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 OF LAW IN SUPPORT OF PETITIONER'S AMENDED VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This case concerns the government's asserted power to hold Adham Amin Hassoun in detention indefinitely—potentially for the rest of his life—based solely on a unilateral executive branch determination that his release could pose a "threat to the national security" or "significant risk of terrorism." Mr. Hassoun has served his criminal sentence and would like nothing more than to leave the United States and regain his freedom by returning to Lebanon, the country of his birth, or another safe country. Unfortunately, Mr. Hassoun is a stateless Palestinian, and the government has failed to identify a country willing to accept him after his removal from the United States. But rather than releasing Mr. Hassoun on appropriate conditions of supervised release until he can be deported, the government seeks to impose an administrative life sentence based on his past conduct and baseless, anonymous, and uncorroborated allegations arising during his time in federal immigration detention. Mr. Hassoun's continued detention is unlawful for the following reasons:

First, the regulation under which the government is holding Mr. Hassoun—8 C.F.R. § 241.14(d)—exceeds the authority of the statute under which it was promulgated.

Second, the regulation violates Substantive Due Process because it allows indefinite detention solely on the basis of past criminal conduct or mere predictions of future dangerousness.

Third, the regulation violates Procedural Due Process because it does not provide for a hearing before a neutral decisionmaker, does not provide an opportunity to confront or cross-examine the government's evidence or witnesses, and does not ensure that the government satisfies an adequate standard of proof.

Fourth, the regulation is unconstitutionally vague because it gives the government unfettered authority to determine what it means to be a "threat to national security" or to present

a "significant risk of terrorism" without providing clear notice of what activity might subject individuals to indefinite detention on that basis, or even what those key terms actually mean.

Fifth, the regulation violates Equal Protection because it impermissibly and irrationally discriminates against a subclass of individuals regarding the fundamental right to be free from unlawful detention.

Finally, even if the regulation were lawful, the government cannot prove that Mr. Hassoun is properly subject to it because it has not and cannot demonstrate that that appropriate conditions of supervised released would fail to mitigate any purported "threat" or "risk."

As set forth below, this Court should order Mr. Hassoun's immediate release.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Hassoun's early years in Lebanon and productive life in the United States.

Mr. Hassoun was born in Beirut, Lebanon on April 20, 1962. *See* Am. Ver. Pet. ¶ 19. His parents were stateless Palestinians who resettled in Lebanon after the 1948 Arab–Israeli War. *Id*. Lebanon does not grant citizenship to the children of Palestinians born within its borders, and because Mr. Hassoun's father never registered his family with the United National Relief Works Agency, Lebanon appears not to even recognize Mr. Hassoun as a Palestinian refugee within its protection. *Id.* ¶¶ 19–20. Mr. Hassoun thus remains stateless, without the protection of any nation's citizenship.

Mr. Hassoun's youth in Lebanon was marked by armed conflict. *Id.* ¶ 21. Like many civilians and Palestinian refugees there, Mr. Hassoun and his family were targeted, detained, and even tortured by various factions. *Id.* ¶ 22. Determined to leave Lebanon and find a peaceful life, Mr. Hassoun eventually made his way to the United States, arriving in 1989 as a nonimmigrant on a visitor visa. *Id.* ¶ 23. He soon changed his status to that of an F-1 student in order to begin studies at Nova Southeastern University, during which time his mother petitioned for lawful

permanent resident status on his behalf. *Id*. With the completion of his degree in computer science, he received work authorization. *Id.* ¶¶ 23–24. In 1990, his mother's petition was approved—but the government failed to process Mr. Hassoun's adjustment of status ("green card") application, which inexplicably remained pending. *Id.* ¶ 24.

In the meantime, over the course of the 1990s and early 2000s, Mr. Hassoun began a family and put down roots in the United States. *Id.* ¶ 24. He married and had three sons, all of whom are U.S. citizens. *Id*. His sister and other extended family naturalized as U.S. citizens. *Id.* ¶¶ 24, 29–30. He worked continuously and productively in the information technology field as a computer programmer and systems analyst. *Id.* ¶ 24. He was a valuable employee, beloved by his bosses and co-workers. *Id.* ¶ 40. He was also an active member of the community, recognized for his compassion and his willingness to assist anyone who needed a hand. *See id.*; *see also* Am. Ver. Pet., Ex. A, 7:17–20 ("Sentencing Hearing Tr."); Ex. B ("Letters of Support").

Mr. Hassoun's initial detention and criminal indictment.

