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 REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

By appealing the district court's March 6, 2020 order ("Order") while habeas proceedings are ongoing, Respondents flout the final judgment rule and attempt "to turn the barrier against piecemeal appeals into Swiss cheese." *Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261 (D.C. Cir. 2012). Federal courts have allowed narrow exceptions to this rule only where appellants would be irreparably injured if they waited until a final judgment to appeal. Respondents have not met their burden of showing irreparable injury and have not provided any reason why this Court cannot review the Order upon appeal from the district court's final judgment.

The last decade of litigation in Mr. al-Qahtani's case has centered on his mental health. His history of psychosis long predates the time when he was systematically tortured at Guantánamo. After many years of effort, Mr. al-Qahtani agreed to meet with a mental health expert who confirmed his diagnoses of

schizophrenia and PTSD. In August 2017, counsel for Mr. al-Qahtani filed a Motion to Compel Examination by a Mixed Medical Commission. On March 6, 2020, the district court granted Mr. al-Qahtani's motion and ordered "a mixed medical commission pursuant to its powers to ensure meaningful review of Mr. al-Qahtani's habeas petition, [so] the Court need not consider Mr. al-Qahtani's alternative request that the Court grant injunctive relief." Mem. Op. 22, ECF No. 386.

In asking this Court to find that the Order is an injunction for the purpose of interlocutory appeal under 28 U.S.C. § 1292(a)(1), Respondents misconstrue precedent on appealable injunctions and invite this Court to carve out another exception to the final judgment rule. Instead, the proper course of action would be to await the Mixed Medical Commission's determination as to whether Mr. al-Qahtani is eligible for repatriation on medical grounds. If he is, the district court may issue the writ, and Respondents can then appeal that final judgment.

ARGUMENT

Appeals prior to final judgment are strongly disfavored. Accordingly, the Supreme Court has interpreted the text of the statute conferring interlocutory appellate jurisdiction over certain orders of district courts, 28 U.S.C. § 1292(a)(1), very narrowly:

> Because § 1292(a)(1) was intended to carve out only a limited exception to the final judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available *only* in circumstances where an appeal will further the

> statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of *serious, perhaps irreparable, consequence*.

Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981) (emphasis added). If a party can appeal an interlocutory order after final judgment without suffering irreparable harm, then appellate jurisdiction will not lie under section 1292(a)(1).

Because Respondents cannot make a plausible case that they will suffer irreparable injury as a result of complying with domestic law and convening a Mixed Medical Commission, they focus their entire brief on the notion that the Order is, in some metaphysical sense, an injunction. Opp'n 8 (citing generic definition of "injunction" from case unrelated to section 1292). Section 1292(a)(1) allows jurisdiction over appeals from "interlocutory orders…granting…injunctions," but does not define which orders constitute injunctions. Caselaw, however, reflects that the proper definition of injunction for section 1292 purposes is a functional one: an appealable injunction is an order, compliance with which would cause harm that cannot be addressed in an appeal from a final judgment.

Respondents' argument limits the irreparable injury requirement of 1292(a)(1) to orders with the practical effect of an injunction, Opp'n 11, but precedent makes clear that the touchstone separating appealable orders from non-appealable orders is irreparable injury. *See, e.g.*, *United States v. W. Elec. Co.*, 777 F.2d 23, 29 (D.C. Cir. 1985) (finding that, even if district court order was a

modification of a 1292(a)(1) injunction, appellants would still have to demonstrate "a serious, perhaps irreparable, consequence").

Respondents' inability to show irreparable injury warranting immediate, interlocutory review is clear from the speculative harms they outline. Whenever this Court has allowed an interlocutory appeal under 1292(a)(1), irreparable harm has been present. This Court explicitly requires a showing of irreparable injury for orders with the "practical effect" of an injunction. For orders that are clearly injunctions, the showing of irreparable injury prior to interlocutory appeal is baked into the adjudication of the preliminary injunction. Where a party requested a preliminary injunction and a district court granted or denied such relief, its ruling necessarily considered the risk of irreparable injury to the moving party if denied and the risk of substantial injury to the other party if granted. While the nomenclature used to label or describe an order may not be dispositive, here, the district court's lengthy legal reasoning militates against classifying the Order as an injunction. The Order is an exercise of the court's habeas jurisdiction to develop the factual record for an ultimate decision on the merits.

