[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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.	No. 20-5130

RESPONDENTS-APPELLANTS' OPPOSITION TO PETITIONER'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Petitioner Mohammed al Qahtani is a member of al-Qaida who is detained at Guantanamo Bay as an unprivileged enemy combatant. Petitioner moved in district court for an order requiring the government to convene a mixed medical commission under § 3-12 of Army Regulation 190-8. *See* Dep't of the Army, Reg. 190-8 (Oct. 1, 1997) (AR 190-8). That regulation implements the provisions of the Geneva Convention Relative to the Treatment of Prisoners at War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention), that govern the repatriation of sick and wounded enemy prisoners of war. AR 190-8 § 3-12(a). Petitioner argued that he was entitled to such relief "pursuant to the All Writs Act [28 U.S.C. § 1651] or in the form of an injunction." Dkt. No. 369, at 3. The district court granted petitioner's motion and ordered the government to establish a mixed medical

commission to examine petitioner. The district court agreed with petitioner that the All Writs Act allowed it to issue such equitable relief. The court also addressed the four preliminary injunction factors and concluded that they favored petitioner.

As the government explained in district court, the medical-repatriation provisions of the Third Geneva Convention do not apply in non-international armed conflicts such as the United States's conflict with al-Qaida—an organization that neither accepts nor applies the Convention. Indeed, the government has never convened a mixed medical commission to examine any individual in petitioner's position. The government thus appealed the district court's unprecedented order to this Court.

Despite requesting injunctive relief under both the All Writs Act and the ordinary preliminary-injunction factors—and despite obtaining such relief from the district court—petitioner asks this Court to dismiss the government's appeal for want of jurisdiction. But this Court's precedents make clear that the challenged order is an "[i]nterlocutory order[] of [a] district court[] of the United States . . . granting . . . [an] injunction[]" that is appealable as of right. 28 U.S.C. § 1292(a)(1). And even if the order were not covered by the plain text of § 1292(a)(1), the order would be immediately appealable either because it is a noninjunctive order with the practical effect of an injunction, or because it satisfies the collateral-order doctrine under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Accordingly, the motion to dismiss should be denied.

STATEMENT

1. a. The Third Geneva Convention establishes rules for the treatment of prisoners of war. The full protections of the Convention apply to international armed conflicts—that is, to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Third Geneva Convention, art. 2. In such conflicts, the Convention applies even if "one of the Powers in conflict may not be a party to the Convention." *Id.* "[T]he Powers who are parties [to the Convention]" shall "be bound by the Convention in relation to the said [non-party] Power, *if* the latter accepts and applies the provisions thereof." *Id.* (emphasis added).

By contrast, the full protections of the Convention do not apply to non-international armed conflicts. "In the case of armed conflict not of an international character," parties are only "bound to apply, at a minimum," certain provisions enumerated in Article 3 of the Convention that relate to the humane treatment of detainees. *Id.*, art. 3; *see generally Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006).

The United States's conflict with al-Qaida is a non-international armed conflict. Al-Qaida is a terrorist organization, not a State that is a High Contracting Party to the Third Geneva Convention. Furthermore, "[n]on-state actors such as al-Qaida" are not "'Power[s]' that would be eligible under Article 2 . . . to secure protection by complying with the Convention's requirements." *Hamdan v. Rumsfeld*, 415 F.3d 33, 44

(D.C. Cir. 2005) (Williams, J., concurring), *cited approvingly by Hamdan*, 548 U.S. at 630. And in any event, al-Qaida neither accepts nor applies the Convention's provisions. The full protections of the Convention thus do not apply to enemy combatants who are part of al-Qaida, as al-Qaida's members are not entitled to prisoner-of-war status under the Convention. *See* White House Press Secretary Announcement of President Bush's Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), https://2009-2017.state.gov/s/l/38727.htm. The Convention only obliges the United States to apply the provisions of Article 3.

b. The Third Geneva Convention requires the parties to an international armed conflict to repatriate "seriously wounded and seriously sick prisoners of war." Third Geneva Convention, art. 109. The Convention's repatriation provisions are not enumerated in Article 3.

