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

MOHAMMED AL-QAHTANI, ***Petitioner-Appellee,*** **v.** **DONALD J. TRUMP, *et al.*,** ***Respondents-Appellants*.**	**Case No. 20-5130**

PETITIONER'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Petitioner Mohammed al-Qahtani respectfully moves the Court to dismiss Respondents' interlocutory appeal for lack of jurisdiction. The district court's March 6, 2020 order ("Order") is not reviewable as of right and Respondents must seek leave to appeal it on an interlocutory basis.

Respondents have imprisoned Mr. al-Qahtani at the U.S. Naval Station at Guantánamo Bay, Cuba since February 2002. In April 2017, Mr. al-Qahtani formally requested that Respondents facilitate his examination by a Mixed Medical Commission to determine his entitlement to medical repatriation pursuant to section 3-12 of Army Regulation 190-8, a provision of domestic law. Upon Respondents' denial of this request, Mr. al-Qahtani filed a Motion to Compel Examination by a Mixed Medical Commission, which was fully briefed and argued by April 2018. Nearly two years later, the district court granted the motion, finding that Mr. al-

Qahtani is entitled to this examination to determine his eligibility for medical repatriation.

Respondents can ask this Court to review the Order along with the ultimate rulings on the merits at the conclusion of these habeas corpus proceedings in district court. As this Court has repeatedly held, piecemeal review of interlocutory orders is disfavored and only permitted in narrow circumstances, where delaying interlocutory review would subject appellants to serious, irreparable injury and render appellants' claims unreviewable. This Court's intervention by way of interlocutory appeal would be premature at this point. Either party can appeal or cross-appeal from a final decision below granting or denying the writ of habeas corpus. Such an appeal from a final judgment would include the issues that Respondents attempt to appeal now as well as other contested issues in the ongoing proceedings. Waiting to review the district court's decisions in accordance with the final judgment rule would not visit irreparable injury upon Respondents. As such, Respondents cannot meet the stringent standard set forth by the collateral order doctrine nor can they meet the requirements for appealing as of right an interlocutory order that has the practical effect of an injunction. They must seek and obtain leave to pursue any appeal at this stage.

FACTUAL AND PROCEDURAL HISTORY

Mohammed al-Qahtani, a national of Saudi Arabia, has been imprisoned without trial at Guantánamo for over eighteen years. He is the only prisoner there whose torture has been formally admitted by a senior U.S. government official. In 2009, Susan J. Crawford, then the Convening Authority in charge of the U.S. Department of Defense's Military Commissions, explained that she had refused to authorize Mr. al-Qahtani's capital trial by military commission in 2008 because "we tortured Qahtani."[1] The torture left Mr. al-Qahtani in a "life threatening condition," again by Crawford's admission. He was hospitalized twice during his interrogation at Guantánamo because he was on the brink of heart failure and death.

Long before Mr. al-Qahtani was taken into U.S. custody, he already suffered from a number of severe psychiatric disabilities. These are documented in detail in five reports and declarations by Dr. Emily Keram—the only psychiatrist independent of the U.S. government known to have examined Mr. al-Qahtani since his imprisonment—and in records of his hospitalization in Mecca from May 2000.[2]

---

[1] Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, THE WASHINGTON POST (Jan. 14, 2009) (quoting Susan J. Crawford), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html.

[2] *See* Pet'r's Mot., Ex. C, Report of Dr. Emily A. Keram, *Al Qahtani v. Trump*, Case No. 05-CV-1971, ECF No. 369-1 (D.D.C. June 5, 2016) ("Keram Rep."); *id.*, Ex. D, Suppl. Decl. of Dr. Emily A. Keram (July 12, 2016) ("Keram Suppl. Decl."); *id.*, Ex. E, Suppl. Decl. of Dr. Emily A. Keram (Dec. 2, 2016) (Keram Second Suppl. Decl.); Pet'r's Reply, Ex. G, Suppl. Decl. of Dr. Emily A. Keram in Resp. to Decl. of Sr.

Finding that Mr. al-Qahtani was "incompetent and unable to assist effectively in this case," Minute Order (Apr. 20, 2012), Judge Rosemary M. Collyer appointed Dr. Keram, pursuant to the Criminal Justice Act, to conduct a psychiatric evaluation of Mr. al-Qahtani. Following a series of visits beginning in 2015, Dr. Keram confirmed his diagnosis of schizophrenia and major depression. Once Dr. Keram's report became public in 2016, Respondents finally acknowledged that Mr. al-Qahtani's symptoms, as observed by the Guantánamo guard force and Joint Medical Group mental health professionals, are consistent with schizophrenia and began efforts to dispense antipsychotic medications to him. *See* Sr. Med. Officer Decl. (Aug. 21, 2017), ECF No. 372-2, ¶ 17.