Mr. Hassoun has been detained by the federal government for seventeen years, since June 12, 2002. *See* Am. Ver. Pet. ¶ 25. The government first put him in removal proceedings after charging him with overstaying his visa, even though his mother's immigrant petition for him had been approved, and his application to adjust status and obtain a green card remained pending. *Id.*

Mr. Hassoun's arrest came amidst a pattern of widespread detention of Muslims on immigration charges for purposes of interrogation in the months after the September 11 attacks. *Id.* ¶ 26. As the Department of Justice's Office of Inspector General has documented, between September 2001 and August 2002, more than 1,200 citizens and immigrants were detained for questioning, and more than 750 immigrants were held long-term in immigration detention as part of a far-reaching and often indiscriminate FBI investigation. *Id.* Throughout his immigration proceedings, which lasted several years, FBI agents repeatedly interrogated Mr. Hassoun and

asked him to serve as an informant or witness for the government, something he was not willing or able to do. *Id.* ¶ 27. An Immigration Judge subsequently ordered Mr. Hassoun's removal on the basis that he had overstayed his student visa and that he was ineligible for various forms of relief. *Id.* ¶ 28. The Board of Immigration Appeals ("BIA") affirmed. *Id.* The government then detained Mr. Hassoun in post–final order detention until his transfer to criminal custody in January 2004. *Id.*

Once transferred, Mr. Hassoun was indicted on 11 counts, eight of which the government never pursued. *Id.* ¶ 34. The three remaining charges related to monetary and verbal support Mr. Hassoun provided, mostly in the 1990s, to individuals supporting Muslims persecuted in conflicts abroad. *Id.* The most serious charge—conspiracy to kill, maim, or murder—was not based on any allegation that he had personally entered any agreement in which he or others would commit specific acts of violence, but rather on the remarkably aggressive and sweeping theory that he was a member of a global Muslim "conspiracy" involving various extremist Muslim groups, some of which had killed people in conflicts abroad. *Id.* ¶¶ 35–39; Sentencing Hearing Tr., Am. Ver. Pet., Ex. A, 5:19–25, 6:7–19.

Mr. Hassoun's criminal conviction and favorable findings at sentencing.

On August 16, 2007, a jury found Mr. Hassoun guilty of three charges. *Id.* ¶ 34. At sentencing, Judge Cooke sentenced Mr. Hassoun to 188 months followed by 20 years of supervised release. *Id*. ¶ 43. That sentence was a radical downward departure from the guidelines range of 360 months to life imprisonment. *Id.* It was also a pointed rejection of the government's request for life imprisonment. *Id.* ¶¶ 41–43. The government did not appeal the sentence. *Id.* ¶ 43.

Judge Cooke issued this sentence after recognizing and explaining the nature of Mr. Hassoun's crimes, his motivations, and what would be just punishment for the offense. She emphasized the attenuated nature of the "terrorism" crimes. *Id.* ¶ 42. As she explained:

> No so-called act of terrorism [in the case] occurred on United States soil. [Hassoun] did not seek to damage United States infrastructure, shipping interests, power plants or government buildings. There was never a plot to harm individuals inside the United States or to kill government or political officials. There was never a plot to overthrow the United States government.

Sentencing Hearing Tr., Am. Ver. Pet., Ex. A, 5:19–25. She further determined that there was "no evidence that [Mr. Hassoun] personally maimed, killed or kidnapped anyone in the United States or elsewhere" and that the crimes involved "no violent acts, had no identifiable victims, and were never directed against the United States or Americans." *Id.* at 6:15–19.

Instead, Judge Cooke emphasized that the conviction was based on Mr. Hassoun's efforts to "provide support to people sited in various conflicts involving Muslims" abroad. *Id*. at 6:8. She also recognized that he was motivated by "the plight of Muslims throughout the world [which] pained and moved him," which he related to because of his experience"[a]s a youngster . . . liv[ing] with a Lebanese conflict," as a result of which "he knew firsthand what happened to a country when internal politics turned violent." *Id.* at 7:13–25. The Judge further stressed that Mr. Hassoun's employer and fellow employees described him as a "smart, compassionate, and caring human being" and that he had no prior criminal record. *Id.* at 7:14, 18.

Judge Cooke squarely rejected the government's contention that Mr. Hassoun was so dangerous that he should be locked up for life, observing that:

> [T]he government intercepted most of Mr. Hassoun's telephone, work, home, cell, and fax. The interceptions and investigation continued for many years. He was questioned and never charged with a crime. The government knew where Mr. Hassoun was, knew what he was doing and the government did nothing. *This fact does not support the government's argument that Mr. Hassoun poses such a danger to the community that he needs to be imprisoned for the rest of his life*.