To implement the Convention's medical-repatriation provisions, the Convention calls for the appointment of mixed medical commissions to "examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them." *Id.* art. 112. The "appointment, duties, and functions of these Commissions" are set forth in Annex II to the Convention. *Id.*

Annex II requires each mixed medical commission to have three members. Third Geneva Convention annex II, art. 1. One member must be appointed by the detaining power. *Id.* The two others "shall belong to a neutral country," *id.*; "shall be appointed by the International Committee of the Red Cross, *id.* annex II, art. 2; and

"shall be approved by the Parties to the conflict," *id.* annex II, art. 3. If the International Committee of the Red Cross cannot arrange for the appointment of neutral members, such appointment "shall be done by the Power protecting the interests of the prisoners of war to be examined." *Id.* annex II, art. 5. The commission's decisions "shall be made by a majority vote," *id.* annex II, art. 10, and must be executed by the detaining power "within three months of the time when it receives due notification of such decisions," *id.* annex II, art. 12.

c. The United States is a High Contracting Party to the Third Geneva Convention. To carry out the government's treaty obligations, the Secretaries of the Army, Navy, and Air Force issued Army Regulation 190-8. This regulation "implements international law" relating to enemy prisoners of war and other categories of individuals detained by the U.S. armed forces. AR 190-8 § 1-1(b); *see id.* § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."). Section 3-12 of the regulation provides for the establishment of mixed medical commissions "to determine cases eligible for repatriation." *Id.* § 3-12(a)(2). The procedures governing those commissions are based on those specified by Annex II of the Convention. *Id.*

Section 3-12 states that, to be eligible for examination and potential repatriation, an individual must fall into one of two categories: Enemy Prisoners of War or Retained Personnel. AR 190-8 § 3-12(h). The glossary to AR 190-8 defines

"Enemy Prisoners of War" as "detained person[s] as defined in Articles 4 and 5 of the [Third] Geneva Convention," and in particular, as individuals "who, while engaged in combat under orders of [their] government, [are] captured by the armed forces of the enemy." *Id.*, glossary, sec. II. The glossary defines "Retained Personnel" as "medical personnel" meeting certain requirements; "[c]haplains"; and "[s]taff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments." *Id.*; *see id.* § 3-15(b).

The glossary also addresses "Other Detainee[s]." AR 190-8, glossary, sec. II. "Other Detainees" are "[p]ersons in the custody of the U.S. Armed Forces who have not been classified as . . . [Enemy Prisoners of War] (article 4, [GC III]), [Retained Personnel] (article 33, [GC III], or [Civilian Internees] (article 78, [Fourth Geneva Convention])." *Id.*[1] Other Detainees "shall be treated as [Enemy Prisoners of War] until a legal status is ascertained by competent authority." *Id.*

2. Petitioner Mohammed al Qahtani is a Saudi Arabian national detained at Guantanamo Bay. In 2005, petitioner filed a habeas petition alleging that his detention was unlawful. The government responded with a factual return explaining that petitioner—a member of al-Qaida who unsuccessfully attempted to enter the

[1] A civilian internee is a "civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power." AR 190-8, glossary, sec. II. The regulation does not provide for the examination of civilian internees by a mixed medical commission. *Id.* § 3-12(h).

United States to participate in the September 11 attacks—is being detained pursuant to the 2001 Authorization for Use of Military Force as informed by the laws of war. Petitioner has not yet filed a traverse challenging the factual basis for his detention. Petitioner's habeas case has been stayed at his request since 2010.

In 2017, petitioner asked the government to convene a mixed medical commission to examine him pursuant to § 3-12 of AR 190-8. After the government rejected that request, petitioner filed a motion in his pending habeas case seeking to "compel Respondents to facilitate" such examination. Dkt. No. 369, at 1. Petitioner claimed that he was "entitled" to such relief "pursuant to the All Writs Act or in the form of an injunction." *Id.* at 3.