"In addition to Mr. al-Qahtani's pre-existing psychiatric diagnoses," Dr. Keram concluded, "he has developed posttraumatic stress disorder (PTSD)" resulting from his systematic torture—which included prolonged solitary confinement, sleep deprivation, physical violence and grotesque sexual humiliation along with other forms of psychological torture—and subsequent indefinite imprisonment. Keram Rep., ECF No. 369-1, Ex. C, at 7. As a doctor with the U.S. Department of Veteran Affairs who has treated patients with PTSD secondary to both combat stress and Prisoner of War confinement for many years, Dr. Keram

---

Med. Officer (Sept. 12, 2017), ECF No. 373 ("Keram Third Suppl. Decl."); Suppl. Decl. of Dr. Emily A. Keram (Apr. 14, 2018), ECF No. 377 ("Keram Fourth Suppl. Decl.").

found that Mr. al-Qahtani's PTSD symptoms are not only "consistent with those exhibited by survivors of torture," but also that they "have been present for years," *id*. at 7-8, and that his torture was so "inhumane" that, "[e]ven in the absence of pre-existing psychiatric illness," it would have been unsurprising for it to have caused the "profoundly disruptive and long-lasting effects on [his] sense of identity, selfhood, dignity, perception of reality, mood, cognitive functioning, and physiology" that she observed. *Id*. at 6-7.

Crucially, Dr. Keram concluded "that Mr. al-Qahtani cannot receive effective treatment for his current mental health conditions while he remains in U.S. custody at GTMO or elsewhere, despite the best efforts of available and competent clinicians." *Id*. at 9. Among the factors precluding effective treatment of Mr. al-Qahtani's mental illnesses in U.S. custody is his lack of trust in medical and mental health personnel at Guantánamo owing to their predecessors' involvement in his interrogations and torture. *Id*.

Mr. al-Qahtani's counsel formally requested his examination by a Mixed Medical Commission on April 28, 2017. The request noted his entitlement under domestic law to an examination that would determine his eligibility for medical repatriation. *See* Dep't of the Army, Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, ch.3, § 12 (Oct. 1, 1997) (hereinafter "Army Regulation 190-8"); *Al Warafi v. Obama*, 716 F.3d 627,

629 (D.C. Cir. 2013) ("Army Regulation 190–8 is domestic U.S. law, and in a habeas proceeding such as this, a detainee may invoke Army Regulation 190-8."). When Respondents denied his request, Mr. al-Qahtani filed a Motion to Compel Examination by a Mixed Medical Commission in the district court. Judge Collyer found that Mr. al-Qahtani's request "sounds in habeas," and granted his motion on March 6, 2020. Mem. Op. 12, ECF No. 386.

During nearly three years, while his motion was pending, Mr. al-Qahtani's health deteriorated to an alarming degree. In her 2018 report, Dr. Keram wrote, "it remains my opinion that Mr. al Qahtani's symptoms … are worsening." Keram Fourth Suppl. Decl. (Apr. 14, 2018), ECF No. 377, ¶ 17. Counsel submitted a Status Report in late 2019 to apprise the Court of a steep decline in Mr. al-Qahtani's mental and physical condition. The declaration supporting that status report (originally lodged at ECF No. 385 and now also filed at ECF No. 393-1) communicated Mr. al-Qahtani's deteriorating health conditions, including an inability to control his behavior that is triggered by his hallucinations, such as "screaming, being angry, throwing things, [and] taking off [his] clothes," which has understandably deterred interaction with fellow prisoners. Decl. of Ramzi Kassem (Sept. 4, 2019), ECF No. 393-1, ¶ 35. He has withdrawn from interacting with his family, *id*. at ¶ 35, and, importantly has failed to attend meetings with his attorneys, and then forgotten that he missed them. *Id*. at ¶¶ 8-10, 44.

