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

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| AHMED BELBACHA,<br>NABIL HADJARAB,<br>ABU WA'EL (JIHAD) DHIAB,<br>SHAKER AAMER,<br><br>*Petitioners,*<br><br>*v.*<br><br>BARACK H. OBAMA, et al.,<br><br>*Respondents.* | Civ. Nos. 04-2215 (RMC), 05-1457 (GK), 05-1504 (RMC), & 05-2349 (RMC) |

**APPLICATION FOR PRELIMINARY INJUNCTION AGAINST FORCE-FEEDING**

Petitioners Ahmed Belbacha, Nabil Hadjarab, Abu Wa'el (Jihad) Dhiab, and Shaker Aamer, by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 65 and the All Writs Act, 28 U.S.C. § 1651 (2012), apply to this Court for a preliminary injunction prohibiting respondents from subjecting petitioners to force-feeding of any kind, including forcible nasogastric tube feeding, and from administering medications related to force-feeding without the petitioners' consent. Petitioners request an expeditious hearing on this application because of the extreme nature of the human rights and medical ethics violations that result from petitioners' force-feeding, and because of the imminent risk that it will deprive them of the ability to observe the Ramadan fast, which commences this year on July 8.

Petitioners have been detained at Guantánamo Bay for up to 11 years. At this point, their detention without trial or military commission proceedings has become indefinite. To force-feed a noncriminal detainee in order to prolong his indefinite detention violates the law of human rights and thus serves no legitimate penological interest.

Petitioners' force-feeding also violates medical ethics and is inhumane. For that reason, too, it serves no legitimate penological interest. The only theory advanced to justify petitioners' detention is that, more than a decade ago, they were enemy belligerents. Their detention, it is said, is necessary to ward off some putative "return" to the battlefield. They dispute that claim, but even if one accepts it, a noncriminal enemy belligerent is still entitled, under the Geneva Conventions and basic standards of human decency, to be treated honorably and humanely. Being strapped to a chair and having a tube forcibly inserted through one's nostrils and into one's stomach is dishonorable and degrading. It falls within the ambit of torture or other forms of inhumane treatment. In the long history of American detention of the enemy, bodily invasions of this character have never been the routine business of the prisoner of war camp.

Because petitioners' force-feeding is not reasonably related to a legitimate penological interest, it is unlawful and should be enjoined. Additionally, the administration of the drug Reglan in conjunction with petitioners' force-feeding should also be enjoined because it violates their right to refuse medical treatment with a drug that poses a significant risk of adverse side effects from prolonged use.

Petitioners did not come lightly to the request they make by this application. But after 11 years of limbo at Guantánamo Bay, they have sensibly concluded that they will never be charged and will never be released. Their detention and their force-feeding has nothing to do with military necessity, for the commander in chief says he wants to stop directing military force (in the form of detention) against them. Their detention is solely a function of a political stalemate between the President and the Congress.

President Obama has even disapproved of petitioners' force-feeding, stating in a speech on May 23, 2013: "Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. Is that who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that." Yahoo! News, *Doctors to Obama: Let us treat Guantanamo detainees on hunger strike*, http://news.yahoo.com/blogs/ticket/doctors-obama-let-us-treat-guantanamo-detainees-hunger-230110562.html. But President Obama has not seen fit to stop the force-feeding. His deeds have not matched his soaring rhetoric.

Petitioners respectfully ask one thing: to be allowed the choice whether to accept food or medicine.

On June 28, 2013, petitioners' counsel discussed this application with respondents' counsel by e-mail, who stated that they would oppose the application.

## I.
## STATEMENT OF FACTS

### A. The Regulations on Force-Feeding at Guantánamo Bay.

A 30-page document recently made public contains regulations governing force-feeding of hunger-striking detainees at Guantánamo Bay. *See* Joint Task Force Guantánamo Bay, Cuba, Joint Medical Group, *Medical Management of Detainees on Hunger Strike* (March 5, 2013) (hereinafter *Medical Management of Detainees*). The regulations pronounce a policy that when a hunger striker refuses sustenance, "medical procedures that are indicated to preserve health and life shall be implemented without consent from the detainee." *Id.* at 2. Those "medical procedures" include forcible nasogastric tube feeding while the detainee is physically restrained in a specially-made chair.

The regulations state that force-feeding via enteral feeding tube will be considered if, among other things, "[t]here is a prolonged period of hunger strike (more than 21 days)" or "[t]he detainee is at a weight less than 85% of the calculated Ideal Body Weight (IBW)." *Medical Management of Detainees, supra* at 5. "Intermittent enteral feedings are usually done two times a day." *Id.* at 18. The detainee is shackled, a mask is placed over his mouth, and he "is escorted to the chair restraint system and is appropriately restrained by the guard force." *Id.* "The feeding tube is passed via the nasal passage into the stomach," "[t]he tube is secured to the nose with tape," and the feeding is typically completed "over 20 to 30 minutes." *Id.* The detainee may be kept in the chair restraint system for as much as two hours after the force-feeding is completed. *Id.*

The force-feeding ceases only "[w]hen a hunger striking detainee voluntarily resumes eating or when the detainee has attained 100% of calculated IBW for at least fourteen (14) consecutive days and the attending physician deems it to be medically appropriate . . . ." *Medical Management of Detainees, supra* at 16. Detainees may be regularly force-fed "for a prolonged period of time," which is defined as generally exceeding 30 days. *Id.* at 3.