Id. 8:8–16 (emphasis added). As a result, she imposed a sentence that was almost 50% lower than the *lowest* recommended sentence under the sentencing guidelines. The government did not appeal Mr. Hassoun's sentence. While incarcerated, Mr. Hassoun received close to two years of good-time credit, ultimately having to serve only 165 months of his 188-month sentence. Am. Ver. Pet. ¶ 44.

The district court's decision ordering Mr. Hassoun released under *Zadvydas v. Davis* and his subsequent detention under 8 C.F.R. § 241.14(d).

Mr. Hassoun has been held in immigration detention at the Buffalo Federal Detention Facility ("BFDF") since his criminal sentence ended on October 10, 2017. *Id.* ¶ 47. He was initially held in ordinary post–final order detention, awaiting removal to another country. *Id.* Lebanon, the country of his birth, had repeatedly refused to accept him. *Id.* ¶ 48. The government's outreach to various other countries also bore no fruit. *Id.* When more than six months passed without any apparent progress on his removal, in May 2018, Mr. Hassoun filed a habeas petition challenging his detention under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Am. Ver. Pet. ¶ 50.

On January 2, 2019, Chief Judge Geraci granted Mr. Hassoun's petition, finding that his detention was no longer authorized under 8 U.S.C. § 1231(a)(6), as construed by the Supreme Court in *Zadvydas*, because his detention was prolonged and his removal was not reasonably foreseeable. *Id.* ¶ 51. He ordered Mr. Hassoun's release under appropriate conditions of supervision by March 1, 2019. *Id.* ¶ 55, 58.

But the government did not release Mr. Hassoun. On February 22, 2019, the Department of Homeland Security ("DHS") served on Mr. Hassoun a "Notice of Intent and Factual Basis to Continue Detention." *Id.* ¶ 58.The notice informed Mr. Hassoun that the government was initiating a procedure to continue detaining Mr. Hassoun under the same statute, 8 U.S.C.

§ 1231(a)(6). *Id.* ¶ 59. The Notice stated that the government intended to rely on a regulation, 8 C.F.R. § 241.14(d), that was promulgated under § 1231(a)(6) after the Supreme Court 's decision in *Zadvydas*. *Id.* ¶ 59.

On March 11, 2019, the government served on Mr. Hassoun an Administrative Record concerning his continued detention under 8 C.F.R § 241.14(d). Am. Ver. Pet. ¶ 75. With one exception, the Administrative Record consists solely of judicial decisions, court documents, and newspaper articles that relate to Mr. Hassoun's prior immigration proceedings and criminal conviction, as well as his prior, successful, habeas petition. *Id.* ¶¶ 76–77. The only document that describes *any* actions that post-date his detention 17 years ago is an unsworn letter from the FBI that describes allegations made by unidentified BFDF detainees to DHS officials relating to conversations involving Mr. Hassoun that these unidentified detainees supposedly "overheard" or were told about secondhand by other detainees. *Id.* ¶¶ 77–78.

The Administrative Record provides no corroboration for the hearsay statements of these anonymous jailhouse informants. *Id.* ¶ 78. Nor does it contain the actual statements provided by these informants or taken by federal officials. *Id*. ¶¶ 78, 81. Nor does it contain any information about the detainees that Mr. Hassoun is alleged to have had illicit conversations with. *Id.* Nor does it indicate any investigation of the statements themselves. *Id*. ¶ 78. Nor does it identify these jailhouse informants. *Id.* ¶¶ 78, 81. Nor does the Administrative Record contain a single allegation of any remotely similar conversations from Mr. Hassoun's 17 previous years of detention in federal custody. *Id*. ¶ 82.

Mr. Hassoun strongly denies all of these new, eleventh-hour allegations. *Id.* ¶ 79.

LEGAL BACKGROUND

The statute under which Mr. Hassoun is held, 8 U.S.C. § 1231(a)(6).

The government's asserted authority to detain Mr. Hassoun derives from 8 U.S.C. § 1231(a)(6), which provides that a noncitizen whose removal has not been effectuated within the ninety-day removal period may be subjected to additional detention. This provision identifies three categories of noncitizens who "may be detained beyond the removal period": noncitizens who are (1) inadmissible; (2) removable due to a violation of nonimmigrant status or a condition of entry, removable due to the commission of certain criminal offenses, or removable on a security ground; or (3) considered to be a risk to the community or unlikely to comply with the order of removal. *See* 8 U.S.C. § 1231(a)(6).

