UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

JEFFREY SEARLS, in his official capacity Acting Assistant Field Office Director and Administrator of the Buffalo Federal Detention Facility,

Respondent.

Case No. 1:19-cv-00370-EAW

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO COMPEL AND FOR A PROTECTIVE ORDER

~~FILED UNDER SEAL~~

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Rules

INTRODUCTION

Mr. Hassoun files this motion to address outstanding discovery disputes between the parties in advance of the April 28, 2020 evidentiary hearing. Although the parties have worked to narrow the issues since the last status conference on January 17, 2020, there remain several critical discovery issues that the parties are unable to resolve without the Court's intervention.

First, the government continues to invoke the confidential-informant privilege (the "CI privilege") in a conclusory manner with respect to informants whose allegations the government may rely on—through hearsay or otherwise—to satisfy its burden in this case. The government must reveal the identities of all such informants and, moreover, must supply Mr. Hassoun with sufficient information about the remaining informants for Mr. Hassoun to determine whether such informants' testimony will be relevant and helpful to his defense.

Second, the government's invocations of the law enforcement investigatory files privilege (the "IV privilege") are vague, conclusory, and non-specific and do not meet the requirements under the Federal Rules for privilege logs in general, or under case law for the investigatory files privilege in particular. The Court should, at minimum, order immediate production of adequate privilege logs so that Mr. Hassoun can meaningfully determine the basis for privilege and, where warranted, challenge its invocation. Given the short timeline, however, the Court may wish to proceed immediately to an *in camera* review of the documents in order to assess the government's claims of privilege.

Third, the government has put Mr. Hassoun on its witness list in violation of Mr. Hassoun's Fifth Amendment right against self-incrimination. Mr. Hassoun asks the Court to issue a protective order prohibiting the government from relying on Mr. Hassoun's testimony to prove its case in chief. Mr. Hassoun is eager to prove his innocence, but he cannot be forced to testify as a government witness—particularly because documents now produced by the

government make it perfectly clear that the FBI continues to investigate him for potential criminal charges arising out of the very same allegations that appear to form the basis for his indefinite detention. The government cannot use the label of indefinite "civil" detention to deprive Mr. Hassoun of his Fifth Amendment rights and compel him to testify about matters that could plainly subject him to criminal liability.

STATEMENT OF FACTS

On January 6, 2020, the government served its discovery responses on Mr. Hassoun, including its proposed witness list for the April 28, 2020 evidentiary hearing. *See* Respondent's Responses to Petitioner's Interrogatories, Dated January 6, 2020, attached as **Exhibit 1**. On January 17, 2020, the Court held a scheduling conference after which, on January 21, 2020, the Court issued a scheduling order for remaining discovery in this case, which among other deadlines, set out the following:

> (1) By no later than February 6, 2020, the parties shall produce all documents responsive to the opposing party's discovery demands. This includes Petitioner's A-file, which Respondent must turn over to Petitioner. Each side must further produce a privilege log by February 6, 2020, except that Respondent need not produce a privilege log related to Petitioner's A-file by that date.
>
> (2) By no later than February 14, 2020, Respondent shall produce a privilege log related to Petitioner's A-file.

ECF No. 71. All motions to compel and briefing on other outstanding discovery disputes were due February 28. 2020. *Id.*

Respondent has provided Mr. Hassoun's counsel with five volumes of responsive documents, including privilege logs for each volume.

Volume 1

"Volume 1" (DEF-00000001 to DEF-00000058) refers to documents produced by Respondent on February 3, 2020. Respondent informed Mr. Hassoun's counsel via email on

February 18, 2020, that Volume 1 had been re-produced in its entirety in Volume 2, and that the privilege log for Volume 2 contained all claims of privilege for Volume 1.

Volume 2

"Volume 2" (DEF-00000059 to DEF-00009274) refers to documents sent to Petitioner via flash drive on February 7, 2020, and received on February 10, 2020. On February 6, Petitioner also received a privilege log for Volume 2, attached as **Exhibit 2**.. On February 14, 2020, Petitioner received an additional privilege log for the "A File" and "T File" disclosed as part of Volume 2, attached as **Exhibit 3**, as well as a privilege log for documents withheld in full (DEF – 00009524 through DEF – 00010921), attached as **Exhibit 4**.

Volume 3

"Volume 3" (DEF-00009275 to DEF-00009523) refers to documents sent to Petitioner via email on February 6, 2020. On February 6, Petitioner also received a privilege log for Volume 3, attached as **Exhibit 5**. Citing several deficiencies, Petitioner requested supplemental privilege information for Volume 3 on February 17, 2020, which was provided to Petitioner on February 24, 2020, attached as **Exhibit 6**.

Volume 4

"Volume 4" (DEF-00010922 to DEF-00010925) refers to a report taken during an interview with Mr. Ahmed Abdelraouf (the individual whose testimony the government improperly sought to obtain through a deposition under Rule 45, *see* ECF No. 84), and was received by Petitioner on February 18, 2020, along with a privilege log for that production, attached as **Exhibit 7**.

Volume 5

On February 24, 2020, the government informed Petitioner that it was no longer asserting the CI privilege as to informants Shane Ramsundar and Hector Rivas Merino and stated that a new production of documents, marked as Volume 5, had been sent via FedEx, which Petitioner received on February 26, 2020. These documents were previously redacted or withheld documents that the government was now disclosing because it had waived the privilege with respect to those informants. No new privilege log was disclosed as part of the Volume 5 production.

On February 25, 2020, counsel met telephonically to confer about outstanding discovery disputes. Petitioner's counsel stated their position that the government's privilege logs were deficient because each line of the privilege log must describe the withheld material in sufficient detail so that Petitioner can assess each privilege claim and make an informed decision about if, or how, to challenge each individual invocation. Respondent's counsel responded that they believed that the generic, all-purpose invocation was sufficient (at least until Mr. Hassoun filed a motion to compel).

Regarding the confidential informants as to which the government has not waived the CI privilege, Mr. Hassoun requested that the government identify how many remaining confidential informants there were and to correlate (through pseudonyms or otherwise) redactions of information with individual informants. The government indicated its openness to this suggestion and stated that Mr. Hassoun would receive "something" related to this request by Monday, March 2, 2020. Mr. Hassoun has not yet received anything in response to this request.

ARGUMENT

I. THE GOVERNMENT MUST DISCLOSE THE IDENTITIES OF ALL CONFIDENTIAL INFORMANTS WHOSE STATEMENTS, ACCORDING TO THE GOVERNMENT, JUSTIFY MR. HASSOUN'S ONGOING DETENTION.