Force-feeding is imposed indirectly as well: The regimen for transporting the detainee and administering the feeding is so intrusive and painful that some detainees will accept a minimal amount of nutrition, such as "Ensure," in order to avoid it. Two of the petitioners in this motion, Shaker Aamer and Abu Wa'el Dhiab, have chosen this course—Mr. Dhiab after a course of force-feeding during the current hunger strike, Mr. Aamer because of prior experience with force-feeding in earlier hunger strikes.

The force-fed regimen may include the drug Reglan (generic metoclopramide), which is used to treat nausea and prevent vomiting. *Medical Management of Detainees, supra* at 15-16. One of the potential adverse side-effects of Reglan's prolonged use is a neurological disorder called tardive dyskinesia. *See infra* at 22.

**B. Petitioners' Circumstances.**

Further detail about each petitioner's situation in Guantánamo and his decision to seek an end to the force-feeding regimen is contained in the Declaration of Cori Crider, attached as Exhibit A (hereinafter Crider Decl. Ex. A). As that declaration explains, the severe logistical barriers to communication with clients at this time meant that to file a signed declaration in the name of each client would have taken a great deal longer.

*Need for independent medical advice*

Medical ethics dictates that a physician's duty is to inform a hunger-striker of the risks of voluntary self-starvation, assess the striker's competence to decide not to eat, and if the striker is deemed competent, to stand aside. *See, e.g.,* World Medical Association, *WMA Declaration of Malta on Hunger Strikers* & 2 (1991, rev. 1992 & 1996) ("Physicians should respect individuals' autonomy. This can involve difficult assessments as hunger strikers' true wishes may not be as clear as they appear. Any decisions lack moral force if made involuntarily by use of threats, peer pressure or coercion. Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable.")

Petitioners do not trust the Guantánamo doctors and nurses, because those staff have been ordered by their superior officers to subject petitioners to a force-feeding regimen they reject and which causes them humiliation and pain. They and others said so in a recent open letter to the Guantánamo authorities, asking that independent medical examiners be permitted to access the base to assess and advise them. Letter from Shaker Aamer et al., the Detainees on hunger strike in Naval Base, Guantánamo Bay, to military doctors (May 30, 2013) THE GUARDIAN (May 31, 2013), http://www.guardian.co.uk/world/interactive/2013/may/31/guantanamo-detainees-protest-letter. Some 150 doctors and other health professionals have stated in a letter published in *The Lancet* that they stand ready to travel to Guantánamo and give independent, non-military advice to these detainees. Letter from Dr. Frank Arnold, et al., military doctors, to President Obama (June 19, 2013) in 381 THE LANCET 9884, at

p. 2166. There are more than enough signatories to supply independent medical advice—not only to the individuals who are being force-fed, but to the entire striking population at Guantánamo.

Stephen N. Xenakis, M.D., a retired brigadier general and security-cleared psychiatrist who has experience treating hunger strikers and Guantánamo detainees, reiterates this consensus in a declaration attached as Exhibit C (hereinafter Xenakis Decl. Ex. C). He is also prepared to travel to Guantánamo to assess petitioners' mental capacity should the Court deem it necessary. Xenakis Decl. Ex. C, at 2-3.

*Ahmed Belbacha*

Mr. Belbacha is a citizen of Algeria and has been held in Guantánamo since March 2002. He was first cleared for release in 2007 by the Defense Department's Administrative Review Board (ARB) process. The Obama Administration's Guantánamo Review Task Force (GRTF) also authorized him for transfer in 2009.

Mr. Belbacha began striking sometime in February and was hospitalized on April 12, 2013. It is unclear exactly when force-feeding started, but the Department of Justice (DOJ) sent counsel an e-mail stating that force-feeding had begun on April 16, 2013. In a phone call with counsel on May 30, 2013, Mr. Belbacha indicated that he wished to join this motion. Crider Decl. Ex. A, at 5. He says that he understands the risks of hunger-striking, and that he nonetheless wishes the Court to order the government to cease force-feeding and forcibly medicating him. *Id.* at 5.

The force-feeding process causes Mr. Belbacha extreme pain. A prior nasal surgery makes intubation even more uncomfortable for him than in the usual case—

one nostril has apparently swelled and cannot accept the tube at all. *Id.* at 6. His requests for smaller-gauge tubes to lessen the pain yield exhortations to eat. *Id.*

Mr. Belbacha has tried to protest his force-feeding individually with the camp medical staff, but on each occasion has been told that the way he is treated—or whether he is fed at all—is not up to them. *Id.* at 7. His impression, from conversations with some of these staff, is that they are unseasoned. It appears, for some, to be their first experience of force-feeding prisoners. *Id.* The ordeal may prove as traumatic and damaging for these unfortunate military medics as it is for Mr. Belbacha.