3. The district court granted petitioner's motion. The court held—notwithstanding the government's determinations that petitioner was part of al-Qaida and that al-Qaida fighters are not entitled to prisoner-of-war status—that petitioner is an "Other Detainee" who must be treated as an enemy prisoner of war under AR 190-8, including with respect to the regulation's medical-repatriation provisions. Dkt. No. 386, at 19-20. The court further concluded that it had authority under the All Writs Act to compel the government to convene a mixed medical commission to provide the Court with the necessary medical facts to reach a legal conclusion in petitioner's habeas case. *Id.* at 21-22. The court stated that, due to its reliance on the All Writs Act, it "need not consider" petitioner's request for injunctive relief. *Id.* at 22. The court nevertheless "address[ed] the legal standard governing preliminary

injunctions" to "assist review," *id.*, and held that the preliminary-injunction factors favored petitioner, *id.* at 22-25.

The government appealed the court's order, and sought a stay of that order in district court. The government's stay motion, which petitioner opposed, remains pending.

ARGUMENT

1. This Court has jurisdiction over the government's appeal because the order requiring petitioner's examination by a mixed medical commission is an "[i]nterlocutory order of [a] district court of the United States . . . granting [an] injunction[]" that the government may appeal as of right. 28 U.S.C. § 1292(a)(1). An order is an "order[] . . . granting an injunction" under § 1292(a)(1) if it "directs the conduct of a party . . . with the backing of [the court's] full coercive powers." *Nken v. Holder*, 556 U.S. 418, 428 (2009); *see id.* (defining "injunction as [a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury") (quoting *Black's Law Dictionary* 784 (6th ed. 1990)).

The challenged order plainly satisfies this definition. The order is directed at four specific "part[ies]": the governmental officials responsible for petitioner's detention at the Guantanamo Bay facility. *Nken*, 556 U.S. at 428. The order "directs the conduct" of those parties by requiring them to take a particular act (convening a mixed medical commission under AR 190-8 to examine petitioner) to "'undo'" a particular alleged wrong (refusing to agree to petitioner's examination request). *Id.*

And if the parties subject to the order do not comply with it, petitioner can ask the district court to enforce the order using the court's "full coercive powers." *Id.*

Petitioner's motion to compel his examination by a mixed medical commission further underscores that the challenged order is an "order[] . . . granting . . . [an] injunction[]" under 28 U.S.C. § 1292(a)(1). Petitioner asked the district court to enter an order with all of the characteristics of an injunction, and argued that he was "entitled" to such relief "pursuant to the All Writs Act or in the form of an injunction." Dkt. No. 369, at 3. Petitioner then argued that, because all four of the preliminary-injunction factors weighed in his favor, the court was required to enter "injunctive relief compelling access to a Mixed Medical Commission immediately." *Id.* at 14-15. The district court entered the requested order under the All Writs Act, and also concluded that the preliminary-injunction factors supported such an order. Because the "court['s] order . . . result[ed] from a specific request for an injunction," the order is an injunctive order appealable under § 1292(a)(1). *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 23 (D.C. Cir. 1986).

Petitioner's decision to frame his request for an injunction in the alternative does not alter the jurisdictional analysis. "[O]rder[s] clearly granting . . . a specific request for injunctive relief . . . are always appealable under § 1292(a)(1)." *I.A.M. Nat'l Pension Fund Benefit Plan A*, 789 F.2d at 24 n.3. "[T]his condition [i]s satisfied" even when a party requests an injunction "in the alternative." *International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Airlines, Inc.*, 849 F.2d 1481, 1486

n.11 (D.C. Cir. 1988). The district court "clearly grant[ed]" petitioner's alternative request, *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24 n.3, by "address[ing] the legal standard governing preliminary injunctions" and by concluding that those factors entitled petitioner to the relief he sought, Dkt. No. 386, at 22.

