considering that the statute 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.").

CONCLUSION

For the foregoing reasons, the conclusion of the district court that RFRA applies to governmental actions at Guantanamo Bay, and can be properly invoked by Plaintiffs here, should be affirmed.

Respectfully submitted,

Dated: March 16, 2007

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 4,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-point Times New Roman font.

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CERTIFICATE OF SERVICE

I, Christopher C. Lund, hereby certify that on this, the 16th day of March 2007, I caused to be served, by Federal Express, two (2) true and correct copies of Brief of 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 as Amicus Curiae In Support of Cross-Appellees Urging Affirmance on the Cross Appeal, upon the following:

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ADDENDUM

Apart from the following materials, all applicable statutes and regulations have been set out in the parties' briefs:

> Proceedings and Debates of the 106th Congress, 146 Cong. Rec. S7991-02, *available at* 2000 WL 1250992.

Congressional Record --- Senate
Proceedings and Debates of the 106th Congress, Second Session
Tuesday, September 5, 2000

***S7991** THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

Mr. THURMOND.

I rise today to express reservations about S. 2869, the Religious Land Use and Institutionalized Persons Act of 2000, and the larger issue of the impact of religious liberty legislation in the context of prisons and the military.

One of the founding principles of our Nation involves the freedom to worship. I have always been a strong supporter of this most basic right. For example, for many years I have introduced a constitutional amendment to permit prayer in public schools, and I would be very pleased if we could pass that amendment.

In the closing hours of the Senate before the August recess, the Senate considered the Religious Land Use and Institutionalized Persons Act, which is essentially an attempt to change the way the courts interpret the Free Exercise Clause of the Constitution regarding prisons and land use regulations throughout the Nation. Ever since the Supreme Court held the Religious Liberty Protection Act unconstitutional as applied to the states, supporters of this legislation have tried to reverse that decision. Just as the Religious Liberty Protection Act has been held unconstitutional as applied to the states and its legality is still unclear regarding the federal government, there are legitimate issues regarding whether S. 2869 is constitutional. Moreover, there are serious questions about whether this bill is good public policy, especially as it relates to the prisons and jails across America.

I first wish to note what this bill is not. It is not directed at laws that intentionally discriminate against a particular religion or even all religions. We all recognize that laws that intentionally discriminate against religious groups cannot be tolerated, and the courts already routinely invalidate such laws. Rather, this bill is directed at laws that apply to everyone equally, but have the effect of burdening someone's exercise of his or her religion. It is this indirect impact that the supporters are trying to address. However, in the process, the bill is entirely inconsistent with the principles of federalism, and it creates significant problems in many areas.

I would like to specifically address prisons. The safe and secure operation of prisons is an extremely difficult and complex task. I fear that establishing new legal rights for inmates through this law will only make that job more difficult and more dangerous.

The Supreme Court under O'Lone and other cases established a reasonable standard for evaluating religious freedom claims in prison, balancing the needs of inmates and the institution. Then, in 1993, the Religious Freedom Restoration Act imposed a very difficult burden on correctional officials when prisoners made demands that they claimed were based on their religious faith. Although R.F.R.A. was held unconstitutional a few years later, the bill will again upset the balance.

Applying this legislation in prison has the real potential to undermine safety and security. Inmates have used religion as a cover to organize prison uprisings, get drugs into prison, promote gang activity, and interfere in important prison health regulations. Additional legal protections will make it much harder for corrections officials to control these abuses of religious rights.

One example of a successful prisoner lawsuit before R.F.R.A. was held

unconstitutional concerns an inmate who refused to take a tuberculosis test in Jolly v. Coughlin. The New York prison system wished to prevent the spread of T.B. to staff and inmates, so it implemented a mandatory testing program to screen inmates for T.B. so the disease could be treated before it became active and contagious. The plaintiff refused to take the test based on his religious beliefs, and won. The courts permitted the inmate to violate this very reasonable health policy. This is a clear interference with prison safety and security. There is no excuse for courts to allow inmates to tell authorities what health policies they will or will not follow.

This case is just an example of how S. 2869 has the potential to put courts back in the business of second-guessing correctional officials and micromanaging state and local jails. There should be deference to the expertise and judgement of prison administrators. These professionals know what is needed to protect the safety and security of inmates, staff, and the public.

The possibilities for inmate demands for religious accommodation under S. 2869 are limited only by the criminal's imagination. As the Attorney General of Ohio said in a letter last year, "We have seen inmates sue the states for the ' right' to burn Bibles, the 'right' to engage in animal sacrifices, the 'right' to burn candles for Satanist services, the 'right' to certain special diets, or the 'right' to distribute racist materials."