The force-feeding makes him feel nauseous and has caused him at times to vomit. *Id.* at 7-8. He says he has never heard of Reglan, but believes that Guantánamo staff might administer it to him without his knowledge or consent. *Id.* at 8. One corpsman indicated to him that the force-feeding bag does include a laxative—it is unclear whether this is Reglan, which the regulations state can be used in this way, *Medical Management of Detainees, supra,* at 16, or some other drug. He indicates he has seen materials being mixed into the force-feeding bag. Crider Decl. Ex. A, at 18.

*Nabil Hadjarab*

Mr. Hadjarab is an Algerian citizen and former French resident. His living relatives are French citizens and have requested that the French government accept him in honor of his family's history of French military service. He was also cleared by the Bush administration ARB in 2007 and by the Obama-era GRTF in 2009.

In a telephone call on June 17, he indicated he wished to join this motion, saying: " 'For years I never thought about being on hunger strike, but I am doing this because I want to know my destiny. I cannot abide not knowing anymore.' " Crider Decl. Ex. A, at 9. While he does not wish to die, he adds, " 'I am *prepared* to die because I believe there is no end-point to my imprisonment.' " *Id.* at 10 (emphasis in original).

Mr. Hadjarab was among the first prisoners to be force-fed, on March 22, 2013. Crider Decl. Ex. A, at 11. He also finds the process degrading and painful, stating that the feeding chair " 'reminds [him] of an execution chair.' " *Id.* at 11. He, too, has sought to raise concerns with medical staff and has been rebuffed. *Id.* at 12. While he has never heard of Reglan and refuses anti-nausea medication if it is offered, he also believes it possible that medication is administered without informing him. *Id.*

*Shaker Aamer*

Mr. Aamer is a Saudi national and British resident cleared by President Obama's GRTF, whose return to the United Kingdom has been requested on several occasions by the UK government. Despite repeated requests from perhaps the United States' closest ally, he continues to be detained.

Mr. Aamer is, like the others, on strike. Nonetheless, because of his prior experience with force-feeding and his family history of renal failure, he has elected to take a very small amount of nutrition each day. *Id.* 12. He has nonetheless lost approximately 50 pounds, continually goes through "Forcible Cell Extractions" (FCEs), and states that if the force-feeding regimen were not in place he would cease eating.

*Id.* 13. He indicated to Clive Smith, lead counsel on Mr. Aamer's case, that he wished to join this motion. *Id.* at 12.

*Abu Wa'el Dhiab*

Mr. Dhiab is a Syrian national. He was cleared for release by President Obama's GRTF in 2009, and DOJ notified his counsel of the force-feeding on April 9, 2013, although it is likely force-feeding began earlier than this. He stated during a telephone call with counsel on May 30, 2013 that he wished to join this motion. *Id.* at 13. He has started taking Ensure because of serious back pain from being forced into and out of the chair, but has stated that if force-feeding were enjoined he, too, would resume a total fast. *Id.* When counsel added that, were the motion successful, he would have the choice either to eat or to die, he stated: " 'Of course I know the consequences of refusing the food. And I will not eat. Why do you think I am on hunger strike in the first place?' " *Id.* at 15. He stated he was prepared to take the risk—having the choice to eat or not was the important thing. *Id.*

He describes force-feeding as a degrading process:

> Straps and shackles are put in place and only the chains on the hands are released. Then all the straps are tightened forcefully so that I cannot move or breathe. In addition to this, there are six riot force members: one holding the head and putting his fingers on the throat and neck from below the chin with severe pressure, the second and third hold the hands, the fourth and fifth hold the legs, and then the nurse inserts the tube. If you are in pain it is natural for your head to move, so they shout "don't resist."

*Id.* 16. As with all other petitioners, Mr. Dhiab does not believe he has heard of Reglan. *Id.* at 18. He said he had not yet vomited because of feeding, but had at the

time of the telephone call not had a bowel movement for 18 days. *Id.* Asked whether he thought medications were administered without his consent, he stated: "I am sure they could be giving Reglan without telling us. They grind up medicine and mix it with the food. We know that. We do not trust them. The doctor who treats us is not a real doctor." *Id.*.

His concluding words on the subject were as follows: "The issue now is: why am I here? We have heard all of this before. The lawyers have been with us for four years and still the government does not want to release us. They are just giving us anesthesia to wait — but there is no action." *Id.*

## II.
## ARGUMENT AND CITATION OF AUTHORITY

### A. Petitioners' Force-Feeding is Not Reasonably Related to Any Legitimate Penological Interest.

#### 1. The Standard for Determining the Validity of the Regulations on Force-Feeding of Guantánamo Bay Detainees is Whether Those Regulations Are Reasonably Related to Legitimate Penological Interests.

"Prison walls do not form a barrier separating prison inmates from the protection of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Nevertheless, the constitutional rights of prisoners must sometimes yield to the practical needs of prison administration. *Id.* Accordingly, the Supreme Court has prescribed a test that strikes a balance between these two interests: "[T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'" *Washington v. Harper*, 494 U.S. 210, 223 (1990) (quoting *Turner*, 482 U.S. at 89). A key consideration in determining the reasonableness of a prison regulation is whether there are "'ready alternatives'" to the regulation. *Id.* at 225 (quoting *Turner*, 482 U.S. at 90-91).