The regulation under which Mr. Hassoun is held, 8 C.F.R. § 241.14(d).

To continue Mr. Hassoun's detention beyond the removal period, the government has invoked 8 C.F.R. § 241.14(d), a regulation the government promulgated under § 1231(a)(6). This regulation states that the government "shall continue to detain" a noncitizen who meets all of the following three criteria:

> (1) the noncitizen "is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) or (B) of the Act or . . . has engaged or will likely engage in any other activity that endangers the national security;"
> (2) the noncitizen's release "presents a significant threat to the national security or a significant risk of terrorism"; and
> (3) "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be."

8 C.F.R. § 241.14(d)(1)(i)–(iii).

According to the regulation, once an individual is notified of DHS's intention to continue to detain him, the government may deny him the opportunity to know the "factual basis for [his or her] continued detention" or to see the "evidence against him or her" if the government determines it wishes to withhold this information for "the protection of national security and

classified information." 8 C.F.R. § 241.14(d)(2). The regulation also provides for an interview with a DHS official, "if possible." § 241.14(d)(3). This information is considered in the first instance by ICE, which makes a recommendation to the Secretary of Homeland Security. § 241.14(d)(5).[1] The regulation provides no opportunity for the individual to question witnesses against him or to have a hearing before an impartial decisionmaker. Instead, the regulation leaves it within the Secretary's sole discretion to make the ultimate determination regarding an individual's potential lifelong imprisonment, and to choose whether to order additional procedures. § 241.14(d)(6). Once the Secretary makes her determination, the Deputy Secretary can re-certify the individual for continued detention every six months, but the agency's decision is not subject to further administrative review. *Id*.

ARGUMENT

I. THE GOVERNMENT'S CONTINUED DETENTION OF MR. HASSOUN IS *ULTRA VIRES*.

The government's indefinite detention of Mr. Hassoun under 8 C.F.R. § 241.14(d) exceeds its authority under § 1231(a)(6) because the regulation authorizes precisely what the Supreme Court has twice held this statutory provision does not: indefinite detention beyond the point where removal is reasonably foreseeable. *See Zadvydas*, 533 U.S. at 689, 699–700, 701; *Clark v. Martinez*, 543 U.S. 371, 378, 383 (2005). But even if the Court finds that the regulation is somehow not foreclosed by these authoritative Supreme Court interpretations, it should still

[1] The regulation refers to the Attorney General as the decisionmaker. 8 C.F.R. § 241.14(d)(5), (6). However, the Homeland Security Act of 2002 abolished the Immigration and Naturalization Service, which was under the control of the Attorney General, and transferred its "detention and removal program" to DHS. Homeland Security Act of 2002, Pub. L. 107–296, § 441, 116 Stat. 2135, 2192 (Nov. 25, 2002 (codified as amended at 6 U.S.C. § 251). Following this change, powers previously assigned to the Attorney General appear to have been reassigned to the Secretary of Homeland Security. 6 U.S.C. §§ 251, 557. The government has likewise indicated that it intends for the Secretary of Homeland Security to make the detention determination, upon the recommendation of the Director of ICE and the FBI. *See* Am. Ver. Pet., Ex. D.

construe the statute not to authorize Mr. Hassoun's indefinite detention under § 241.14(d) because, just as in *Zadvydas*, that interpretation raises serious constitutional problems.

A. The Supreme Court has authoritatively construed § 1231(a)(6) not to allow continued detention of any category of detainee when removal is no longer reasonably foreseeable.

The former INS (now superseded by DHS) promulgated 8 C.F.R. § 241.14(d)(3) in response to the Supreme Court's decision in *Zadvydas*. In *Zadvydas*, the Supreme Court addressed the application of 8 U.S.C. § 1231(a)(6) to the second category of noncitizens subject to the statute: those removable due to a violation of nonimmigrant status or a condition of entry, removable due to the commission of certain criminal offenses, or removable on a security ground. In that case, the petitioners were former lawful permanent residents with qualifying criminal convictions who were subject to final orders of removal that could not be effectuated. The government had indefinitely continued their detention by invoking regulations that conditioned release on a noncitizen's showing that he would not pose a danger or risk of flight. *See Zadvydas*, 533 U.S. at 683–84. One petitioner in *Zadvydas* had an extensive criminal record and a history of flight, *id.* at 684; the other had a manslaughter conviction for a gang-related killing, and the government continued his detention because it was "unable to conclude that [he] would remain nonviolent and not violate the conditions of release," *id.* at 685–86.

