**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**IMAD ABDULLAH HASSAN,**

***Petitioner/Plaintiff,***

**v.**

**BARACK H. OBAMA, et al.,**

***Respondents/Defendants.***

**Civ. No. 04-1194 (UNA)**

**PETITIONER'S EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING ORDER PROHIBITING RESPONDENTS FROM DEPRIVING PETITIONER OF THE RIGHT TO PRAY COMMUNALLY DURING THE MONTH OF RAMADAN**

## INTRODUCTION

This motion seeks a temporary restraining order (TRO) prohibiting Respondents from depriving Petitioner of the right to participate in communal prayers during the Islamic holy month of Ramadan, which commenced this year on June 28.

Petitioner's pending application for preliminary injunction includes an argument that the deprivation of his right to participate in communal prayers violates the Religious Freedom Restoration Act (RFRA), which imposes a heightened standard of review where government substantially burdens "a person's" religious free exercise. 42 U.S.C. § 2000bb-1; *see* Doc. #1001-1 at 29-32. The question here is whether Petitioner, as a nonresident alien detainee at Guantánamo Bay, is a "person" whose religious free exercise rights are protected by the RFRA. The Supreme Court's newly-minted decision in *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, _S. Ct. _, 2014 WL 2921709 (June 30, 2014) (*Hobby Lobby*) compels this Court's

determination that the answer to that question is *yes*, and thus Petitioner is entitled to a TRO protecting his right to pray communally during Ramadan.[1]

Respondents' counsel have indicated that they will oppose this motion.

## FACTUAL BACKGROUND

Petitioner's previously-filed application for preliminary injunction explains the importance of communal prayer during the Islamic holy month of Ramadan. After each day's final evening prayer, Muslims traditionally perform extra prayers—called *tarawih*—in which they recite one-thirtieth of the Qu'ran in consecutive segments throughout the month. *See* Doc. #1001-1 at 13. "This is a special part of Ramadan tradition and is a collectively performed act of piety. If a person were prevented from performing this highly valued and deeply spiritual practice, it would truly create a great sense of deprivation and distress." Dr. Sayyid M. Syeed, *The Meaning of Tarawih*, *available at* http://www.nrcat.org/interfaith-campaign-to-address-anti-muslim-sentiment/background/the-meaning-of-tarawih.

The previously-filed application for preliminary injunction also explains how hunger-striking Guantánamo Bay detainees were deprived of the right to perform the communal *tarawih* prayers during Ramadan in 2013, by virtue of being required to quit hunger-striking in order to be permitted to participate in communal activities. *See* Doc. #1001-1 at 13-14. Now, with the commencement of Ramadan in 2014, hunger-striking detainees like Petitioner are again being deprived of the right to perform the *tarawih* prayers in congregation. The fact that Petitioner is engaged in a peaceful hunger strike should not deprive him of his religious free exercise rights; nor is there any legitimate security-related or other reason why a hunger-striking prisoner should not be permitted to pray communally.

[1] A similar application for a TRO has been filed simultaneously before Judge Lamberth in *Rabbani v. Obama*, Civ. No. 05-1607 (RCL).

## ARGUMENT

Two D.C. Circuit decisions previously have concluded that the Guantánamo Bay detainees do not have religious free exercise rights because they are not "person[s]" within the scope of the RFRA. In the wake of the Supreme Court's decision this week in *Hobby Lobby*, however, those decisions are no longer good law. *Hobby Lobby* makes clear that *all* persons—human and corporate, citizen and foreigner, resident and alien—enjoy the special religious free exercise protections of the RFRA.

In *Rasul v. Myers*, 563 F.3d 527, 532-33 (D.C. Cir. 2009), the D.C. Circuit held that the Guantánamo Bay detainees are not protected "person[s]" within the meaning of the RFRA. *Rasul* bypassed the dictionary definition of "person" and instead looked to prior case law prescribing the scope of the word "person" for purposes of the Fourth and Fifth Amendments—which did not, in the *Rasul* court's view, apply to nonresident aliens. *But see Rasul v.Myers*, 512 F.3d 644, 676 (D.C. Cir. 2008) (Brown, J., concurring) ("[T]he majority's approach . . . . leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantanamo are not 'person[s].' This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human.").

In *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014), the D.C. Circuit adhered to *Rasul* as "the law of this circuit" which "expressly held that RFRA's protections do not extend to Guantanamo detainees." *Id.* at 1043. *Aamer* reiterated the reasoning in *Rasul* that, as nonresident aliens, the Guantánamo Bay detainees "do not qualify as protected 'person[s]' within the meaning of" the RFRA, which Congress purportedly intended to be read consistently with Supreme Court case law predating the impetus for the RFRA—*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)—excluding

nonresident aliens from the scope of the Fourth and Fifth Amendments. *Aamer* at 1043. *Aamer* rejected an argument that *Rasul* was undermined by the holding in *Citizens United v. FEC*, 558 U.S. 310 (2010) expanding the First Amendment's protections of corporate political speech. *Id.*

Petitioner's application for preliminary injunction expressly preserved this religious free exercise issue for subsequent review once the Supreme Court decided two cases presenting the question whether for-profit corporations are "person[s]" within the meaning of the RFRA. *See* Doc. #1001-1 at 29-30. Subsequently, on June 30, 2014, the Supreme Court decided those cases in *Hobby Lobby*. The decision in *Hobby Lobby* eviscerates the reasoning in *Rasul* and makes clear that Petitioner, as a flesh-and-blood human being, is among the "person[s]" protected by the RFRA.