Since the charges against Mr. al-Qahtani were dismissed in 2008, Respondents have continued to imprison him in the place where he was tortured, without adequate psychiatric treatment. The district court's Order allows Mr. al-Qahtani to proceed toward eventual adjudication of his habeas corpus petition on its merits: if the Mixed Medical Commission finds him to be entitled to medical repatriation under the domestic law provisions of Army Regulation 190-8, he can then move the district court to issue the writ of habeas corpus on that basis. Respondents have sought a stay of the Order pending appeal from the district court and now seek to lodge this appeal on an interlocutory basis. Because Respondents cannot show that they will be irreparably harmed and that the Order cannot be reviewed by this Court pursuant to a final judgment in the habeas proceedings below, this Court should dismiss Respondents' interlocutory appeal for lack of jurisdiction.

ARGUMENT

This Court does not have jurisdiction to review the district court's interlocutory Order compelling Respondents to facilitate Mr. al-Qahtani's examination by a Mixed Medical Commission because there has been no final judgment on whether he should be repatriated. Controlling law reflects a "healthy respect for the virtues of the final-judgment rule." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). Here, Respondents may not appeal as of right and must instead seek leave to appeal. *See, e.g.*, 28 U.S.C. § 1292(b). By purporting to proceed

with an interlocutory appeal as of right, *see* Civil Docketing Statement, Doc. No. 1846445 (June 10, 2020), Respondents attempt to take this Court beyond the class of interlocutory appeals permitted under 28 U.S.C. §§ 1291 & 1292(a), thus "undermin[ing] 'efficient judicial administration; and encroach[ing] upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). As appellants, Respondents have not met their burden of establishing that this Court has jurisdiction to review the Order immediately. *See, e.g.*, *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008).

Appellate review typically occurs once there is "nothing more for the [district] court to do." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945). It is uncontroversial that any exceptions to this rule are narrow and limited. *See, e.g.*, *City of Morgantown, W. Va. v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949) (restating that "piecemeal appeals have never been encouraged"); *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure."); *Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261 (D.C. Cir. 2012) (noting that the Court "must take care not to turn the barrier against piecemeal appeals into Swiss cheese").

Respondents' proposed appeal does not fall into the two possibly relevant exceptions from the final judgment rule—interlocutory appeal under the collateral order doctrine or appeal of an order that has the practical effect of an injunction—because conforming to the normal procedure and waiting to appeal all issues upon a final judgment from the district court will not irreparably harm Respondents. Indeed, under either theory of exceptional interlocutory review, an appellant must show irreparable harm. *See I.A.M. Nat. Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 25 n.5 (D.C. Cir. 1986) ("The [Supreme] Court has read the third prong of [the collateral order] test to require a showing of irreparable harm. The requisite showing of irreparable harm is similar to that required in cases involving interlocutory injunctive orders.") (internal citation omitted).

The Order at issue in this case requires Respondents to convene a Mixed Medical Commission to examine Mr. al-Qahtani at Guantánamo. While implementation of the Order might require Respondents to overcome certain policy and practical hurdles, so, too, does enforcement of any domestic law by the Executive. The challenges inherent to this particular undertaking do not amount to an undue burden or rise to the level of irreparable injury. On the contrary, this Court's appellate review at this juncture would delay habeas proceedings and irreparably harm Mr. al-Qahtani's rapidly deteriorating health.

I. The Interlocutory Order Is Not Reviewable Under the Collateral Order Doctrine

The district court's Order does not fall within the "small class" of interlocutory orders that can be appealed as of right while litigation in district court is still pending. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Will v. Hallock*, 546 U.S. 345, 350 (2006) ("We have meant what we have said[:] we have … kept [the 'small class'] narrow and selective in its membership."); *Citizens for Responsibility & Ethics in Washington ("CREW") v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 864 (D.C. Cir. 2008) ("The Supreme Court has repeatedly emphasized the doctrine's deliberately modest scope.") (internal quotations and citations omitted).

An appealable interlocutory order under this exception must meet three requirements, cumulatively: it must be conclusive; it must resolve important questions separate from the merits; and—most importantly here—it must be effectively unreviewable on appeal from a final judgment in the underlying action. *See, e.g.*, *Mohawk*, 558 U.S. at 107-08 (dismissing appeal where appellants "satisfied the first two conditions of the collateral order doctrine—conclusiveness and separateness—but not the third—effective unreviewability"); *see also Khadr*, 529 F.3d at 1117 (dismissing appeal because order at issue "cannot satisfy the third requirement" so Court did "not consider the first two requirements of the doctrine"); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 35-36 (1995) (vacating circuit

court's judgment on appeal where district court's order was neither conclusive nor unreviewable).

Respondents bear the burden of demonstrating that the Order would be unreviewable if they waited to appeal. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). This Court has "read the third prong of [unreviewability in the collateral doctrine] test to require a showing of irreparable harm." *I.A.M.*, 789 F.2d at 25 n.5.