The government's decision to subject Mr. Hassoun to indefinite confinement under 8 U.S.C. § 1226a(a)(6) rests centrally on the veracity of statements by a still-undisclosed number of jailhouse informants. These informants allege that Mr. Hassoun either said certain things to them, said certain things in their presence, or said certain things in the presence of others. While the government has now disclosed four previously confidential informants, the government has refused to disclose the names, or even the unredacted criminal histories and disciplinary records, of an unknown number of additional informants, without providing any specific justifications. The government, moreover, has failed—despite specific requests from Mr. Hassoun's counsel—to use pseudonyms (or comparable techniques) to enable Mr. Hassoun to determine how many informants remain undisclosed and which portions of the documents produced during discovery or in the record, particularly the allegations in the FBI Letter, are linked to which undisclosed informants. This has significantly undermined Mr. Hassoun's review of, and investigation into, the government's allegations, as well as his assessment of which documents requested through discovery remain unaccounted for in the government's productions. It is impossible for Mr. Hassoun to fairly defend himself against the government's allegations unless he has the opportunity to independently investigate the informants, probe their credibility, and challenge their versions of events.[1]

[1] The government has explicitly dropped its initial claims of the CI privilege over three informants: Shane Remi Ramsundar; Hector Rivas Merino; and Ahmed Hamed. The government has also disclosed the name of another informant and potential government witness, Ahmed Abdelraouf. But the government still claims the CI privilege to shield the identities of an undisclosed number of other sources.

Accordingly, the Court should order the government to disclose the identities all criminal/immigration histories, *at a minimum*, of all informants on whose statements it intends rely, or has previously relied, to satisfy its burden in this case, as well as records that would tend to undermine their credibility, that tend to contradict the allegations of other witnesses, or that would otherwise be considered exculpatory evidence in a criminal case. The Court should further order the government to pseudonymously list any other informants from whom it collected information relevant to Mr. Hassoun—even if the government has not and will not rely on that information to justify Mr. Hassoun's detention—and briefly summarize those informants' knowledge, so that Mr. Hassoun and the Court may evaluate whether the government's assertion of privilege over those informants is sustainable (*i.e.*, whether the information would be relevant and helpful to the defense).

As an initial matter, the government has failed to provide specific justifications for its invocation of the CI privilege in this case. The CI privilege is qualified by "the fundamental requirements of fairness" rooted in the Fifth Amendment's Due Process Clause. *Roviaro v. United States*, 353 U.S. 53, 60 (1957).[2] To put forth a colorable claim of privilege, the government may not cite "only general concerns for the free flow of information" without more specific information justifying the "cloaking [of] the informer," as *Roviaro* "plainly requires more than such a general allegation." *United States v. Ayala*, 643 F.2d 244, 247 (5th Cir. 1981).

[2] While *Roviaro* did not explicitly invoke the Fifth Amendment, as one court in this Circuit long ago explained, "We need not indulge in semantic gymnastics or turn conceptual somersaults over the fact that the Supreme Court did not specifically denote the Due Process Clause as the basis for its decision in *Roviaro*: it is beyond peradventure that the right to a trial in which the 'fundamental requirements of fairness' are secured is a right essential to, and at the very heart of, the protections guaranteed by our Constitution." *Hawkins v. Robinson*, 367 F. Supp. 1025, 1034 (D. Conn. 1973); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982); *Gaines v. Hess*, 662 F.2d 1364, 1368 (10th Cir. 1981); *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993).

To date, the government has not articulated any specific justifications for its claims of the CI privilege, either with respect to the group of still-unidentified informants or any particular member of that group. The privilege logs contain the following generic justification for the invocation of the CI privilege:

> Information compiled for law enforcement purposes, the disclosure of which could reasonably be expected to reveal the identity of a confidential source or information furnished by a confidential source.

See Ex. 2. This violates the *Roviaro* standard.[3]

But the government's position suffers from a more fundamental defect. Even if the government had provided facially valid justifications, the court still "must determine whether the potential helpfulness of [an] informant's testimony to the defendant warrants a conclusion that the defendant cannot be tried fairly absent disclosure." *United States v. Brodie*, 871 F.2d 125, 128 (D.C. Cir. 1989). And the privilege "must give way" when the challenging party shows that the informant's identity is "relevant and helpful to the defense" or "essential to the fair determination of [the] cause." *Roviaro*, 353 U.S. at 61; *see United States v. Glover*, 583 F. Supp. 2d 5, 11 (D.D.C. 2008) (same). Critically, the Second Circuit has established that this standard is generally met "where the informant is a key witness or participant in the crime charged, someone whose testimony would be significant in determining guilt or innocence"—even if the challenging party cannot guarantee that informant's testimony would be favorable to his case. *United States v. Saa*, 859 F.2d 1067, 1073 (2d Cir. 1988); *see United States v. Gaston*, 357 F.3d

[3] Certain redactions and subsequent disclosures also suggest that the government has improperly invoked the confidential-informant privilege, at least in some circumstances. For example, the government initially invoked the privilege to withhold 154 pages of documents in their entirety, without any explanation, under the label "call logs." *See* Volume 2 Privilege Log, at ln. 161. The government later unredacted these documents, and Petitioner learned that the call logs were related to Rami Abuziyad, who has never been classified as a confidential informant. *See* DEF 719–873, attached as **Exhibit 8.**

77, 84 (D.C. Cir. 2004) (explaining that an otherwise legitimate invocation of the privilege can be overcome where an informant "had some sort of direct connection, either as a participant or an eyewitness, to the crime charged").

Here, the government's interest in nondisclosure cannot outweigh the potential impact on Mr. Hassoun's right to a fair defense with respect to at least those informants on whose testimony or hearsay statements on which the government has relied, or intends to rely, to justify Mr. Hassoun's indefinite detention. The disclosure of these informants is necessarily "relevant and helpful to [Mr. Hassoun's] defense," *Roviaro*, 353 U.S. at 61, as these are "key witness[es]," *Saa*, 859 F.2d at 1073, who have a "direct connection" to the allegations against Mr. Hassoun, *Gaston*, 357 F.3d at 84.

Further, the government should be required to pseudonymously list any other informants from whom it collected information relevant to Mr. Hassoun—even if the government has not and will not rely on that information to justify Mr. Hassoun's detention—and briefly summarize those informants' relevant knowledge, so that Mr. Hassoun and the Court may evaluate whether the government's assertion of privilege over those informants is sustainable. Because *Roviaro* requires a case-by-case analysis based on "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors," 353 U.S. at 62, this information is essential to determining whether the privilege should be overcome as to particular government witnesses and informants.

The need for the informants' identities is underscored by the fact that the government's entire case rests upon the proposition that the statements of its jailhouse informants are true and correct. To hold the government to its burden, Mr. Hassoun needs the ability to investigate the government's informants. Such investigation is crucial to the defense in at least two ways: (a) to

discover information bearing on the informants' credibility—for instance, fraud convictions, which at least three of the four currently identified informants possess;[4] and (b) to lend context to the informants' allegations regarding Mr. Hassoun's supposed statements or actions, including how the various informants' allegations relate to one another. Information falling into these categories bears directly on the credibility and reliability of the informants' statements—and since the government itself has placed those statements at the heart of its affirmative case, information on the informants' credibility and reliability is inevitably paramount to the "fair determination of [the] cause." *Roviaro*, 353 U.S. at 61*; see also, e.g.*, *Rugendorf v. United States*, 376 U.S. 528, 535 (1964) (privilege must give way where "informants' testimony could help establish petitioner's innocence").