Nor is it significant that the district court ordered relief under the All Writs Act, Dkt. No. 386, at 21-22, without first addressing the preliminary-injunction factors. A court's All Writs Act authority "is defined by 'what is the usage, and what are the principles of equity applicable in such a case.'" *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 n.8 (1999). The preliminary-injunction factors are the only "principles of equity" under which the court could have granted equitable relief in the form that it did. Otherwise, courts could routinely invoke the All Writs Act to bypass the standards that govern the "extraordinary remedy of injunction." *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The court's erroneous decision to mandate extensive governmental action under the All Writs Act without reference to the preliminary-injunction standards does not render its order any less of an "order[] . . . granting . . . [an] injunction[]" for purposes of 28 U.S.C. § 1292(a)(1). *Cf. International Ass'n of Machinists*, 849 F.2d at 1486 (holding that an "injunction does not cease to be appealable under section 1292(a)(1) merely because it is contained in an order for civil contempt") (quoting *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987)).

2. Petitioner's motion to dismiss the government's appeal ignores all of these jurisdictional principles. Indeed, petitioner neither cites the definition of an injunctive order nor attempts to explain how the challenged order fails to satisfy that definition. Petitioner instead proceeds (Mot. 17) from the premise that § 1292(a)(1) confers jurisdiction only over "interlocutory order[s] that ha[ve] the practical effect of an injunction." Such an order is appealable if it "affects predominately all of the merits" of the case. *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1262 (D.C. Cir. 2012) (alteration and quotation marks omitted). Even if the order does not affect predominately all of the merits, the order is still appealable if it has a "serious, perhaps irreparable, consequence" that is effectively challengeable only by immediate appeal. *Id.* (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981)). Petitioner argues that, because the order at issue does not satisfy these criteria, this Court lacks jurisdiction under § 1292(a)(1).

This Court has repeatedly rejected petitioner's interpretation of § 1292(a)(1). The limitations that apply to review of noninjunctive orders with the "practical effect" of an injunction "do[] not apply to an order clearly granting . . . a specific request for injunctive relief." *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24 n.3. Such an order "falls within the plain text of § 1292(a)(1) and is appealable without any further showing." *Salazar*, 671 F.3d at 1261. That conclusion reflects the Supreme Court's recognition that "Section 1292(a)(1) . . . provide[s] appellate jurisdiction over orders that grant or deny injunctions *and* [over] orders that have the practical effect of granting or denying

injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988) (emphasis added). It is also consistent with the holdings of every other court of appeals to have considered the question. *Salazar*, 671 F.3d at 1262 n.2 (listing cases). Because the challenged order "falls within the plain text of § 1292(a)(1)," this Court has jurisdiction over the government's appeal whether or not the order satisfies the limitations on review of noninjunctive orders with the practical effect of an injunction. *Salazar*, 671 F.3d at 1261.

In any event, the challenged order is reviewable even accepting petitioner's misinterpretation of § 1292(a)(1). Petitioner does not dispute that the order has the practical effect of an injunction. Instead, petitioner contends that the order does not satisfy the limitations on review of noninjunctive orders with the practical effect of an injunction. But even if the order does not resolve predominantly all of the merits of the case, it remains appealable because it threatens "serious, perhaps irreparable consequence[s]," and because it "can be effectually challenged only by immediate appeal." *Carson*, 450 U.S. at 84 (quotation marks omitted).

As the government's district-court stay filings explain in detail, the district court's order requires the government to establish a mixed medical commission to examine a fighter who is part of al-Qaida—a terrorist organization that emphatically rejects the Geneva Convention and disregards its provisions. The government has never convened such a commission in the context of a non-international armed

conflict with a terrorist group. Yet the order requires the government to develop—for the first time in history—procedures and standards for medical repatriation for the benefit of an al-Qaida fighter who is not entitled to the benefits of the Geneva Convention's medical-repatriation provisions. The order is also likely to interfere with the government's detention operations in Guantanamo, and to disrupt pending military-commission proceedings. *See generally* Dkt. No. 389 (sealed stay motion); Dkt. No. 395 (sealed reply in support of stay motion).[2] The order could even permit petitioner's potential release irrespective of the Executive Branch's determination that his detention remains necessary to protect against a continuing significant threat to national security. *See generally* Dkt. Nos. 389, 395. If the government is barred from appealing the order until petitioner's habeas proceeding goes to judgment—a proceeding that has been held in abeyance, at petitioner's request, since 2010—the government would be required to timely convene a mixed medical commission to examine petitioner in the interim. Thus, the district court's order can only be effectively reviewed now.