The Order requires Respondents to convene a Mixed Medical Commission in keeping with the procedure laid out in the applicable provision of domestic law. It does not require them to release and repatriate Mr. al-Qahtani. The burden Respondents must meet to warrant interlocutory review calls for more than "the mere identification of some interest … [that] would be irretrievably lost." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994) (noting that although some interest may be lost, even "an erroneous district court decision" may not render an interlocutory order unreviewable); *see also Firestone*, 449 U.S. at 378 n.13 (vacating circuit court's decision where appellants claimed harm that was no "greater than the harm suffered by any litigant forced to wait until the termination of the trial before challenging interlocutory orders it considers erroneous"). Any burdens associated with implementing domestic law here do not visit irreparable injury upon Respondents.

First, Army Regulation 190-8 offers a turnkey scheme that sets forth how a Mixed Medical Commission (or Medical Commission) should be appointed. The scheme accounts for a variety of situations, including the circumstances at hand. *See* Army Regulation 190-8, § 3-12(b) (where "neutral doctors" from a neutral state might not be available, "the United States, acting in agreement with the Protecting Power concerned, will set up a Medical Commission," which "will perform the duties of a Mixed Medical Commission"); *id.* § 1-5(e) ("A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP)").

Judge Collyer acknowledged that a Mixed Medical Commission would be "likely burdensome" to some extent. Mem. Op. at 24, ECF No. 386. But this does not mean that the burden would amount to an irreparable injury. While Respondents will have to expend *some* resources to convene the Mixed Medical Commission, that obligation does not rise to a "substantial public interest" nor does it implicate "some particular value of a high order." *Will v. Hallock*, 546 U.S. at 352–53. Examples of sufficiently substantial public interests that would be harmed if appellants waited until final judgment have included presidential immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), sovereign immunity under the Eleventh Amendment, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), or the

protection against double jeopardy. *Abney v. United States*, 431 U.S. 651 (1977). Implementation of the Order in this case would implicate no such interest.

The Order only requires Respondents to convene a Mixed Medical Commission to examine Mr. al-Qahtani, which may result in a recommendation of medical repatriation pursuant to Army Regulation 190-8. In that event, Respondents could honor the recommendation and repatriate Mr. al-Qahtani, resolving this case without further judicial intervention, or the matter would continue to be litigated in district court in habeas proceedings to a final disposition on the merits, preserving all issues—including the one Respondents attempt to raise now—for appellate review. No departure is warranted here from the final judgment rule and the stringent requirements of the collateral order doctrine. Interlocutory appeal is inappropriate at this juncture, where proceedings are ongoing in the district court and there has been no showing of irreparable injury. It also bears emphasis that this Court need not waste scarce time and resources prematurely reviewing questions now that may resolve themselves in any number of ways in the ordinary course of proceedings without the need for any appeal.

Second, the United States has convened Mixed Medical Commissions before. For instance, during World War II, under the predecessor 1929 Geneva Convention, the United States activated Mixed Medical Commissions beginning "in November 1943 to examine sick and wounded German prisoners to determine their eligibility

for repatriation." Lt. Col. James T. McGibony, *Hospitalization and Disposition of PW Patients in the United State*s, MILITARY REV., June 1947, at 60, 63-64. Nor is there anything daunting about the single case presented here: "From the activation of the mixed medical commission in 1943 until its deactivation in 1945, approximately 8,000 German prisoners were examined. Of this number over 1,000 were found eligible for direct repatriation which was accomplished." *Id.*; *see also Headquarters Army Service Forces, Office of the Provost Marshal General*, WORLD WAR II, A BRIEF HISTORY 500-04 (1946) (describing operations of Mixed Medical Commissions).

At present, only forty individuals remain imprisoned at Guantánamo.[3] Anticipating Respondents' objection, if some of these prisoners request examination by a Mixed Medical Commission in writing, there is no reason to think Respondents and the district court will be unable to handle these requests. Respondents can either accede to any such written request or deny it, as they did in this case. A prisoner would then have the option of filing a motion to compel in district court, as Mr. al-Qahtani did. The district court, which is more than capable of weeding out requests from suspected malingerers, would then decide whether or not to grant that motion to compel. In this case, for example, Mr. al-Qahtani's own motion was supported by

[3] *See* The Guantánamo Docket: 40 Current Detainees, The New York Times, *available at* https://www.nytimes.com/interactive/projects/guantanamo/detainees/current.

ample expert testimony developed over the course of many years, based on extensive evaluation by an independent specialist, which included both review of his pre-detention mental health records and lengthy interviews with him, resulting in one report and four supplemental declarations for a total of no fewer than five submissions over the course of two years by Dr. Keram.