I. Awaiting Final Judgment Will Not Cause Respondents Irreparable Injury

An interlocutory order must cause serious, irreparable injury in order to merit immediate review. The harms Respondents conjecture do not reach that level.

First, Respondents argue that developing "procedures and standards for medical repatriation" would constitute irreparable injury. Opp'n 13. But Army Regulation 190-8 already provides both procedures and standards for a Mixed Medical Commission. *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). Even were that not the case, it is difficult to see how the need to develop rules to comply with domestic law could meet the high threshold of harm required for an interlocutory appeal to proceed. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) ("That a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment…has never sufficed."). The process costs of moving forward with a Mixed Medical Commission appear no more significant than, for example, the burden of complying with discovery orders. *Cf.* Wright, Miller & Cooper, 16 Fed. Prac. & Proc. § 3922.2 (citing numerous cases rejecting appellate jurisdiction over discovery orders).

Second, Respondents note that implementing the Order will "interfere with the government's detention operations in Guantanamo, and…disrupt pending military-commission proceedings." Opp'n 13. Where injury is speculative, it cannot be considered irreparable injury warranting immediate appeal. "Irreparable harm must be both certain and great, and actual and not theoretical." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 904 F.3d 1014,

1019 (D.C. Cir. 2018). With respect to ongoing military commissions, Respondents have previously invoked the *Councilman* abstention doctrine to halt habeas proceedings so military commissions could proceed first. *See Schlesinger v. Councilman*, 420 U.S. 738, 756-58 (1975); *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (affirming decision granting Respondents' motion to hold habeas petition in abeyance while military commission trial was pending). It therefore seems unlikely that a similar order issued in a habeas case on behalf of a commissions defendant would impede prosecution.

Last, Respondents state that the Order "could even permit petitioner's potential release." Opp'n 13. Again, this harm is speculative. The writ of habeas corpus will not issue as an inevitable result of the Order, which merely mandates the implementation of a process that may or may not result in a finding of entitlement to medical repatriation. Even if a finding ultimately recommended repatriation, further proceedings in district court would be required before a judgment could issue. That judgment would be appealable; even at that point, Respondents would not have suffered irreparable harm.

II. Not All District Court Orders Commanding Action Are Injunctions

Respondents complain that "petitioner neither cites the definition of an injunctive order nor attempts to explain how the challenged order fails to satisfy that definition." Opp'n 11. Respondents then propose their own definition of an

interlocutory injunction warranting immediate review under section 1292(a)(1), citing to Black's Law Dictionary and an immigration-stay case unrelated to section 1292. Opp'n 8 (citing *Nken v. Holder*, 556 U.S. 418 (2009)). If this Court adopted Respondents' definition, then every district court order commanding or prohibiting a party would be an appealable injunction and the exception in section 1292(a)(1) would swallow the final judgment rule.

The caselaw is clear that 1292(a)(1) is to be construed narrowly, not expansively. "[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 481-82 (1978). Jurisdiction under section 1292(a)(1) is "available *only* in circumstances where an appeal will further the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of *serious, perhaps irreparable, consequence*." *Carson*, 450 U.S. at 84 (emphasis added) (internal citation and quotation omitted); *see also Gardner*, 437 U.S. at 480 (order at issue "did not have any such 'irreparable' effect").[1]

[1] In *Salazar*, this Court in dicta attempted to define a category of automatically-appealable injunctions as those that accord at least part of the "relief sought by a complaint" in a non-temporary fashion. But that does not help Respondents here, since the relief sought in habeas is release and, again, that will not be available until final judgment. In any event, the entire discussion in *Salazar* is dicta: "both parties" agreed the contested order "grants injunctive relief," and this Court found the district court had not "refus[ed] to dissolve" it within the meaning of section 1292(a)(1). 671 F.3d at 1262 & nn. 2-4.

Thus, courts have declined to permit appeals from declaratory judgments and temporary restraining orders, even though they may have the same practical force as injunctions; from orders mandating discovery production, even though they require some expenditure of resources and effort on the part of the aggrieved party; and from orders limiting communications with shareholders by the management of public companies, even though such orders implicate First Amendment concerns. *See* Wright, Miller & Cooper, 16 Fed. Prac. & Proc. §§ 3922, 3922.1, 3922.2 (citing cases).