This standard has been applied to claims by Guantánamo Bay detainees. See *Al-Adahi v. Obama*, 596 F. Supp. 2d 111, 120 (D.D.C. 2009); *Hicks v. Bush*, 452 F. Supp. 2d 88, 101 (D.D.C. 2006). It makes no difference whether the purpose of petitioners' detention is intended to be punitive, because the "legitimate penological interests" test refers to the "interest in security and management" of prisons and jails. *Harper*, 494 U.S. at 247. Thus, even if a restriction accompanying pretrial detention

does not amount to punishment, it is still unlawful if it is "not reasonably related to a legitimate [governmental] goal." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

Accordingly, the relevant question here is whether the regulations under which petitioners are being force-fed are reasonably related to legitimate penological interests.

**2. Petitioners' Detention Has Become Indefinite.**

The correct answer to the question posed by this application largely turns on the fact that, at this point, petitioners have been detained at Guantánamo Bay without trial or military commission proceedings for up to *11 years*, and there is no reason to believe that such trial or proceedings will be expeditiously forthcoming. *Obaydullah v. Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010) (vacating stay of habeas petition because "charges against Obaydullah have not been referred [to a military commission] and the Government has provided [the court] with no reason to believe such a referral is imminent"). As a practical matter, petitioners' detention has become *indefinite*.

**3. There is No Legitimate Penological Interest in Force-Feeding to Prolong Petitioners' Indefinite Detention.**

Under any standard of fairness, due process, or basic human rights, there cannot be a legitimate penological interest in detaining petitioners indefinitely, or in forcibly administering nutrition so as to prolong that detention. The right to a speedy trial "has its roots at the very foundation of our English law heritage." (*Klopfer v. N. C.*, 386 U.S. 213, 223 (1967). "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Id.* at 226. It appeared in the Magna Carta, which stated "we will not

deny or defer to any man either justice or right." *Id.* at 223 (quoting the Magna Carta, c. 29 (c. 40 of King John's Charter of 1215), translated and quoted in Coke, The Second Part of the Institutes of the Laws of England 45 (Brooke, 5th ed., 1797)). Indefinite detention is anathema to America's sense of fairness and due process.

Indefinite detention is known by health care professionals to cause substantial harm to its victims, including: severe and chronic anxiety and dread; pathological levels of stress that have damaging effects on the core physiologic functions of the immune, cardiovascular, and central nervous system; depression and suicide; post-traumatic stress disorder; dissociation, schizophrenia, and psychosis; and enduring personality changes. *See, e.g.,* Physicians For Human Rights, *Punishment Before Justice: Indefinite Detention in the US* 2, 11-17 (2011).

International human rights law prohibits indefinite detention. The Universal Declaration of Human Rights states: "No one shall be subject to arbitrary arrest, detention or exile." Univ. Decl. of Human Rights art. 9 (1948). The International Covenant on Civil and Political Rights (ICCPR) states: "No one shall be subject to arbitrary arrest or detention." Int'l Cov. on Civ. & Pol. Rights art. 9, para. 1 (1976). "In its jurisprudence the United Nations Human Rights Committee, the body responsible for monitoring compliance by States party to the ICCPR, has made it clear that detention which may be initially legal may become 'arbitrary' *if it is unduly prolonged* . . . ." Alfred de Zayas, *Human rights and indefinite detention*, 87 Int'l. Rev. of the Red Cross 15, 17-18 (2005) (emphasis added); *see also id.* at 19 ("[I]ndefinite detention may also entail a violation of other provisions of the Covenant, including

Article 14, which guarantees a prompt trial before a competent and impartial tribunal, Article 7, which prohibits torture and inhuman or degrading treatment or punishment, and Article 10, which provides for humane treatment during detention.").

Petitioners' indefinite detention, now exceeding a decade, has become unduly prolonged and thus arbitrary. Given the harm that indefinite detention is known to cause its victims, and given its violation of international human rights law and the Anglo-American legal tradition, force-feeding to prolong such detention cannot serve any legitimate penological interest. Indefinite detention is un-American.

**4. There is No Legitimate Penological Interest in Subjecting Petitioners to a Painful Invasive Procedure That is Inhumane, Degrading, and a Violation of Medical Ethics.**

The consensus of the United Nations Rapporteurs, the World Medical Association, the American Medical Association, bioethicists and human rights organizations is that force-feeding of prisoners falls within the ambit of torture or cruel, inhuman, and degrading treatment or punishment. *E.g.,* U.N. High Commissioner for Human Rights, Statement of IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Health on Human Rights and Counter-Terrorism, and UN Rapporteur on Health reiterate need to end the indefinite detention of Individuals at Guantánamo Naval Base in light of current human rights crisis (May 1, 2013), www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid= 13278&langl ("it is unjustifiable to engage in forced feeding of individuals contrary to their informed and voluntary refusal of such a measure"); World Medical Association, *WMA Declaration of Tokyo-Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and*