There was a large increase in prisoner demands and a rise in lawsuits based on religious liberty while R.F.R.A. was in effect. The Solicitor of Ohio testified a few years ago that there were 254 inmate R.F.R.A. cases in the Lexis computer database during the three years the law applied to the states. This does not include cases that were not included in the database, and some of the cases listed actually included many inmates because the cases were class action suits.

Winning lawsuits will encourage inmates to challenge authority more and more often in day to day prison life, and S. 2869 will make it much more likely that they will win. However, even if a prisoner's claim fails, it costs the prison much time and money to defend, at a time when prison costs are rising. The new legal standard will make it much harder to get cases dismissed before trial, greatly increasing the diversion of time and resources.

As former Senator Alan Simpson said during the debate on R.F.R.A. in 1993, applying this legislation to prisons will impose "an unfunded Federal mandate requiring the State and local governments to pay for more frequent, expensive, and protracted prisoner suits in the name of religious freedom."

Some have argued that the fact that S. 2869 must comply with the Prison Litigation Reform Act solves any problems regarding inmates. Unfortunately, as the National Association of Attorneys General has recognized, this is incorrect. It is true that the P.L.R.A. has limited the number of frivolous lawsuits inmates can bring. However, under this new legislation, lawsuits that formerly were frivolous now will have merit because this bill changes the legal standard under which religious claims are considered. Because S. 2869 makes it much easier for prisoners to win their lawsuits, the P.L.R.A. will be of little help.

Not all prisoners abuse the law. Indeed, it is clear that religion benefits prisoners. It helps rehabilitate them, making them less likely to commit crime after they are released. In fact, it is ironic that S. 2869 may actually diminish the quality and quantity of religious services in prison. If R.F.R.A. is any indication, requests for religious accommodation will rise dramatically for bizarre, obscure or previously unknown religious claims. These types of claims divert the attention and resources of prison chaplains away from delivering religious services. The great majority of inmates who legitimately wish to practice their religious beliefs will be harmed by this law.

I am pleased that the General Accounting Office will be conducting a study regarding the impact of religious liberty legislation in the prison environment. We must continue to review this important issue very closely.

Additionally, I wish to discuss my concerns regarding the effect of religious rights legislation in the military. While S. 2869 does not directly impact the Armed Services, the Administration considers the predecessor to S. 2869, the Religious Freedom Restoration Act, to be constitutional and binding on all of the federal government, ***S7992** including the military. I strongly believe that the military should be excluded from any legislation creating special statutory religious rights.

In discussing religious rights, it is important to note that the Free Exercise Clause of the Constitution has never provided individuals unlimited rights. The Free Exercise Clause must be balanced against the interests and needs of society in various circumstances.

Government interests are especially significant outside of general civilian life, and the military is the best example. Here, governmental interests are paramount for a variety of reasons that the courts have always recognized. The courts have always been tasked with balancing the rights of individuals against the interests of society. In this area, I believe the courts have struck a good balance.

In Goldman v. Weinberger, the key legal authority on this issue, the Supreme Court reaffirmed its long-standing position and made clear that courts must defer to the professional judgment of the military regarding the restrictions it places on religious practices. The military, not the courts, generally should decide what is permitted and what is not permitted.

This does not mean that soldiers have no religious rights under the Constitution, but the courts generally must defer to the professional judgement of the military on applying these rights in the military. This is essential because of the military's need to foster discipline, unity, and respect in achieving its mission of protecting America's national security.

As the court in Goldman explained, "The military is, by necessity, a special society separate from civilian society. . . . The military must insist upon a respect for duty and a discipline without counterpart in civilian life. . . . The essence of military service is the subordination of the desires and interest of the individual to the needs of the service."

The R.F.R.A. entirely rejected this approach. It put the courts in the business of deciding what religious activities should be permitted in the military and what should not. It does this by establishing a very high legal standard, called the strict scrutiny test, that must be met before the government, including the military, may enforce a law or regulation that interferes in any person's exercise of their religious rights. Under this test, a restriction on religious practices is permitted only if it is narrowly tailored to achieve a compelling governmental interest. This is a very difficult legal standard to meet and is an unrealistic and dangerous burden for the military. However, under this law, the courts must treat all requests for religious practice under the same standard, whether it is the Armed Forces or anywhere else in society.

The R.F.R.A. does not in any way recognize the special circumstances of the military. This is a serious mistake. There is simply no reason why the courts should be in the business of second-guessing how the military handles these matters.

In the past, the Department of Defense has recognized this problem. A comprehensive Defense Department study of religion in the military in 1985 concluded that the "strict scrutiny" test should not apply to the military. It concluded that adopting this standard "would be a standing invitation to a wholesale civilian judicial review of internal military affairs. . . . It would invite use of the results in civilian cases as a model for the military context when, in fact, the differences between civilian and military society are fundamental. Adoption of the civilian 'strict scrutiny' standard poses grave dangers to military discipline and interferes with the ability of the military to perform its mission."