Further, almost every one of the allegations in the FBI Letter describes a government informant who claims to have observed Mr. Hassoun saying or doing the things that, in the government's view, justify his confinement. ECF No. 17-2, Ex. B at 3-4. Similarly, the documents produced by the government during discovery indicate that the government's informants claim to have personally observed the very statements or actions underlying its dangerousness determination. *See, e.g.*, DEF 1288; 1341, 1344–45, attached as **Exhibit 9**. Thus, the government appears to be relying on information provided by these individuals, and even if not, these informants have information that is relevant and helpful to Mr. Hassoun's defense. In

[4] The government has represented that its claims of CI privilege justify the withholding of information regarding, for example, its still-withheld informants' criminal histories—and it refused to provide such information even with identifying information like case numbers redacted. But as *Roviaro* itself made clear, "[t]he scope of the privilege is limited by its underlying purpose," 353 U.S. at 60, and even if the privilege can be sustained to protect an informant's identity, it does not necessarily extend to other documents responsive to Mr. Hassoun's discovery requests that provide information about that is "relevant and helpful" to his defense.

either circumstance, the privilege generally "must give way." *Roviaro*, 353 U.S. at 61; *see, e.g.*, *United States v. Warren*, 42 F.3d 647, 654 (D.C. Cir. 1994) (a critical question in assessing the privilege is whether the informants were "'participant[s], . . . eyewitness[s], or . . . otherwise in a position to give direct testimony concerning'" the alleged conduct (quoting *United States v. Skeens*, 449 F.2d 1066, 1070 (D.C. Cir. 1971)).[5]

Typically, when courts have upheld the government's invocation of the CI privilege, the government has used the informant's statements to *discover* the evidence that it then uses to meet its burden. *See, e.g.*, *Warren*, 42 F.3d at 654 (privilege sustained where "the informant's role was

[5] Information about these informants is critical to Mr. Hassoun's preparation for the hearing, including his counsel's decisions about which potential witnesses to interview. The Second Circuit has explained:

> As the Supreme Court noted in *Roviaro*, "[t]he desirability of calling [the informant] as a witness, *or at least interviewing him in preparation for trial*, [i]s a matter for the accused rather than the Government to decide." 353 U.S. at 64, 77 S. Ct. at 629 (emphasis added). From this language, as well as from the practical reality that a witness with a special relationship with the Government is not truly "available" to the defense merely because he is physically available to be called, *see United States v. Torres*, 845 F.2d 1165, 1170 (2d Cir. 1988), stems the right under *Roviaro* to information about an informant not merely so that the defense can call the informant to testify, but so that it can seek to interview him first. *See United States v. Fischel*, 686 F.2d 1082, 1092 n. 11 (5th Cir. 1982) ("The desire for a pretrial interview constitutes a justification for disclosing an informant's address even when the government has agreed to produce the informer at trial...."); *United States v. Barnes*, 486 F.2d at 780 (Government obligated to try to locate informant "*for interview by the defendant* and use as a possible witness") (emphasis added); *Roberts*, 388 F.2d at 649 (district court should have ordered disclosure of informant's whereabouts, if requested by defendants "*in order to interview him* as a potential witness") (emphasis added). As the Fifth Circuit noted in *Fischel*, a witness may decide not to grant an interview to a defendant, "[b]ut it is a different matter for the government to place a defendant at a tactical disadvantage by reserving to itself alone the ability to request an interview with a material witness." 686 F.2d at 1092.

Saa, 859 F.2d at 1074.

limited to providing the information that justified issuance of [a] search warrant" that led to discovery of evidence of a crime); *Hawkins*, 367 F. Supp. at 1035 (disclosure is not generally required in cases where, for example, an informant "merely introduced law enforcement officers to a suspected drug dealer but was not involved in any later transactions between the parties"). Here, by contrast, the government has used its informants' statements as the direct evidence for its allegation that Mr. Hassoun is detainable under 8 U.S.C. § 1226a. This atypical use of the CI privilege makes a careful evaluation of its invocation even more paramount than in the ordinary case.

Moreover, even if the Court permits the government to introduce the hearsay statements of informants through a federal agent, *see Hassoun v. Searls*, No. 1:19-CV-00370 EAW, 2020 WL 408349, at *7 (W.D.N.Y. Jan. 24, 2020), Mr. Hassoun must be provided with the identity of the informants so that he can investigate them for impeachment evidence and probe the agent about the credibility of the informants and the statements themselves. *See* Fed. R. Evid. 806 ("When a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness."). The CI privilege does not permit the government to launder its informants' untrustworthiness by preventing the accused from learning their identities while at the same time submitting their statements as evidence through a federal agent, who is not the source of the accusation. The government's broad, multiple assertions of the CI privilege cannot be sustained, and the Court should order the disclosure of the identities of informants on whom the government is relying to justify Mr. Hassoun's continued detention.[6]

[6] In an email dated February 27, 2020, Respondent's counsel notified Petitioner for the first time that it may invoke the state secrets privilege with respect to some documents it withheld on other

The government's limited revelations to date underscore how important it is for the defense—and the Court—to know the identities of the informants whose statements form the basis of the government's case. For example, Mr. Hassoun has reason to believe that Shane Ramsundar—for whom the government waived the privilege earlier this week—is the source of the (false) allegation that [redacted], attached as **Exhibit 10**. Mr. Ramsundar is a [redacted] national, making it likely that he was independently in position to know [redacted] Moreover, Petitioner's very preliminary investigation has already revealed that Mr. Ramsundar has a long history of fraud and deception: he was previously charged with stealing $1.75 million from 19 fellow West Indian immigrants by falsely promising to help them obtain green cards and bargain deals on federally seized property in three cites, and for impersonating an ICE officer on loan to the FBI, carrying an air gun, a phony badge and a false ID card. *See* Kirk Semple, *3 Charged with Stealing $1.75 Million From Immigrants*, N.Y. Times (Mar. 18, 2010), https://nyti.ms/32AYKsW. Mr. Ramsundar was convicted and sentenced ultimately to between 10 and 20 years in prison. *See People v. Ramsundar*, 138 A.D.3d 892, 893 (N.Y. App. Div. 2d Dep't 2016). The point, for purposes of this motion, is not that Mr. Ramsundar's prior criminal history directly calls into question his credibility (though it assuredly does); rather, Mr. Ramsundar's criminal history demonstrates why the government should be required to disclose the names of the *other* informants on whom it is relying so that Petitioner can meaningfully probe their allegations.[7]

---

grounds. To date, however, the government has not invoked that privilege or identified the precise information or documents to which it would apply.

[7] During the most recent telephonic meet-and-confer on February 25, 2020, the government represented that its claims of CI privilege justify the withholding of information regarding, for example, an informant's criminal and other incarceration history—even without identifying

Finally, if the Court concludes that it requires more information to determine whether, and for which informants, the privilege is sustainable, Mr. Hassoun respectfully requests that the Court order the government to produce its informants' identities, their allegations related to Mr. Hassoun, their criminal histories, and other information relevant to credibility—including, potentially, the informants themselves—for *in camera* review. *See, e.g.*, *Black v. Sheraton Corp. of Am.*, 564 F.2d 550, 553 (D.C. Cir. 1977) (explaining that "*in camera* inspection is a valuable technique for protecting the confidentiality of government documents while verifying a claim of [confidential informant] privilege"); *see also Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 770 (D.C. Cir. 1965); *United States v. Grisham*, 748 F.2d 460, 464–65 (8th Cir. 1984).