The government argued that 8 U.S.C. § 1231(a)(6) set no limit on the length of detention it could impose. *See id.* at 689. The Supreme Court rejected this argument and held that the statute "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* The *Zadvydas* Court also explained that "[w]hether a set of particular circumstances amounts to

detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority." *Id*. at 699.

In construing § 1231(a)(6), rather than affording the agency's interpretation deference under *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984), the *Zadvydas* Court applied the canon of constitutional avoidance, which dictates that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (citations omitted). The canon is a means of effectuating congressional intent, as it is presumed that Congress did not intend to create an alternative interpretation that would raise serious constitutional concerns. *See Clark*, 543 U.S. at 381. The Court concluded that a statute authorizing indefinite detention of a previously admitted noncitizen would indeed raise "a serious constitutional threat." *Zadvydas*, 533 U.S. at 699; *see id.* at 696.

Recognizing that the Court could not construe the statute to avoid this threat if Congress had clearly expressed an intent to authorize indefinite detention, the Court examined the text and legislative history of the statute and found "nothing" that "clearly demonstrate[d] a congressional intent to authorize indefinite, perhaps permanent, detention." *Id.* at 699. Even with respect to the notion that the statute might indicate congressional intent to impose detention for the purpose of guarding against potential danger, the Court could not find "any clear indication of congressional intent to grant the [government] the power to hold indefinitely in confinement an alien ordered removed. *And that is so whether protecting the community from dangerous aliens is a primary (or as we believe) secondary statutory purpose*." *Id.* at 697 (emphasis added). The Court thus construed the statute to avoid the serious constitutional threat posed by the government's proposed construction and concluded that "once removal is no longer reasonably foreseeable,

continued detention is no longer authorized by statute." *Id.* at 699; *see also Clark*, 543 U.S. at 377 (explaining *Zadvydas*).

Following *Zadvydas*, the Supreme Court in *Clark v. Martinez* foreclosed any possible argument that § 1231(a)(6) might be amenable to a different interpretation or admit of an exception depending on the person involved or the government's asserted basis for indefinite detention. The *Clark* Court addressed the question whether *Zadvydas*'s interpretation of § 1231(a)(6) applies to the statute's first category of aliens, namely inadmissible aliens who have not effected entry into the United States.[2] The government maintained that *Zadvydas* had left open the possibility that § 1231(a)(6) could be interpreted differently for the noncitizens in *Clark* because their indefinite detention would not raise the same constitutional problem that was presented for the once-lawful permanent residents in *Zadvydas*. *Clark*, 543 U.S. at 380–81.

The Court rejected the government's argument. Writing for the Court, Justice Scalia emphasized that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject." *Id.* at 378. The *Clark* Court concluded that, consequently, the construction of the statute set forth in *Zadvydas* must apply to all those who are subject to the statute. *See id.* at 377–79. "[T]o sanction indefinite detention in the face of *Zadyvdas* would establish within [the Supreme Court's] jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 386.

[2] Like the noncitizens in *Zadvydas*, the noncitizens in *Clark* both had lengthy criminal histories that included serious offenses such as assault with a deadly weapon, attempted oral copulation by force, armed robbery, and aggravated battery. *See Clark*, 543 U.S. at 374. Their criminal convictions are in stark contrast with Mr. Hassoun's non-violent crimes, which the trial judge found involved "no violent acts, had no identifiable victims, and were never directed against the United States or Americans." Sentencing Hearing Tr., Am. Ver. Pet., Ex. A, 6:15–19.

In response to the specific argument that the statutory purpose and constitutional concerns underlying *Zadvydas*'s interpretation of the statute were not present for noncitizens who had not effected an entry into the United States—the first statutory category of noncitizens—*Clark* explained that this difference "cannot justify giving the *same* detention provision a different meaning when such aliens are involved." *Id.* at 380; *see id.* at 382 (finding there is "little to recommend the novel interpretive approach . . . which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case."); *id.* at 384 (rejecting the argument that § 1231(a)(6)) "'authorizes detention until it approaches constitutional limits.'" (quoting government briefs)).