The only irreparable injury that could arise here would be the one incurred by Mr. al-Qahtani should this interlocutory appeal be permitted to proceed. Mr. al-Qahtani has already spent eighteen years in U.S. custody without trial. If the Court were to allow this interlocutory appeal to proceed (and implementation of the Order were stayed pending appeal, as per Respondents' request to the district court), Mr. al-Qahtani would have to wait years more until the final disposition of the appeal and, even if he were to prevail, would then have to languish longer still while Respondents convene a Mixed Medical Commission. That would run afoul of the Supreme Court's unequivocal admonition that "the costs of delay can no longer be borne by those who are held in custody." *Boumediene v. Bush*, 553 U.S. 723, 795 (2008); *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) (habeas proceedings are "particularly inappropriate for any delay").

Mr. al-Qahtani is particularly vulnerable to harm due to his pre-existing schizophrenia, the post-traumatic stress disorder (PTSD) resulting from his undisputed torture at Guantánamo, and his inability to receive effective treatment

for either at Guantánamo. *See* Keram Rep., ECF No. 369-1, Ex. C, at 8-9; *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) ("[W]here the health of a ... vulnerable person is at stake, irreparable harm can be established."). Evaluating Mr. al-Qahtani several times over the years, Dr. Keram concluded "it remains my opinion that Mr. al Qahtani's symptoms … are worsening." Keram Fourth Suppl. Decl. (Apr. 14, 2018), ECF No. 377, ¶ 17. Counsel has also noted Mr. al-Qahtani's decline over the years, including in Mr. al-Qahtani's capacity to work with his legal team. Decl. of Ramzi Kassem, ECF No. 393-1, ¶¶ 35, 44. Mr. al-Qahtani would be irreparably harmed if the Court allowed this interlocutory appeal to proceed.

While compliance with the district court's Order may inconvenience Respondents to a degree, "[t]hat a ruling 'may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment … has never sufficed'" to show that an order is effectively unreviewable. *Mohawk*, 558 U.S. at 107 (quoting *Digital Equip.*, 511 U.S. at 872). Indeed, "the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner, is dispositive." *Digital Equip.*, 511 U.S. at 879 (internal quotations and citations omitted). Here, the rights and values at stake, Mr. al-Qahtani's liberty and health, as well as Respondents' adherence to domestic law, are paramount and weigh in Mr. al-Qahtani's favor.

II. The Interlocutory Order Is Not Reviewable Under 28 U.S.C. § 1292(a)(1)

Respondents cannot meet the strict requirements to appeal an interlocutory order that has the practical effect of an injunction. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (finding such appeals are a narrow exception to final judgment rule). The district court noted that it issued its Order "pursuant to its powers to ensure meaningful review of Mr. al-Qahtani's habeas petition" and therefore did not need to consider Mr. al-Qahtani's "alternative request that the Court grant injunctive relief." Mem. Op. at 22. Even assuming that the interlocutory order here has the "practical effect" of an injunction, *see, e.g.*, *Carson*, 450 U.S. at 83, it still does not fall within the category of immediately appealable orders under 28 U.S.C. § 1292(a)(1). *CREW*, 532 F.3d at 864 (D.C. Cir. 2008).

Respondents can only appeal as of right if the Order effectively disposes of all the merits of the underlying habeas case, *Salazar*, 671 F.3d at 1262, or if they show that they would be irreparably harmed and would lose the opportunity to challenge the Order if they waited to appeal it following a final judgment in the habeas proceedings before the district court. *Carson*, 450 U.S. at 84; *Salazar*, 671 at 1262. Neither is the case here.