II. RESPONDENT HAS FAILED TO PROPERLY INVOKE THE LAW ENFORCEMENT INVESTIGATORY FILES PRIVILEGE AND, MOREOVER, ANY CLAIM OF PRIVILEGE MUST BE OVERCOME.

Respondent has failed to properly invoke the law enforcement investigatory files privilege. The privilege is inappropriate for proceedings of this kind and, regardless, the government has failed to provide petitioner with adequate privilege logs for any of the four volumes of documents disclosed to date. *See In re Sealed Case*, 856 F.2d 268, 271–72 (D.C. Cir. 1988); Fed. R. Civ. P. 26(b)(5). Even if the government has properly invoked the privilege, this Court should conduct an *in camera* review of the withheld documents to determine whether the qualified privilege is overcome because the public interest weighs in favor of disclosure. *See In re Sealed Case*, 856 F.2d at 271–72; *In re City of New York*, 607 F.3d 923, 940 (2d Cir. 2010).

---

information like case numbers or the like. But as *Roviaro* itself makes clear, "[t]he scope of the privilege is limited by its underlying purpose," 353 U.S. at 60, and even if the privilege can be sustained to protect an informant's identity, it does not necessarily extend to other documents responsive to Mr. Hassoun's discovery requests that provide information about those anonymous informants that are "relevant and helpful" to his defense.

A. The Government Has Not Met Its Burden of Showing that It Has Properly Invoked the Investigatory Files Privilege.

As an initial matter, it is doubtful that the government can invoke the IV privilege to shield information about an investigation in a quasi-criminal proceeding like this one, in which the investigation being protected is the basis for the allegations intended to justify an individual's incarceration.[8] The government, in short, may not conduct an investigation aimed at justifying detention and then claim privilege to selectively hide the fruits of that investigation when it comes time to justify that detention to the Court.

The IV privilege has limited applicability in the criminal context because the rules of discovery are controlled by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. Under this line of cases, the government cannot refuse to disclose evidence that is material and exculpatory simply because it relates to an investigation or might reveal a law enforcement technique used. *See Brady*, 373 U.S. at 87 (holding that "evidence favorable to an accused" must be disclosed); *Giglio*, 405 U.S. at 154 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady* rule]."). Here, like in a criminal case, the government is seeking to deprive Mr. Hassoun of his liberty and has the burden to prove that it is legal to do so. It would be incongruous to permit the government to withhold the details of the investigation of Mr. Hassoun in a nominally civil proceeding under 8 U.S.C. § 1226a through an IV privilege claim that would plainly fail in any criminal proceeding against him. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (Under our Constitution, "[i]t is

[8] In the meet-and-confer call on February 26, 2020, the government refused to clarify whether iw was invoking the IV privilege with respect to the investigation into Mr. Hassoun, other related investigations, or both. Petitioner assumes, given this non-answer, that at least some of the material withheld or redacted under the IV privilege relates to the investigation of Mr. Hassoun.

unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997))).

Moreover, even if the IV privilege is applicable to this proceeding, the government has failed to provide sufficient justification for its application under both Federal Rule of Civil Procedure 26(b)(5) and case law governing the privilege.[9] The privilege logs produced by the government contain only boilerplate language that is wholly inadequate under Rule 26(b)(5). The Rule requires that the party claiming privilege (1) expressly make the claim, and (2) describe the nature of the documents or information withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5). This obligation is met through the provision of a privilege log, which must contain enough information that "the opposing party should be able, from the entry in the log itself, to assess whether the claim of privilege is valid." *Chevron Corp. v. Weingberg Grp.*, 286 F.R.D. 95, 98 (D.D.C. Sep. 26, 2012). To sustain a claim of privilege for law enforcement investigatory files, the withholding party must provide "(1) a formal claim of privilege by the

[9] Although the Court sits in the Western District of New York, § 1226a(b)(3) provides that "[t]he law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described" therein. The government has represented to Petitioner its position that the procedural requirements for invoking the privilege, as opposed to the substance of the privilege, should be decided under Second Circuit law because those requirements do not constitute the "rule of decision." Petitioner disagrees that Second Circuit law applies here. Congress enacted 8 U.S.C. § 1226a(b)(3) to avoid circuit splits of the type that would be created if this Court were to apply Second Circuit law to determine whether a claim of privilege is properly invoked. Nevertheless, the Court need not decide the choice-of-law issue since the government's privilege logs are deficient under Second Circuit law as well. *See In re City of New York.*, 607 F.3d at 940 (adopting test in *In Re Sealed Case* for the IV privilege and placing the burden to show that the privilege applies on the withholding party).

head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*, 856 F.2d at 271; *see also Friedman v. Bache Halsey Stuart Shields, Inc*., 738 F.2d 1336, 1342 (D.C. Cir. 1984); *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996).[10]

The government has produced five volumes of documents. Volume 1 was reproduced in its entirety in Volume 2 and Volume 5 re-produced some documents from Volume 2 without certain redactions related to waived claims of privilege, leaving three volumes with their corresponding privilege logs. For nearly every invocation of the IV privilege in Volume 2, the government provided the following justification (or a portion of it) in its privilege log:

> IV - Information compiled for the purpose of a law enforcement purposes, the disclosure of which could reasonably be expected compromise an ongoing investigation and investigatory techniques; Record identification numbers and similar codes, information identifying law enforcement agents and agencies, narrative text the disclosure of which might reveal sensitive law enforcement investigative information, techniques, and procedures and if disclosed will risk circumvention or evasion of the law.

See, e.g., Ex. 2, Volume 2 Privilege Log at 1. Volume 3 contained a slightly longer but equally vague invocation that applied to *every single invocation* of the privilege:

> Information compiled for law enforcement purposes, the disclosure of which could reasonably be expected to compromise an ongoing investigation and investigatory techniques. This also includes record identification numbers and similar codes, information identifying law enforcement agents and agencies, and narrative text the disclosure of which might reveal sensitive law enforcement investigative information, techniques, and procedures, and which, if disclosed, will risk circumvention or evasion of the law or harm to investigations or investigative techniques and interests.

[10] The government has represented to Petitioner its position that these requirements do not attach until a motion to compel has been filed and a formal invocation of the privilege has occurred. Regardless of whether this is correct, now that the Petitioner has filed a motion to compel, the government must now comply with these requirements in order to invoke the privilege.

See Ex. 6, Volume 3 Privilege Log at 1. The privilege log for Volume 4 contains the same language as Volume 3. *See* Ex. 7. The privilege logs do typically contain some description of the documents withheld, but in most cases, the information provided (for example, the recipient and sender of an email, or the filename of an electronic document) does not explain why the IV privilege has been invoked in that particular case.