*Imprisonment* & 6 (1975, rev. 2005) ("Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially."); World Medical Association, *WMA Declaration of Malta on Hunger Strikers* & 13 (1991, rev. 1992 & 2006) ("Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment."); Letter from Jeremy A. Lazarus, M.D., President of Am. Med. Ass'n, to Honorable Chuck Hagel, Sec'y of Def. (Apr. 25, 2013) ("the forced feeding of detainees violates core ethical values of the medical profession"); Guantánamo: hunger strikes and a doctor's duty, 381 *The Lancet* 1512 (May 4, 2013) ("to force-feed infringes the principle of patient autonomy"); International Committee of the Red Cross, *Hunger strikes in prisons: the ICRC's position* (Jan. 31, 2013) ("The ICRC is opposed to forced feeding or forced treatment; it is essential that the detainees' choices be respected and their human dignity preserved"); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Dec, 10, 1984, 1465 U.N.T.S. 85, 113 (defining torture as intentional infliction of "severe pain or suffering" for specified purposes or reasons); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 (requiring that armed-conflict detainees "shall all circumstances be treated humanely"); *see* Declaration of Steven H. Miles, M.D., attached as Exhibit B at 2-3 (hereinafter Miles Decl. Ex. B).

Force-feeding of hunger strikers is a violation of medical ethics. Miles Decl. Ex. B, at 4; Xenakis Decl. Ex. C, at 2; *see* George J. Annas, Sondra S. Crosby & Leonard H. Glanz, *Guantánamo Bay: A Medical Ethics-free Zone?*, NEW ENG. J. MED., 10.1056 NEJMp 1306065 (June 12, 2013), at 1 (hereinafter Annas et al.) ("That force-feeding of mentally competent hunger strikers violates basic medical ethics principles is not in serious dispute."); Michael L. Gross, *Force-Feeding, Autonomy, and the Public Interest*, NEW ENG. J. MED., 10.1056 NEJMp 13063225 (June 12, 2013) at 1 (hereinafter Gross) ("most bioethicists unequivocally oppose force-feeding"). "Physicians can no more ethically force-feed mentally competent hunger strikers than they can ethically conduct research on competent humans without informed consent." Annas et al., *supra* at 2. "Force-feeding a competent person is not the practice of medicine; it is aggravated assault." *Id.* Indeed, a recent article in the New England Journal of Medicine, describing Guantánamo Bay as having become "a medical ethics-free zone," urges the military physicians there to refuse to participate in force-feeding. *Id.* at 3.

Forcible nasogastric tube feeding can be extremely painful. One Guantánamo Bay detainee recently said: "I will never forget the first time they passed the feeding tube up my nose. I can't describe how painful it is to be force-fed this way. As it was thrust in, it made me feel like throwing up. I wanted to vomit, but I couldn't. There was agony in my chest, throat and stomach. I had never experienced such pain before. I would not wish this cruel punishment on anyone." Samir Naji al Hasan Moqbel, *Gitmo Is Killing Me*, N.Y. TIMES, Apr. 14, 2013 at A19. Such pain should not be visited upon any prisoner if it has no legitimate penological justification, which is absent

where the purpose of the force-feeding is to keep the prisoner alive for indefinite detention.

Petitioners do not wish to die. But hunger striking is the only peaceful means available to them to protest their indefinite detention. Miles Decl. Ex. B, at 4 ("a hunger strike is virtually the only means of meaningful expression of personal rights and public appeal open to the petitioners"); Xenakis Decl. Ex. C, at 3; *see* Annas et al., *supra* at 2 ("Hunger striking is a peaceful political activity to protest terms of detention . . . . [h]unger strikers are not attempting to commit suicide. . . . . [t]heir goal is not to die but to have perceived injustices addressed."); Gross, *supra* at 1 ("Hunger striking is a nonviolent act of political protest. It is not the expression of a wish to die . . . ."). The purpose of petitioners' force-feeding is to facilitate their indefinite detention not just by keeping them alive, but also by suppressing the only form of expression available to them to protest such detention. Miles Decl. Ex. B, at 4.

Senator Dianne Feinstein, writing as Chair of the United States Senate Select Committee on Intelligence, recently voiced her objection to force-feeding at Guantánamo Bay as being "out of step with international norms, medical ethics and practices of the U.S. Bureau of Prisons." Letter from Dianne Feinstein, Senator, to Honorable Chuck Hagel, Sec'y of Def. (June 19, 2013) at 1 http://www.feinstein.senate.gov/public/index.cfm/files/ serve/?file_id=17585d46-c235-4f32-b957-50648d4e6252. She stated: "Hunger strikes are a long known form of non-violent protest aimed at bringing attention to a cause, rather than an attempt of suicide. I believe that the current approach raises very important ethical questions

and complicates the difficult situation regarding the continued indefinite detention at Guantánamo." *Id.* at 3.