A. The Order Does Not Affect All the Merits of the Case

Not all interlocutory orders which have the practical effect of an injunction can be appealed under 28 U.S.C. § 1292(a)(1). This Court has stated that when such

an interlocutory order "affects predominantly all of the merits" of the case, effectively becoming equivalent to a final judgment, immediate review is appropriate. *I.A.M.*, 789 F.2d at 24 n.3. But this Circuit has never held that an interim order "affected predominantly all of the merits of the case." In *I.A.M.*, this Court found that an order mandating an interim payment of pension contributions, imposing no irreparable harm, did not "affect ... all of the merits." *Id.* at 24 n.3 (holding that order mandating interim payment of company's alleged pension obligations did not resolve merits of appellant's defense and counterclaims and so "cannot be said to have affected predominantly all of the merits of the case"). A summary judgment order that ruled on the merits of one count but left eleven remaining counts in the case pending was not appealable under this standard. *Ctr. for Nat'l Sec. Studies*, 711 F.2d at 413. Similarly, in a case where the district court "reject[ed] only one of two grounds supporting a motion to dissolve" a consent decree, this Court found that the order denying relief did not "affect ... all of the merits." *Salazar v. D.C.*, 671 F.3d 1258, 1265 (D.C. Cir. 2012).

In the instant case, the writ of habeas corpus will not issue as an inevitable result of the Order appealed from—which merely mandates the implementation of a process that may or may not yield the outcome Mr. al-Qahtani desires. Such an order resolves nothing about the merits, and even if the Mixed Medical Commission's finding is favorable to Mr. al-Qahtani, further proceedings in the district court will

be required before a judgment will issue. *That* judgment will be appealable, and even at that point, Respondents will not have suffered irreparable harm. In sum, the Order does not reach the ultimate relief Mr. al-Qahtani seeks on the merits of his habeas claim: release from Guantánamo. Here, as in *Salazar*, "there is something more that the district court 'may yet do,'" 671 F.3d at 1263—namely, issue the writ should the Mixed Medical Commission conclude that medical repatriation is warranted.

B. The Order Does Not Carry Irreparable Consequences and Respondents Can Challenge It After Final Judgment

Nor can Respondents show that the Order carries a "'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal." *Salazar*, 671 F.3d at 1262 (quoting *Carson*, 450 U.S. at 84). This Court has found that "the first part of the *Carson* test—the requirement of a serious, perhaps irreparable, consequence—resembles the second element of the test set forth in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam), for the granting of a stay—irreparable injury." *United States v. W. Elec. Co.*, 777 F.2d 23, 30 (D.C. Cir. 1985). Another instructive parallel is the showing of irreparable harm required under the unreviewability prong of the collateral order doctrine. *See I.A.M.*, 789 F.2d at 25 n.5.

As discussed above, this Order inflicts no irreparable injury on Respondents, and any delay in implementing the Order pending appeal is likely to cause grave and irreversible injury to Mr. al-Qahtani. Respondents bear the burden of complying

with the Order and convening a Mixed Medical Commission to examine Mr. al-Qahtani inasmuch as the Executive bears the burden of implementing any other law. *Cf. Al-Bihani v. Obama*, 619 F.3d 1, 14 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of reh'g en banc) (citing Army Regulation 190-8 as an example of "domestic U.S. law," understood to include "statutorily authorized executive regulations that have the force of law").

Also as detailed above, the appropriate time to raise the issues Respondents seek to presently place before this Court would be after any final order requiring repatriation, at the conclusion of habeas proceedings before the district court. The district court's ruling on the question Respondents seek to present for immediate review—"whether, upon the request of a member of al Qaeda detained at Guantanamo Bay by the U.S. Armed Forces as an unprivileged alien enemy combatant, the Armed Forces must convene a mixed medical commission to examine the detainee and determine whether he should be repatriated under AR 190-8," Statement of Issues, Doc. No. 1846451—can be "effectually challenged" after final judgment, along with any other issues that arise up to that point.

CONCLUSION

For the aforementioned reasons, Respondents are not entitled to interlocutory review of the district court's Order as of right under either the collateral order doctrine or under 28 U.S.C. § 1292(a)(1) for any interlocutory order that has the

practical effect of an injunction. Accordingly, this Court should dismiss Respondents' interlocutory appeal for lack of jurisdiction.

Dated: June 25, 2020

Respectfully submitted,

_____/s/_____

Ramzi Kassem
(D.C. Cir. Bar No. 51212)
Saba N. Ahmed
Main Street Legal Services, Inc.
City University of New York School of Law
2 Court Square
Long Island City, NY 11101
(t) (718) 340-4558
(f) (718) 340-4478
(e) ramzi.kassem@law.cuny.edu

Shayana Kadidal
(D.C. Cir. Bar No. 49512)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(t) (212) 614-6438
(f) (212) 614-6451
(e) kadidal@ccrjustice.org

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4714 words, in compliance with Fed. R. App. P. 27(d)(2)(A).
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

_____/s/_____

RAMZI KASSEM

June 25, 2020