Petitioner responds (Mot. 19) that the harms to the government are not sufficiently severe to warrant immediate appellate review. Petitioner's principal

[2] In district court, the parties filed their stay papers under seal because the filings contain information that the government has deemed "protected information" under the protective order that governs the case. The government is currently preparing public redacted versions of the parties' filings, and is conferring with petitioner with respect to those redactions.

argument (Mot. 12-15) is that establishing a mixed medical commission to examine him would be neither novel nor burdensome. But petitioner has failed to cite a single instance in which the government has convened such a commission in the context of a conflict with a terrorist group. And the procedures specified in AR 190-8 further illustrate that § 3-12 does not apply to such conflicts. AR 190-8 requires two of the Commission's members to be "appointed by the [International Committee of the Red Cross] and approved by the parties to the conflict." AR 190-8 § 3-12(a)(2). The United States cannot effectuate that mandate without first initiating negotiations with al-Qaida—a task that not even petitioner contends that the regulation requires. Petitioner instead proposes (Mot. 12) that the United States establish a "Medical Commission" to "perform the duties of a Mixed Medical Commission" by "acting in agreement" with a State designated to protect al-Qaida's interests. *Id.* § 3-12(b). But no such State exists. And petitioner's contrary assertion notwithstanding, AR 190-8 does not provide for the designation of the International Committee of the Red Cross as al-Qaida's "Protecting Power" in this context. *See* AR 190-8 § 3-12(b) (describing the roles of the International Committee of the Red Cross and the Protecting Power separately and as alternatives to one another).

Petitioner also contends (Mot. 15-16) that, notwithstanding the harms that the government has identified, those harms are outweighed by the harms to petitioner that immediate appeal would engender. This argument conflates the standard for appealing a noninjunctive order with the practical effect of an injunction—which

turns exclusively on whether *appellant* would sustain "serious, perhaps irreparable" injury if prevented from appealing, *Carson*, 450 U.S. at 84 (quotation marks omitted)—with the standard for obtaining a stay of that order. In any event, petitioner's allegations of injury are identical to those that he asserted in district court in response to the government's stay application, and lack merit for the reasons the government's sealed stay papers set forth. *See generally* Dkt. Nos. 389, 395.

3. Petitioner separately argues that the government's appeal should be dismissed because the challenged order is not a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This argument similarly misses the mark. The collateral-order doctrine is inapplicable because the challenged order is an "order[] . . . granting . . . [an] injunction[]" under § 1292(a)(1), and such orders are "appealable without any further showing." *Salazar*, 671 F.3d at 1261.

In any event, the challenged order is also appealable under *Cohen*. Petitioner does not dispute that the order is a "final[] determin[ation]" of petitioner's entitlement to examination by a mixed medical commission under AR 190-8. *Cohen*, 337 U.S. at 546. Petitioner also does not dispute that the question of AR 190-8's applicability is "separable from, and collateral to," the merits of petitioner's underlying habeas petition. *Id.* Petitioner merely reiterates his contention (Mot. 10-11) that the order can be effectively reviewed after his habeas case goes to judgment. As explained, *supra* pp. 12-15, that argument lacks merit.

CONCLUSION

For these reasons, the motion to dismiss should be denied.

Respectfully submitted,

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JULY 2020

CERTIFICATE OF SERVICE

I hereby certify that, on July 16, 2020, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and will be served through the CM/ECF system.

/s/ Michael Shih
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 3,740 words according to the count of Microsoft Word.

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