These descriptions do not meet the requirements of Rule 26(b)(5). A privilege log must contain enough information for "the opposing party [and ultimately the judge] . . . to discern . . . that the information not being disclosed is properly claimed as privilege." *Chevron Corp*., 286 F.R.D. at 98. A boilerplate entry that merely restates the privilege "is insufficient since there is no indication in the log of why the document" should be privileged. An insufficient privilege log "may disguise a flawed understanding of the privilege" and a "sufficient entry at least warns the opposing party of that possibility" while an insufficient one does not. *Id*. Here, the privilege logs merely restate the privilege and provide no information entry by entry as to why the government believes the invocation of the privilege is appropriate. *See also United States v. Constr. Prod. Research, Inc*., 73 F.3d 464, 473 (2d Cir. 1996) (concluding that a privilege log containing "a cursory description of each document" was insufficient under the Federal Rules); *Citizens Against Casino Gambling in Erie Cty. v. Stevens*, No. 09-CV-0291S, 2012 WL 2405195, at *9 (W.D.N.Y. June 23, 2012) (ordering in camera review of documents because privilege log described documents in a "general manner"); *Sulaymu-Bey v. City of New York*, 372 F. Supp. 3d 90, 93 (E.D.N.Y. 2019) ("vague, non-specific description[s]" and "generic assertions" do not meet the requirement of Rule 26(b)(5)).

Moreover, the government has failed to comply with the specific requirements of the IV privilege. None of the privilege logs: (1) makes a formal claim of privilege by the head of the

department having control over the requested information; (2) makes an assertion of the privilege based on actual personal consideration by that official; or (3) gives a detailed specification of the information for which the privilege is claimed with an explanation why it properly falls within the scope of the privilege. *See In re Sealed Case*, 856 F.2d at 271. Requirements (1) and (2) are wholly absent from the privilege logs. Requirement (3) is not satisfied by the circular, general description recounted above.[11]

These general descriptions make it impossible for Mr. Hassoun to discern whether the privilege has been invoked appropriately. For example, the government disclosed one document that listed multiple "photographs" as attachments, but the photographs have been withheld in full. *See* DEF 9370, attached as **Exhibit 11**. The government has given no indication how revealing photographs would reveal methods or techniques, or would threaten an ongoing investigation, or would disclose information related to a confidential informant. Likewise, the government withheld a document described as "Hassoun - Detention Center Call Translations" without explaining how a translation of Mr. Hassoun's own calls would compromise an ongoing investigation. *See* Volume 3 Privilege Log at 4.

In some cases, the government has provided descriptions of the documents that might be sufficient if it were claiming a different privilege like, say, the attorney-client privilege, but which are wholly inadequate for the invocation of the IV privilege. For example, many documents in Volume 3 provide the sender and recipient of an email regarding the investigation into Mr. Hassoun, but the only information given as to the content of the email is the subject line

[11] Though the Second Circuit does not appear to require that the invocation be "based on actual personal consideration" of the official invoking the privilege, the requirements of a formal claim of privilege and a detailed specification and explanation of why the information falls within the privilege is required. *In re City of New York*, 607 F.3d at 944.

"Re: Hassoun," which does not even suggest a justification for the IV privilege. *See ,e.g.*, DEF 680, 690, attached as **Exhibit 12**; Ex. 2, Volume 2 Privilege Log, at ln 144, 148.[12] Finally, the inadequate privilege log means that Petitioner cannot discern whether a particular document referenced elsewhere in the disclosures is being withheld under the IV privilege, or whether it has not been produced at all. For example, one document now produced refers to a polygraph test conducted by a Miami-based FBI agent on Shane Ramsundar, *see* DEF6833, attached as **Exhibit 13**, but Petitioner has been unable to find any mention of such a test in the privilege log nor any documents disclosing the results of that interview. These and other discrepancies make it impossible for Petitioner to even identify with any accuracy which invocations of the privilege to challenge, or to determine whether the defendants have simply failed to identify and produce documents responsive to their request for production.

B. The Court Should Order the Government to Produce New, Rule-Compliant Privilege Logs and, if Necessary, Review the Documents *In Camera* to Determine Whether Petitioner Overcomes the Invocation of the Privilege.

Even if the government has properly invoked the privilege, the privilege is not absolute. Instead, "the public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." *In re Sealed Case*, 856 F.2d at 272. To make this determination, courts must balance a number of different factors, including:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal

[12] Petitioner is not challenging the government's use of the IV privilege to withhold "record identification numbers and similar codes." However, while Mr. Hassoun can attempt to surmise which redactions relate to this category of privilege based on the length of the redaction, the government has not provided Petitioner any roadmap —with a few exceptions — for determining which of the redactions fall into this category.

> proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

Friedman, 738 F.2d at 1342–43; *In re City of New York*, 607 F.3d at 940 (citing *Friedman* factors in its analysis of the IV privilege).

Mr. Hassoun is not in a position to argue that these factors counsel in favor of disclosure without additional information from the government. Nevertheless, with the limited information that Petitioner possesses, it is clear that many of the relevant factors counsel in favor of disclosure. For instance, it is clear that Petitioner's habeas petition is far from frivolous—indeed, were it otherwise there would be no need for April's evidentiary hearing. *See* ECF No. 55 at 26–27 (ordering evidentiary hearing). It is also clear that Petitioner cannot obtain this information from any other source because the government has custody and control of all evidence upon which it has based its certification of Mr. Hassoun under the statute. Finally, the information withheld by the government could not be more important to Petitioner's case. The government intends to detain Petitioner indefinitely based on allegations that he has essentially engaged in criminal conduct during his detention. The government now seeks to withhold much of the information related to its investigations of Petitioner on the grounds that it is privileged. If Petitioner does not have access to this information, there will be no way for him to challenge the government's allegations, putting him at risk of life imprisonment without ever knowing the evidence against him. Argument concerning the other factors require more information from the government. For example, Mr. Hassoun obviously cannot determine "whether the information sought is factual data or evaluative summary" if the government does not provide that information. *Friedman*, 738 F.2d at 1342.

In order to resolve these claims of privilege, the Court should order the government to produce new privilege logs that meet the requirements of Rule 26(b)(5) and the IV privilege, and, if the government refuses to do so or if the parties cannot resolve their differences after production of the new privilege logs, to order an *in camera* review of the documents. *See In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 751 (D.C. Cir. 2006) ("Where detailed description of the contested documents would undermine the claimed privilege, the proponent's burden to describe with particularity can be met in other ways, such as *in camera* review by the court."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 337–38 (D.D.C. Aug. 20, 2001) (declining to rule on law enforcement privilege before an *in camera* review); *Alexander v. F.B.I.*, 192 F.R.D. 37, 38 (D.D.C. Mar. 6, 2000) (ordering *in camera* review of documents in which the government had invoked IV privilege); *Black Love Resists In the Rust by & through Soto v. City of Buffalo, N.Y.*, No. 1:18-CV-719, 2019 WL 6907294, at *8 (W.D.N.Y. Dec. 19, 2019) ("The court cannot evaluate the applicability of the law enforcement privilege without a privilege log and an in camera inspection of the [documents]."); *see also Arroyo v. City of Buffalo*, No. 15-CV-753A(F), 2018 WL 4376798, at *7 (W.D.N.Y. Sept. 13, 2018). Further, the Court's order should require the government to produce the new privilege logs with adequate time for resolution of the issues by the parties or, if necessary, by the Court. The government's failure to adequately justify this privilege should under no circumstances either prejudice Mr. Hassoun's ability to contest the allegations against him or cause any delay of the April 28 evidentiary hearing (and thus prolong Mr. Hassoun's unlawful detention).