*Hobby Lobby* explains that Congress intended the RFRA, as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, "to effect a complete separation from First Amendment case law," *Hobby Lobby*, 2014 WL 2921709, at *8, and go "far beyond what this Court has held is constitutionally required." *Id.* at *13. Contrary to the D.C. Circuit's supposition in *Rasul*, Congress did *not* intend for the scope of "person[s]" protected by the RFRA to be restricted by "then-existing Supreme Court precedents." *Id.* at *16; *see also id.* at *17.

Thus, the meaning of "person[s]" in the RFRA is to be determined by reference to the Dictionary Act, 1 U.S.C. § 1, which defines "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *See Hobby Lobby*, 2014 WL 2921709, at *14. The RFRA's protection is not restricted to persons who fall "within a category of plaintiffs one of whom had brought a free- exercise claim that this Court entertained in the years before *Smith*." *Id.* at *17. Indeed, in an analogy similar

to the present case, *Hobby Lobby* mentions a "resident noncitizen" as an example of a person whom it "would be absurd" to exclude from the RFRA's protection merely because the Supreme Court had not previously addressed such a person's rights of religious free exercise. Likewise here, a nonresident alien Guantánamo Bay detainee, who inarguably has constitutional rights in what is *de facto* sovereign U.S. territory, *see Boumediene v. Bush*, 553 U.S. 723 (2008), must also enjoy the protections extended by the RFRA.

The holding and express reasoning in *Hobby Lobby* makes *Rasul* a dead letter. *Rasul* relied on Supreme Court case law that predated *Smith* and excluded nonresident aliens from the scope of constitutional protections guaranteed by the Fourth and Fifth Amendments. *Hobby Lobby* wholly undermines *Rasul* by holding that the pre-*Smith* Supreme Court case law does *not* restrict the scope of "person[s]" protected by the RFRA, which Congress intended to *exceed* the scope of constitutional protection as set forth in the pre-*Smith* case law. *Hobby Lobby* instructs that the scope of "person[s]" protected by the RFRA is to be determined by reference to the definition of "person" in the Dictionary Act, not by reference to the pre-*Smith* case law.

*Hobby Lobby* leads inexorably to the conclusion that the nonresident alien detainees at Guantánamo Bay are "person[s]" protected by the RFRA. The Dictionary Act definition of "person" includes "individuals." 1 U.S.C. § 1. The Dictionary Act does not confine "individuals" to U.S. citizens, just as it does not confine "corporations" to U.S. corporations; nor does it confine "individuals" to U.S. residents. The Guantánamo Bay detainees, as flesh-and-blood human beings, are surely "individuals," and thus they are no less "person[s]" than are the for-profit corporations in *Hobby Lobby* or the resident noncitizens whom *Hobby Lobby* gives as an example of persons to whom the RFRA must apply. The fact that the detainees are at Guantánamo Bay changes nothing, for *Hobby Lobby* makes clear that a "person" whose religious

free exercise is burdened under color of law need not be a U.S. citizen or resident in order to enjoy the RFRA's protections.

Thus, *Hobby Lobby* puts it beyond reasonable dispute that, as "person[s]" protected by the RFRA, the Guantánamo Bay detainees enjoy rights of religious free exercise, including the right to pray in congregation. *Cf. Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993) ("It is well established that prisoners have a constitutional right to participate in congregate religious services. Confinement in keeplock does not deprive prisoners of this right." (citation omitted)).

Respondents might argue that under the RFRA the burden they have imposed on Petitioner's religious free exercise is "in furtherance of a compelling governmental interest," 42 U.S.C. § 2000bb-1(b)(1)—specifically, the interest in maintaining institutional security. For such an argument to succeed, however, Respondents would have to make the unlikely showing that congregational prayer poses a threat to institutional security, even though detainees not on hunger strike are freely allowed to pray communally. Further, to justify this burden on the hunger strikers, Respondents must *also* show that the burden "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Respondents cannot make that showing.[2]

To obtain this TRO, Petitioner must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of the TRO, (3) the balance of equities tips in his favor; and (4) the TRO is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22-23 (2008); *Bayer Healthcare, LLC v. U.S. Food & Drug Admin.*, 942 F. Supp. 2d 17, 23 (D.D.C. 2013). The decision in *Hobby Lobby* demonstrates all four

[2] And even if Respondents could demonstrate a compelling governmental interest in segregating hunger strikers from the general prison population, the least restrictive means of furthering that interest would be to keep the hunger strikers segregated but still allow them to pray communally amongst themselves.

factors by establishing indisputably that Petitioner enjoys the RFRA's protections, and by exemplifying our Nation's deep commitment to religious free exercise as a matter of utmost public interest and personal significance.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to issue a TRO prohibiting Respondents from depriving Petitioner of the right to perform the *tarawih* prayers in congregation.

Respectfully submitted,

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