**5. There is No Legitimate Penological Interest in Force-Feeding That Interferes With Petitioners' Observation of the Ramadan Fast.**

In 2013, the Islamic holy month of Ramadan begins at sundown on July 8. During Ramadan, observant Muslims worldwide fast from sunup to sundown. Petitioners are observant Muslims. According to the Geneva Conventions, petitioners must be afforded "complete latitude in the exercise of their religious duties." Geneva Convention Relative to the Treatment of Prisoners of War art. 34, Aug. 12, 1949, 75 U.N.T.S. 135

Further, petitioners invoke the Religious Freedom Restoration Act (RFRA), which imposes a heightened standard of review where government substantially burdens "a person's" religious exercise. 42 U.S.C. § 2000bb-1 (2012); *see Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205, 1213 (10th Cir. 1999) (denying Muslim prisoner the ability to observe the Ramadan fast infringes his right to freely exercise his religion). The D.C. Circuit Court of Appeals previously held that Guantánamo Bay detainees are not protected "person[s]" within the meaning of the RFRA, by analogy to constitutional law precedents establishing that nonresident aliens were not protected by the Fourth and Fifth Amendments. *Rasul v. Myers*, 563 F.3d 527, 532-33 (D.C. Cir. 2009). But *Rasul v. Myers*, and the precedents upon which it relied, predated *Citizens United v. FEC*, 558 U.S. 310 (2010), which espoused a dramatically expansive view of the scope of constitutional protection for "persons"—in that case, for corporate personhood. In *Citizens United*, the Supreme Court expressly declined to decide the

question whether the First Amendment's protection for "persons" extends to "foreign individuals or associations." *Citizens United* at 362; *see generally Bluman v. FEC*, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (federal ban on political contributions by foreign nationals held constitutional, but "we do not decide whether Congress could prohibit foreign nationals from engaging in speech other than" such contributions). Thus, *Citizens United* revives the issue addressed in *Rasul v. Myers* and makes it an open question whether the RFRA's protection extends to nonresident aliens—a question this Court should resolve in petitioners' favor.

Accordingly, even if petitioners could lawfully be subjected to force-feeding, it must not interfere with their observation of the Ramadan fast, which would violate the Geneva Conventions and the RFRA and thus cannot serve a legitimate penological interest. Because dozens of Guantánamo Bay detainees are currently being force-fed, it might very well prove to be logistically infeasible to conduct twice-daily force-feedings only at nighttime. Petitioners therefore ask this Court, at a minimum, to enjoin any force-feeding between sunup and sundown during the month of Ramadan.

**6. Petitioners' Force-Feeding Cannot Be Justified By the Interest in Maintaining Institutional Security and Discipline.**

The indefinite nature of petitioners' detention distinguishes this case from a line of cases that have approved force-feeding of hunger-striking prisoners as reasonably related to the legitimate penological interest in maintaining prison security and discipline. *See, e.g., Freeman v. Berge*, 441 F.3d 543, 546-47 (7th Cir. 2006); *Bezio v. Dorsey*, 21 N.Y.3d 93, 103-04 (N.Y. 2013). In none of those cases was the prisoner detained indefinitely without trial. A previous challenge to the use of chair restraints

in the force-feeding of Guantánamo Bay detainees was rejected, *see Al-Adahi,* 596 F. Supp. 2d 111, but that was more than four years ago, before the indefinite nature of detention at Guantánamo Bay had become evident, and the court was not adjudicating a challenge to force-feeding itself and did not address the impact of indefinite detention on such a challenge.

There cannot be a legitimate penological interest in force-feeding petitioners to prolong their indefinite detention. It facilitates the violation of a fundamental human right. The very notion of it is grotesque. Moreover, there are *ready alternatives* to force-feeding the petitioners: *promptly bring them to trial or military commission proceedings*, the absence of which is the reason why they are hunger striking. Those alternatives make petitioners' force-feeding unreasonable. *Harper*, 494 U.S. at 223; *see* Gross, *supra* at 1 (urging, as an alternative to force-feeding, "accommodation" of Guantánamo Bay hunger strikers by, e.g., repatriating detainees who have been cleared for release and providing "customary legal proceedings" to other detainees).

## B. Forcible Administration of the Drug Reglan Violates Petitioners' Right to Refuse Medical Treatment.

### 1. Petitioners Have a Right to Refuse Medication.

The Constitution's guarantee of due process protects the right to refuse unwanted medical treatment. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 281 (1990). This right extends to prisoners and includes a right to refuse medication, with the exception that a mentally ill prisoner who is a danger to himself or others may be treated involuntarily with antipsychotic drugs. *Harper*, 494 U.S. at 222-27; *see, e.g.,*

*Comm'r of Corr. v. Turner*, 20 Mass. L. Rptr. 437 (Mass. Super. Ct. 2006) (upholding prisoner's right to refuse treatment with blood pressure medication).

**2. Petitioners' Force-Fed Regimen Includes Reglan, Which Poses a Significant Risk of Causing Tardive Dyskinesia.**

According to the regulations governing force-feeding at Guantánamo Bay, petitioners' force-fed regimen may include the drug Reglan (generic metoclopramide) for treatment of nausea and prevention of vomiting. *Medical Management of Detainees, supra* at 15-16. A June 2009 black box warning for Reglan, mandated by the Food and Drug Administration, states: "Treatment with metoclopramide can cause tardive dyskinesia (TD), a potentially irreversible and disfiguring disorder characterized by involuntary movements of the face, tongue, or extremities. The risk of developing tardive dyskinesia increases with duration of treatment and total cumulative dose. . . . Treatment with metoclopramide for longer than 12 weeks should be avoided in all but rare cases . . . . There is no known treatment for tardive dyskinesia." FDA, U.S. Department of Health and Human Services, *Safety Labeling Changes Approved by FDA Center for Drug and Research: Reglan (Metoclopramide) Safety Information, June 2009 Boxed Warnings for Tardive Dyskinesia*, www.fda.gov/safety/medwatch/safetyinformation/ ucml70934.htm (last updated Dec. 13, 2010); *see generally PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011). The regulations further state that the force-fed regimen may also include the drug Phenergan, which substantially increases the long-term risk of tardive dyskinesia when taken with Reglan. *Medical Management of Detainees, supra* at 15; *see* Drug Information Online, *Drug interactions between Phenergan and Reglan,*

http://www.drugs.com/drug-interactions/phenergan-with-reglan-1949-1259-1612-984.htm.