The Armed Forces today fully accommodates religious practices. In fact, I have concerns about whether the Defense Department is too generous in what it is

permitting on military bases today. For example, as reported last year in the Washington Post, Army soldiers who consider themselves to be members of the Church of Wicca are carrying out their ceremonies at Fort Hood in Texas. The Wiccas practice witchcraft. At Fort Hood, they are permitted to build fires on Army property and perform their rituals involving fire, hooded robes, and nine inch daggers. An Army chaplain is even present.

More recently, I read about an ongoing case where a Marine soldier disobeyed a direct order against leaving his military base because the date fell on the new moon, a holy day for Wiccas, and he said he needed to get copper sulfate to perform a ritual. This is just the type of case that a soldier could win under R.F.R.A.

I do not believe that the Armed Forces should accommodate the practice of witchcraft at military facilities. The same applies to the practices of other fringe groups such as Satanists and cultists. Racist groups could also claim religious protection. For the sake of the honor, prestige, and respect of our military, there should be no obligation to permit such activity.

Members of some groups, such as the Native American Church and Rastafarians, use controlled substances in their religious ceremonies. The military today broadly allows the use of the drug peyote for soldiers who claim to be members of the Native American Church. Peyote, a controlled substance, is a hallucinogenic drug. According to a 1997 letter from the National Institute on Drug Abuse, peyote appears to cause an acute psychotic state for up to four hours after it is ingested. The long term effects of its use, especially its repeated use, are simply not known, including the possibility of flashbacks and mood instability. As part of the Authorization Bill for the Department of Defense, I am requiring that the Defense Department conduct a study on this drug. It simply has no legitimate place within our Armed Forces. This is an excellent example of the military going too far today in its efforts to accommodate religious practices.

Another problem from the military's efforts to accommodate fringe groups is that it can harm recruitment. Last year, various religious organizations called for a boycott of the Armed Forces because of its accommodation of these fringe religious groups. The military is having significant difficulty today with recruitment for our all-volunteer force, and the accommodation of groups such as the Wiccas further complicates this problem.

Without R.F.R.A., it is clear that the military could severely limit or prevent practices such as these if it wished. It is less clear exactly what limits the military can impose under R.F.R.A., to the extent that the law is constitutional as applied to the Federal Government.

When I have raised concerns about these matters with Defense Department officials, I have been told that the military will not permit soldiers to practice beliefs that pose a threat to good order and discipline. Unfortunately, that is not the legal standard the Department is faced with under R.F.R.A. Under religious liberty laws, the courts make the decision based on whether the religious restriction is the least restrictive means to accomplish a compelling governmental interest, not whether the restriction is based on good order and discipline.

Religious liberty legislation could cause many problems for the military that have not been considered. Although there have been few claims under R.F.R.A. in the military to date, this could easily change in the future. Soldiers who adhere to various faiths, including many established religions, could make claims that violate important, well-established military policies. For example, soldiers who are Rastafarian can claim protection to wear beards or dread-locks, and Native Americans can claim protection for long hair. Also, Rastafarians may claim an exemption from routine medical care that require injections, such as immunizations. Although it is my understanding that the military does not accommodate exemptions from grooming standards or receiving health care, soldiers could bring such claims and likely win. To date, inmates or guards in prisons have won cases similar to these in court, and there is little reason to expect that cases brought by soldiers would turn out any differently.

Soldiers brought lawsuits in the 1960s seeking exemptions from immunizations and exemptions from work on certain days based on religious practices, but these claims failed under the deferential standard. However, under R.F.R.A., there are endless opportunities for religious practices to interfere ***S7993** in important military policies and practices, and it is much more likely that such cases would be successful.

One such matter arose during the Persian Gulf War. At the time, the military imposed restrictions on Christian and Jewish observances and the display of religious symbols for soldiers stationed in Saudi Arabia. This was important so that our troops would not violate the laws and religious decrees of the host nation. There was some talk of lawsuits against our military because of these restrictions. Although this matter arose before R.F.R.A. was enacted, such a lawsuit is much more likely to be successful today.

In short, it is not in the best interest of our nation and national security for religious liberty legislation to apply to our Armed Forces. Decisions about religious accommodation should be left to the military, not the courts.

I will continue to monitor this most serious matter. It is my sincere hope that the next Administration will recognize the seriousness of this issue and support excluding the military from legislation that creates special religious rights.

146 Cong. Rec. S7991-02, 2000 WL 1250992 (Cong.Rec.)

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