III. THE GOVERNMENT CANNOT CALL MR. HASSOUN AS A WITNESS AND COMPEL HIM TO TESTIFY.

The government has put Mr. Hassoun on its witness list and apparently intends to use his testimony to meet its burden of proving by clear and convincing evidence that Mr. Hassoun is

subject to indefinite detention under 8 U.S.C. § 1226a. This Court should make clear that Mr. Hassoun has the right to decide whether to testify in his own defense just as he would if the government had used the criminal process to prosecute him for the serious criminal allegations it has lodged against him. This Court should thus issue a protective order pursuant to Fed. R. Civ. P. 26(c) prohibiting the government from calling Mr. Hassoun as a witness and attempting to use his testimony—which, importantly, formed no part of the administrative record or the government's ongoing basis for his detention—to meet its burden of proof. Mr. Hassoun may decide to testify in his own defense; he has been eager to tell his side of the story since the government first disclosed the FBI letter containing the allegations against him. But Mr. Hassoun must be allowed to make the decision about whether to testify at the conclusion of the government's case against him. The government, which has unlawfully deprived Mr. Hassoun of his liberty well over two years, by claiming it had investigated him and deemed him a significant threat to national security, should not be permitted to compel Mr. Hassoun's testimony to try now to gather the evidence it needs to sustain its burden.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. While this case is not criminal as a technical matter, the government's compulsion of testimony by Mr. Hassoun would be a dangerous attempt to circumvent an individual's constitutional right against self-incrimination—a right that affirms our judicial system is an accusatorial proceeding, not an inquisitorial one. *See Allen v. Illinois*, 478 U.S. 364, 375 (1986) (citing *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961)). Compelling Mr. Hassoun's testimony would allow the government essentially to lodge criminal allegations against him and then use this detention proceeding as an end-run around the constitutional protections afforded to criminal defendants. Indeed, documents now produced by the government show that

he remains under criminal investigation by the FBI and in criminal jeopardy for precisely the same allegations the government is using to justify this indefinite "civil" detention. DEF1282–83, attached as **Exhibit 14.** It would eviscerate the Fifth Amendment's core protection if government were allowed to detain a person based on criminal allegations and then force the person to testify at a habeas proceeding challenging that detention before the government decides whether to prosecute the person on the same allegations.

The Constitution demands fidelity to the rights of an accused, and the "government may not abrogate the accused's privilege against self-incrimination by electing the vehicle of a nominally civil proceeding, when in reality, punishment for activity which violates the criminal law is being imposed." *In re Daley*, 549 F.2d 469, 475 (7th Cir. 1977). Moreover, the government has certified Mr. Hassoun under the statute (and held him for almost an entire calendar year) based *entirely* on evidence from other sources—meaning it would be manifestly unfair to permit the government to now meet its burden through Mr. Hassoun's compelled testimony. The nature of this proceeding therefore provides Mr. Hassoun the right to choose whether to testify in his own defense. Even if he does not possess that absolute right, Mr. Hassoun must be permitted to invoke the privilege against self-incrimination to the extent that his statements could be used in a future criminal case, and adverse inferences must be prohibited.

A. The Fifth Amendment's Privilege Against Self-Incrimination Provides Mr. Hassoun an Absolute Right Not to Testify in this Proceeding.

The Fifth Amendment's privilege against self-incrimination applies to this proceeding, and thus Mr. Hassoun cannot to be compelled to testify. The privilege against self-incrimination guarantees a defendant in a criminal case an "absolute right not to testify." *Salinas v. Texas*, 570 U.S. 178, 184 (2013) (quoting *Turner v. United States*, 396 U.S. 398, 433 (1970) (Black, J., dissenting)). Although this habeas proceeding is not technically criminal, the Fifth Amendment

right not to testify should attach here because the proceedings are sufficiently "quasi-criminal" and because the government is pursuing allegations in this proceeding that plainly subject Mr. Hassoun to criminal jeopardy. The Supreme Court has upheld the privilege against self-incrimination in proceedings that, though nominally civil, are sufficiently punitive in intent or effect to transform the proceeding into one that is criminal in nature. Specifically, in *In re Gault*, the Supreme Court held that "juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." *In re Gault*, 387 U.S. 1, 49 (1967); *see also In re Grand Jury Proceedings*, 491 F.2d 42, 44 (D.C. Cir. 1974) ("To hold [juvenile proceedings] otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."). The facts here are even more compelling—Mr. Hassoun's habeas proceeding to determine his alleged "dangerousness" could result in his indefinite, potentially lifelong, detention in prison-like conditions.

Although the Supreme Court later elected not to extend *In re Gault* to certain civil commitment contexts, *see Allen*, 478 U.S. at 373, the habeas proceedings here are properly analogous to juvenile proceedings that punish, not to civil commitment proceedings that treat and remediate the mentally ill. The Supreme Court in *Allen* held that proceedings for committing sexually dangerous persons serve the "purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment," and therefore are not criminal within the meaning of the privilege against self-incrimination. *Id.* The *Allen* Court distinguished *Gault*, noting that in contrast to commitment proceedings for sexually dangerous persons, juvenile proceedings punish "for conduct that if committed by an adult would be a crime." *Id*. Here, like in *Gault* and unlike in *Allen*, Mr. Hassoun

will be confined "in a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care," *id.*, and which is being imposed as a result of allegations that are criminal in nature.

Moreover, the Supreme Court has held that proceedings can be "quasi-criminal" for purposes of the right against self-incrimination without requiring that the entire panoply of constitutional protections in criminal proceedings attach. For example, the Court has held that civil forfeiture proceedings are quasi-criminal and thus implicate the privilege against self-incrimination, even if the proceedings are not sufficiently criminal for purposes of other constitutional protections. *Compare Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (holding that suits for penalties and forfeitures, incurred by the commission of offenses against the law, are quasi-criminal and therefore the privilege against self-incrimination applies), *overruling on other grounds recognized by Fisher v. United States*, 425 U.S. 391, 407–09 (1976), *and United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971) (holding that an alleged violator of IRS laws could invoke the Fifth Amendment in a forfeiture proceeding), *and One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 700 (1965) (reaffirming *Boyd*'s determination that a forfeiture proceeding is quasi-criminal in nature), *with United States v. Ursery*, 518 U.S. 267 (1996) (holding that a civil in rem forfeiture was not punishment for purposes of double jeopardy), *and OneLot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972) (holding that forfeiture proceeding is not barred by the Double Jeopardy Clause), *and United States v. Regan*, 232 U.S. 37, 50 (1914) (holding that forfeiture proceedings under the Alien Immigration Act do not require proof beyond a criminal doubt). And other (non-forfeiture) types of nominally civil proceedings borrow criminal-based constitutional protections, where appropriate, as well—including "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" that

import the "clear and convincing" evidentiary standard. *Addington v. Texas*, 441 U.S. 418, 424 (1979).