Given the long-term risk of tardive dyskinesia and the black box warning to avoid treatment with Reglan for longer than 12 weeks, petitioners wish to exercise their right to refuse to ingest Reglan.

**3. Forcible Treatment with Reglan is Inconsistent With the Manufacturer's Duty to Warn of the Risk of Tardive Dyskinesia.**

The substantive law of numerous jurisdictions imposes a duty on drug manufacturers to warn of dangers to users. *See, e.g., PLIVA, Inc.*, 131 S. Ct. at 2573. Accordingly, the manufacturers of Reglan and its generic equivalent have a duty to warn of the risk of tardive dyskinesia; hence the black box warning. Forcible treatment of Guantánamo Bay detainees with Reglan is inconsistent with that duty, because forcible treatment deprives the warning of its efficacy.

Respondents have been warned that prolonged use of Reglan can cause tardive dyskinesia and should be avoided for longer than 12 weeks. But the regulations governing force-feeding at Guantánamo Bay allow the forcible administration of Reglan for *a prolonged period of time*, and the regulations deprive petitioners of the right to heed the manufacturer's warning and refuse such treatment. As a result, petitioners are deprived not only of the right to refuse unwanted medication, but also the protection of American tort law.

In early June of 2013, petitioners' counsel wrote twice to Arthur Przybyl, the CEO of ANI Pharmaceuticals, which manufactures Reglan, expressing concern about the prolonged use of Reglan in petitioners' force-feeding. On June 20, 2013, Mr.

Przybyl wrote back to counsel, stating he is "deeply concerned" about this matter and "it is our hope that all of our products are used in a medically acceptable manner." Crider Decl., Exh. A, at 19. Thus, even Reglan's manufacturer acknowledges the seriousness of this issue.

### C. The Military Commissions Act of 2006 (MCA) Does Not Bar the Relief Sought Here As Relating to Conditions of Confinement.

Several judges of this Court have ruled that section 7 of the Military Commissions Act of 2006 (MCA), Pub. L. 109-366, 120 Stat. 2600 (2006), to the extent it amends 28 U.S.C. § 2241(e)(2) (2012), strips federal courts of jurisdiction as to any action by an enemy combatant against the United States relating to "conditions of confinement." 28 U.S.C. § 2241(e)(2); *see, e.g., Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 108-09 (D.D.C. 2010) (and cases cited therein). In *Al-Adahi,* the 2009 action by Guantánamo Bay detainees seeking an injunction against the use of chair restraints in force-feeding, the court concluded that "[t]he relief they seek clearly falls under § 2241(e)(2)." *Al-Adahi*, 596 F. Supp. 2d at 118. Petitioners submit, however, that § 2241(e)(2) does not bar the remedy sought here, and that if it did, it would constitute an unlawful suspension of the writ of habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723 (2008).

#### 1. Petitioners' Force-Feeding is Not a Condition of Confinement.

*Al-Adahi* did not illuminate the phrase "conditions of confinement," but decisions in the criminal context have described "conditions of confinement" as "any *deprivation* that does not affect the *fact or duration* of a prisoner's overall confinement." *Jenkins v. Haubert*, 179 F.3d 19, 28 (2d Cir. 1999) (emphasis added) (holding that relief by writ of

habeas corpus rather than under 42 U.S.C. § 1983 (2012) is available where the fact or duration of a prisoner's confinement is at issue). The phrase includes "terms of disciplinary or administration segregation" and "more general conditions affecting a prisoner's *quality of life* such as: the revocation of telephone or mail privileges or the right to purchase items otherwise available to prisoners; and the *deprivation* of exercise, medical care, adequate food and shelter, and other conditions that, if improperly imposed, could violate the Constitution." *Id.* (emphasis added) (citations omitted).

Petitioners' motion does not challenge a "deprivation" of "medical care" or "adequate food" affecting their "quality of life." *Jenkins*, 179 F.3d at 28. Rather, the motion challenges regulations *forcing them to receive* a nasogastric delivery of food and medicine. The claim is not that the regulations degrade petitioners' quality of life by depriving them of sustenance, but that the regulations mandate an unwanted *direct bodily invasion*. This is not a "quality of life" challenge to the conditions in which petitioners are confined. A forced invasive medical procedure is not a condition of confinement. *Cf. Vitek v. Jones*, 445 U.S. 480, 493 (1980) (transfer of prisoner to mental hospital "is not within the range of conditions of confinement" contemplated by imposition of prison sentence).