This Court has likewise found that not all district court orders that require a government agency to take specific action are injunctions under 1292(a)(1), especially where there is no irreparable injury. For example, in *Green v. Department of Commerce*, the district court granted judgment to the plaintiff and ordered the defendant to take the specific action of notifying companies that their reports would be released as a result of FOIA litigation. 618 F.2d 836, 841 (D.C. Cir. 1980). The defendant characterized the district court's order as "injunctive in nature" and sought interlocutory appeal, but this Court found that the order was not an injunction under section 1292(a)(1). *Id.* at 841. In another interlocutory appeal, this Court found that an order that Respondents must process plaintiff's FOIA request within twenty days was not an injunction under section 1292(a)(1). *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.* ("*CREW*"), 532 F.3d 860, 864 (D.C.

Cir. 2008). This Court noted that even if Respondents acted upon the order and located documents responsive to the FOIA request, additional proceedings remained in the district court. The district court might rule on any FOIA exemptions Respondents claimed; therefore, interlocutory review was "premature." *Id*.

Here, the Order "does not differ from any other time-consuming requirement imposed on litigants by courts in the interest of obtaining full information." *Green*, 618 F.2d at 841. The district court issued the Order so that a Mixed Medical Commission could "provide necessary facts to resolve Mr. al-Qahtani's habeas petition." Mem. Op. 21. Additionally, Respondents here, as in *CREW*, are instructed to undertake efforts while proceedings remain pending below. Respondents do not know whether the Mixed Medical Commission will recommend medical repatriation and the district court has not issued the writ of habeas corpus. As in *CREW*, at this stage, any appellate review is premature. "A holding that such an order falls within § 1292(a)(1) would compromise the integrity of the congressional policy against piecemeal appeals." *Gardner*, 437 U.S. at 482 (internal citation omitted).

III. The District Court Ruled in Aid of Its Habeas Jurisdiction and Did Not Grant Injunctive Relief

The district court held that Mr. al-Qahtani's request for a Mixed Medical Commission "sounds in habeas." Mem. Op. 12. It ruled that the All Writs Act, 8 U.S.C. § 1651, allows it to "fashion procedures…in order to develop a factual record as necessary for the Court to make a decision on the merits of Petitioner's habeas

claims." *Id.* at 21; *see also Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held…it may issue such writs and take or authorize such proceedings with respect to development…of the facts.").

Mr. al-Qahtani had sought relief pursuant to the All Writs Act, in aid of the court's habeas jurisdiction, or, alternatively, "injunctive relief compelling access to a Mixed Medical Commission immediately." Mot. to Compel 14, ECF No. 369. The district court opinion includes over twenty pages explaining why Army Regulation 190-8 applies to Mr. al-Qahtani and how the Order is an exercise of habeas jurisdiction because it will yield facts necessary for the court's ultimate decision on Mr. al-Qahtani's habeas petition. The court then states that it "need not consider Mr. al-Qahtani's alternative request that the court grant injunctive relief," before addressing the relevant standard "briefly." Mem. Op. 22.

Respondents argue that this All Writs Act ruling to develop a factual record for habeas is an injunction because Mr. al-Qahtani requested injunctive relief in the alternative. Opp'n 9-10. Respondents cite no authority for such legerdemain. In the case they rely on, *International Association of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 849 F.2d 1481 (D.C. Cir. 1988), the district court granted petitioner's primary and alternative forms of relief and not only held Eastern Airlines in civil contempt, but also "further enjoined and restrained" it from

spinning off its shuttle operations into a separate corporate entity. *Id*. at 1484. That injunction constituted irreparable harm, and thus was an appealable order under section 1292(a)(1).

Additionally, there was no finding that Mr. al-Qahtani made a "clear showing" of entitlement to a preliminary injunction, *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), because the court did not rule on each factor. For example, as to whether he had demonstrated the irreparable harm required for an injunction, the district court noted that it "does not rule on the question." Mem. Op. 24. Regarding the likelihood of success on the merits, the court stated that it "will not substitute its lay opinion for that of a competent mixed medical commission." *Id*. While the discussion of the preliminary injunction factors is brief and general, the district court's analysis of its habeas authority is lengthy and precise, providing a strong foundation for its Order. Respondents mischaracterize the Order as granting injunctive relief.

CONCLUSION

Respondents cannot show irreparable injury if they appeal the Order upon final judgment. With neither a showing of irreparable injury nor a clear grant of injunctive relief below, this Court ought not exercise jurisdiction over this interlocutory order. For these reasons, the Court should dismiss Respondents' appeal for want of jurisdiction.

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Respectfully submitted,

_____/s/_____

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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).

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