Moreover, the government has held Mr. Hassoun for almost an entire year on a certification under the statute based on evidence it obtained from other sources. To permit the government to now meet its burden by forcing Mr. Hassoun to testify in a proceeding with the potential to impact his liberty indefinitely would open the door to potentially unfounded and abusive future uses of the statute. The certification is not akin to a "probable cause" finding requiring further development and proof; it is the government's formal assertion that Mr. Hassoun *is* a danger to the national security, and the government has made that assessment without Mr. Hassoun's own testimony as a basis for it.

Even if this proceeding is not itself criminal or quasi-criminal in nature (which it is), failing to accord Mr. Hassoun the right not to testify in this habeas proceeding—which is taking place while an apparent criminal investigation by the FBI into Mr. Hassoun continues to this day—would eviscerate the Fifth Amendment right against self-incrimination in criminal proceedings. The privilege against self-incrimination must be interpreted liberally to protect it against improper encroachments. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) (This guarantee against testimonial compulsion… must be accorded liberal construction in favor of the right it was intended to secure."). The government may not use nominally "civil" indefinite detention as a sword to compel a person to testify regarding as-yet-uncharged criminal allegations that the government is still actively pursuing.[13] Though nominally civil, this habeas proceeding is a context

[13] *See United States v. Ward*, 448 U.S. 242, 254–55 (1980). In *Ward*, the Supreme Court held that a monetary penalty is civil and did not trigger most protections afforded to criminal defendants, but stopped short of holding that this foreclosed the Fifth Amendment's protection against compulsory self-incrimination in quasi-criminal proceedings. *See Ward*, 448 U.S. at 253–54 ("The question before us, then, is whether the penalty imposed in this case, although clearly

in which Mr. Hassoun retains an absolute right to choose whether to testify, both because the proceeding is in fact quasi-criminal in nature and because forcing him to testify would destroy the Fifth Amendment right with respect to criminal prosecution on the same allegations.

B. Alternatively, Mr. Hassoun is Entitled to Invoke the Privilege Against Self-Incrimination to the Extent that His Statements Could Be Used in a Future Criminal Proceeding, and Adverse Inferences Should Be Prohibited.

Even if Mr. Hassoun does not have absolute right not to testify by the government's compulsion, Mr. Hassoun should be permitted to invoke the privilege in a civil proceeding "against any disclosures [he] reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) ("[S]ince the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution."). Mr. Hassoun may invoke a blanket assertion of this privilege given the relevance of any statements to potential future incrimination, or alternatively may invoke this privilege on a question-by-question basis. Moreover, adverse inferences should be prohibited because the government has failed to

---

not 'criminal' enough to trigger [other Constitutional protections], is nevertheless 'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment."). Although *Ward* held that the privilege against self-incrimination was ultimately inapplicable because of the "overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect," *id*. at 254, the facts here are quite different. Notably, *Ward* based its holding on the civil nature of monetary damages, the lack of punitive consequences like imprisonment, and the fact that the proceedings would not prejudice the defendant in possible criminal proceedings. *See Id*. at 253–54. Here, in contrast, these factors point in the opposite direction: this proceeding concerns detention—a classic incident of punishment—that is being imposed as a result of criminal-like accusations and which could prejudice Mr. Hassoun in future criminal proceedings involving closely related, if not identical, alleged conduct.

demonstrate that it has a substantial need for Mr. Hassoun's testimony that outweighs the undue prejudice that would otherwise result.

1. Mr. Hassoun may make a blanket assertion of the privilege against self-incrimination in a civil proceeding, or alternatively may invoke the privilege on a question-by-question basis.

"The Fifth Amendment applies in any proceeding to 'disclosures which the witness reasonably believes could be used [against him or her] in a criminal prosecution or could lead to other evidence that might be so used.'" *Anton v. Prospect Cafe Milano, Inc*., 233 F.R.D. 216, 218 (D.D.C. Feb. 27, 2006) (*citing Kastigar*, 406 U.S. at 444-45). "[T]he court may not force the witness to prove that he will in fact incriminate himself by testimony." *United States v. Reese,* 561 F.2d 894, 900 (D.C. Cir. 1977). Instead, "[a] trial judge may appraise a claim of privilege in light of his [or her] personal perception of the peculiarities of the case and should not be overruled unless it is perfectly clear that the witness is mistaken and that the answers cannot possibly incriminate." *Id*. (citing *Hoffman*, 341 U.S. at 487–88). And "[t]he privilege extends not only to answers which would in and of themselves support a criminal conviction, but also to answers which would furnish a link in the chain of evidence needed to prosecute." *Anton*, 233 F.R.D. at 218–19 (citing *Hoffman*, 341 U.S. at 487–88.). Therefore, a witness can often succeed in demonstrating that a reasonable basis exists for invoking the privilege against self-incrimination in a civil proceeding. *See Reese,* 561 F.2d at 901 ("Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime… [and] no witness is compellable to furnish *any one of them* against himself." (emphasis added)); *see also Hoffman*, 341 U.S. at 486 (holding that the Fifth Amendment must be "accorded liberal construction in favor of the right it was intended to secure [to embrace that which] would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime").

Moreover, "a district judge may sustain a blanket assertion of [the Fifth Amendment] privilege after determining that there is a reasonable basis for believing a danger to the witness might exist in answering any relevant question." *United States v. Ortiz*, 82 F.3d 1066, 1073 (D.C. Cir. 1996) (citing *United States v. Thornton*, 733 F.2d 121, 125–26 (D.C. Cir. 1984)). The subject matter about which a proffered witness is supposed to testify to may therefore be dispositive. In *Ortiz*, for example, the D.C. Circuit upheld a blanket privilege in a civil case where "the witness would testify about knowledge that she obtained while translating telephone conversations involving drug deals for one of the co-defendants." *Id*.

Similarly, in *Anton*, the D.C. District Court upheld a restaurant manager's invocation of the privilege against self-incrimination in his refusal to answer deposition questions in an action against the restaurant for an employee's wrongful death. *Anton*, 233 F.R.D. 216. First, the manager's fear of prosecution was deemed substantial and real, despite the fact that no criminal charges had yet been brought, "because a criminal prosecution against [the manager was] possible." *Id*. at 219. Second, the court held that the blanket assertion of the privilege was justified given the nature and scope of the questions asked, as even "[t]hough some of the questions asked of [the manager] appear to be fairly innocuous, they nonetheless may 'harbor hidden dangers for the unwary witness.'" *Id*. at 220 (citing *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 884 (D.C. Cir. 1981)). The Court rejected the plaintiff's assertion that questions relating to the operation of the business and questions relating to the manager's relationship with the deceased employee were not potentially incriminating, as the "*mere potential* of incrimination is sufficient to justify [the manager's] invocation." *Id*. (emphasis added). "For example, questions regarding [the manager's] relationship with the decedent… could lead [the manager] to divulge motive-related information." *Id*. And though questions regarding the restaurant operations were "certainly

more remote," they could nonetheless "furnish a link in the chain of evidence in demonstrating the manager's knowledge of, or participation in, or complacency with wrongdoing." *Id*. The court further emphasized that information pertaining to the business "is likely available through the traditional discovery process…. [and the] right not to self-incriminate outweighs the plaintiff's need in securing this information from him, particularly because the information is likely otherwise available." *Id*. (citing *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1215 (D.C. Cir. 2004)) (holding that Rule 26 "vests the trial judge with broad discretion to tailor discovery narrowly.").