Moreover, petitioners' force-feeding affects the *duration* of their confinement at Guantánamo Bay. Because petitioners are now being detained indefinitely, force-feeding necessarily *prolongs* their indefinite detention. Because the force-feeding

affects the duration of their confinement, it is not within the scope of "conditions of confinement." *Jenkins*, 179 F.3d at 28.

For each of these reasons, section 7 of the MCA does not apply to this particular administration of force-feeding and does not purport to strip this Court of jurisdiction to rule on this application.

**2. If Construed to Bar the Relief Sought Here, the MCA Would Violate the Suspension Clause.**

If section 7 of the MCA were construed to bar the relief sought here as pertaining to "conditions of confinement," it would constitute an unconstitutional suspension of the writ of habeas corpus, according to the Supreme Court's reasoning in *Boumediene*.

In this regard, we submit that the "conditions of confinement" cases culminating with *Al-Zahrani* were incorrectly decided. Those courts determined that although *Boumediene* held the provision in the MCA stripping federal courts of jurisdiction to hear habeas corpus actions by Guantánamo Bay detainees, 28 U.S.C. § 2241(e)(1), violated the Suspension Clause, *Boumediene* did not invalidate § 2241(e)(2). *See Al-Zahrani*, 684 F. Supp. 2d at 109 (quoting the admonition in *Boumediene* that " '[i]n view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement,' " *Boumediene,* 553 U.S. at 792, and stating that "[g]iven the [Supreme] Court's unwillingness to consider the issue, there is no basis upon which to argue that [*Boumediene*] invalidated § 2241(e)(2)"); *Al-Adahi*, 596 F. Supp. 2d at 118-19. Those courts did not, however, address the reason *why* *Boumediene* held that § 2241(e)(1) violated the Suspension Clause: Although the

Detainee Treatment Act of 2005 (DTA) provided a mechanism for review of detentions, that mechanism was not "an adequate substitute for [the writ of] habeas corpus." *Boumediene,* 553 U.S. at 779. Here, there is no mechanism *at all*, much less an inadequate one, for a detainee to challenge his conditions of confinement. No tribunal currently exists to afford petitioners relief from the regulations on force-feeding at Guantánamo Bay.

There can be no doubt that invasions of liberty of the kind at issue here sound in habeas. *See Schlup v. Delo*, 513 U.S. 298, 319 (1995) (habeas "is at its core, an equitable remedy"); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"). *Boumediene* simply did not present the question whether the jurisdiction-stripping provisions of § 2241(e)(2) are unconstitutional to the extent they purport to deprive petitioners of the ability to secure habeas relief. The Supreme Court's "unwillingness," *Al-Zahrani*, 596 F. Supp. 2d at 109, to consider in *Boumediene* whether § 2241(e)(2) might unconstitutionally suspend the writ in a given case, under given facts, is not a holding, or even a signal, whether § 2241(e)(2) suffers from the same infirmity as § 2241(e)(1). The reasoning in *Boumediene*, however, leads inevitably to that conclusion.

Finally, even if the Combatant Status Review Tribunals (CSRTs) were still functioning, they could not be an adequate substitute here for a writ of habeas corpus. *Boumediene* held that that under the DTA's provisions for judicial review of proceedings before a CSRT, the review process in the Court of Appeals was not an

adequate substitute for habeas relief because, among other things, the Court of Appeals lacked power "to admit and consider newly discovered evidence that could not have been made part of the CSRT record because it was unavailable to either the Government or the detainee when the CSRT made its findings." *Boumediene*, 553 U.S. at 790. That same infirmity would necessarily exist in any proceeding before a CSRT challenging petitioners' force-feeding. If this infirmity meant § 2241(e)(1) violated the Suspension Clause, the same must be true of § 2241(e)(2). Moreover, there could not be any basis for a Guantánamo Bay detainee to challenge his force-feeding before a CSRT, given that the sole stated purpose of a CSRT was "to review the detainee's status as an enemy combatant." Paul Wolfowitz, Deputy Sec'y of Def., *Memorandum for the Secy of the Navy, Order Establishing Combatant Status Review Tribunal* 1, § *d* (2004).

### D. This Application is Not Barred by Existing Stays on Three of the Petitioners' Habeas Petitions.

Finally, we note that, although the habeas petitions of three of the petitioners—Belbacha, Hadjarab, and Dhiab—have been temporarily stayed, those stays do not bar this non-dispositive application, *because* it is non-dispositive. The stays expressly specify only the habeas petitions themselves, and thus do not extend to motions and applications that do not pertain to the disposition of the habeas petitions but only seek non-dispositive relief.

In the event this Court disagrees with petitioners on this point, petitioners Belbacha, Hadjarab, and Dhiab respectfully request that the Court lift the stays in their habeas proceedings for the limited purpose of adjudicating the present application.

## III.
## CONCLUSION

For the reasons discussed above, petitioners have demonstrated that they are likely to succeed on the merits of their arguments against force-feeding, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction should be granted because it is in the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). A proposed order is attached hereto.

Respectfully submitted,

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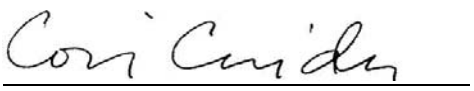

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2013 I filed and served the foregoing on ECF and by e-mailing a copy to andrew.warden@usdoj.gov.

June 30, 2013