Here, Mr. Hassoun is entitled to a blanket assertion of the privilege against self-incrimination in response to the government's attempt to call him as its witness because any relevant question the government intends to compel Mr. Hassoun to answer is reasonably dangerous and could potentially incriminate him in a future criminal proceeding. The government is attempting to indefinitely detain Mr. Hassoun on account of a "dangerousness" determination, and thus any testimony that the government seeks could "furnish a link in the chain of evidence in demonstrating… knowledge of, or participation in, or complacency with wrongdoing." *Anton*, 233 F.R.D. at 220. Indeed, documents disclosed by the government have confirmed that a criminal FBI investigation into Mr. Hassoun is ongoing. DEF1282–83, attached as **Exhibit 14**. Even if some questions might seem fairly innocuous, "they nonetheless may 'harbor hidden dangers for the unwary witness.'" *Id*. (citing *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 884). And the right against self-incrimination outweighs the government's need in securing Mr. Hassoun's testimony because the government has had exclusive control over Mr. Hassoun over the past seventeen years and therefore has access to any evidence regarding anything that Mr. Hassoun could conceivably testify about, including, for example, access to all of Mr. Hassoun's call records and written communications. If the government does not have such evidence, then it stands to

reason that such evidence does not exist, and the government should not be allowed keep Mr. Hassoun in prison while it tries to build its case using Mr. Hassoun's testimony.[14] Alternatively, if this Court determines that some of the government's questions may not pose a reasonable danger to Mr. Hassoun and thus allows Mr. Hassoun to testify, he may still invoke the privilege on a question-by-question basis for all other questions that are potentially incriminating. *See*, *e.g.*, *id*. at 219.

2. Adverse inferences would be inappropriate in this proceeding.

Although "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976), an adverse inference is appropriate only if "[t]he burden on the party asserting the privilege… '[is] no more than is necessary to prevent unfair and unnecessary prejudice to the other side.'" *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 67 (D.D.C. 2000) (citing *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir.1996)). "The tension between one party's Fifth Amendment rights and the other party's right to a fair proceeding is resolved by analyzing each instance where the adverse inference was drawn, or not drawn, on a case-by-case basis under the microscope of the circumstances of that particular civil litigation." *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 912 (9th Cir. 2008).

[14] If the Court concludes that a blanket privilege is not available to Mr. Hassoun, then the Court should, at a minimum, instruct the government that it must call Mr. Hassoun at the end of its case so that Mr. Hassoun can hear the evidence against him before testifying. *See* Fed. R. Evid. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses"); *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

A court may permit an adverse inference in light of a party invoking their privilege against self-incrimination only in limited circumstances. First, the proponent of the adverse inference must support the inference with independent evidence. *See S.E.C. v. Whittemore*, 659 F.3d 1, 12 (D.C. Cir. 2011); *Alexander v. F.B.I.*, 691 F. Supp. 2d 182, 196 (D.D.C. 2010), *aff'd*, 456 F. App'x 1 (D.C. Cir. 2011) (citing *States v. Stelmokas*, 100 F.3d 302, 311 (3d Cir.1996)). Second, "[t]he inference may not be drawn "unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information." *Id*. (citing *Serafino*, 82 F.3d at 518–19); *see also In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d at 65 ("The duty of a trial court when confronted with an invocation of a party's Fifth Amendment privilege in a civil case is to 'strive to accommodate a party's Fifth Amendment interests' while at the same time being careful to 'ensure that the opposing party is not unduly disadvantaged.'" (citing *Serafino*, 82 F.3d at 518)).

To determine if there is a substantial need for an adverse inference, "[t]he district court must determine 'whether the value of presenting [the] evidence [is] substantially outweighed by the danger of unfair prejudice' to the party asserting the privilege." *Nationwide Life Ins. Co.*, 541 F.3d at 912 (citing Fed. R. Evid. 403; *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983)). "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994); *see also Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000) ("[U]nder certain circumstances, within the civil framework, because of the constitutional nature of the right implicated, an adverse inference from an assertion of one's privilege not to reveal information is too high a price to pay."). Thus, in *Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 170 (2d Cir. 2017), the Second Circuit held that the admission of adverse inferences resulted in prejudicial error when an

employee brought a civil action under the Family and Medical Leave Act and invoked the privilege against self-incrimination in their deposition. The court noted that "[s]uch adverse inferences are appropriately admitted, however, only if they are relevant, reliable, and not unduly prejudicial… [and the employee suffered] even harsher prejudice from the admission of an adverse inference… in response to being asked whether she was ever convicted of any immoral or unethical conduct." *Id*. at 170–71.

An adverse inference is inappropriate here because of the unfair and unnecessary prejudice that it would create and the absence of a substantial need by the government to have access to Mr. Hassoun's testimony in light of its ability to obtain evidence from less burdensome sources, such as its own purported witnesses to the conversations in question, on which the crux of its case that Mr. Hassoun poses a danger is based. The government is attempting to extract from Mr. Hassoun testimony about whether he is guilty not only of immoral or unethical conduct, as in *Woods*, but also unlawful conduct. The prejudice that results from an adverse inference to these questions is thus particularly concerning because they essentially accuse Mr. Hassoun of criminal conduct in a proceeding that carries an indefinite sentence, conduct that law enforcement appears to be actively investigating. Given the constitutional dimensions of the privilege and the potential consequences of this proceeding, this Court should not permit adverse inferences if Mr. Hassoun invokes the privilege if called to testify by the government.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to grant his motion to compel the government to supplement its discovery responses and grant a motion for a protective order prohibiting the government from calling him as a witness.

Respectfully submitted,

/s/ A. Nicole Hallett

A. Nicole Hallett
Supervising Attorney
Brian Zagrocki
Naphtalie Librun-Ukiki
Samantha Becci
Student Attorneys
Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
773-702-9611
nhallett@uchicago.edu

Jonathan Manes
Supervising Attorney
Roderick & Solange MacArthur Justice Center
160 E. Grand Ave., 6th Floor
Chicago, IL 60611
312-503-0012
jonathan.manes@law.northwestern.edu

Erin Barry
Colton Kells
Marline Paul
Student Attorneys
University at Buffalo School of Law
507 O'Brian Hall, North Campus
Buffalo, NY 14260
716-645-2167

Counsel for Petitioner

Jonathan Hafetz
Brett Max Kaufman
Charlie Hogle*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
jhafetz@aclu.org
*Not admitted to W.D.N.Y.

Judy Rabinovitz
Celso Perez
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2616
jrabinovitz@aclu.org

Victoria Roeck
Christopher Dunn
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
212-607-3300
cdunn@nyclu.org

Dated: February 28, 2020
Chicago, IL

~~FILED UNDER SEAL~~