Two circuit courts have held that the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas* and *Clark* forecloses regulations purporting to authorize indefinite detention under the statute, even for the purpose of addressing security risks. The Fifth Circuit in *Tran v. Mukasey* and the Ninth Circuit in *Tuan Thai v. Ashcroft* invalidated an analogous regulation authorizing continued detention beyond the removal period of noncitizens deemed "specially dangerous," 8 C.F.R. § 241.14(f), because it conflicted with the Supreme Court's interpretation of § 1231(a)(6) as authorizing detention only for such time as removal remains reasonably foreseeable. *See Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) ("The Supreme Court has twice held that § 1231(a)(6) does not authorize indefinite detention for any class of aliens covered by the statute. We are bound by the statutory construction put forward in *Zadvydas* and *Clark*."); *Tuan Thai v. Ashcroft*, 366 F.3d 790, 795 (9th Cir. 2004) (because § 1231(a)(6) categorically does not allow detention once removal is not reasonably foreseeable, 8 C.F.R. § 241.14(f) cannot authorize

detention beyond that point, as "it is the statute's meaning that must control"), *reh'g and reh'g en banc denied*, 389 F.3d 967 (9th Cir. 2004).

A single appellate court, the Tenth Circuit, has taken the contrary view, holding that the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas* and *Clark* did not prevent the agency from enacting the same regulation at issue in *Tran*, and *Tuan Thai*. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244–45 (10th Cir. 2008) (relying on *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The Tenth Circuit's decision, however, is based on the mistaken assumption that the Supreme Court in *Zadvydas* and *Clark* left it open to the agency to reinterpret the statute to permit indefinite detention. It did not. The Court construed the statute not to allow indefinite detention in order to avoid a serious constitutional problem and because the Court found no congressional intent to authorize indefinite detention in either the statute's text or legislative history. *Zadvydas*, 533 U.S. at 699. In these circumstances, "there is 'no gap for the agency to fill' and thus 'no room for agency discretion'" to reinterpret the statute in the face of the Supreme Court's contrary authoritative construction. *United States v. Home Concrete & Supply*, 566 U.S. 478, 487 (2012) (plurality op.).[3]

Put simply, the Supreme Court left it up to *Congress*, not the agency, to enact new legislation if it wished to venture beyond established constitutional limits on the government's detention authority as to a particular category of individuals. "The Court [in *Clark*] was

[3] The Tenth Circuit's opinion in *Hernandez-Carrera* thus relied on an overbroad and mistaken reading of the Supreme Court's decision in *Brand X*, 545 U.S. 967. As the Court subsequently clarified in *Home Concrete*, an agency may not adopt a subsequent interpretation of a statute that conflicts with a prior judicial interpretation simply because a court described the statute as potentially "ambiguous" or "not unambiguous." 566 U.S. at 486–89 (clarifying limits on agency's authority to second-guess a judicial interpretation in decisions—like *Zadvydas* and *Clark*—that do not engage in a *Chevron* analysis or that precede *Brand X* itself); *see id.* at 493 (Scalia, J., concurring).

unequivocal that based on the statutory text, § 1231(a)(6) must be interpreted consistently, without exception" and it "directly rejected" the possibility that the government could apply the statute "disparately." *Tran*, 515 F.3d at 483–84. To conclude otherwise "would be to invent a statute rather than interpret one." *Clark*, 453 U.S. at 377–78.[4] The Court should therefore invalidate the regulation as *ultra vires*.

B. In order to avoid serious constitutional problems, this Court should construe § 1231(a)(6) not to allow for continued detention when removal is no longer reasonably foreseeable.

Even if this Court determines that § 1231(a)(6) somehow remains open to agency reinterpretation notwithstanding *Zadvydas* and *Clark*, it should still construe the statute to allow detention only insofar as removal is reasonably foreseeable because indefinite detention under the regulation, 8 C.F.R. § 241.14(d), would raise serious constitutional problems. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575–77 (1988) (avoiding agency interpretation that would raise a serious constitutional question even where that interpretation "would normally be entitled to deference" under *Chevron*). As *Zadvydas* underscores, freedom from detention "lies at the heart of the liberty that [the Due Process] Clause protects," and "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." 533 U.S. at 690. The Supreme Court has therefore "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Id.* at 691. Additionally, when "preventive detention is of potentially *indefinite* duration, [the Court has] also demanded that the

[4] The government may argue that the regulation is permissible based on dicta in *Zadvydas.* 533 U.S. at 696 (the Court did not "consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."). The Supreme Court, however, was addressing what *Congress might authorize in a new statute*, not what the Executive branch could interpret § 1231(a)(6) to authorize.

dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps create the danger." *Id.* (emphasis in original).

Section 241.14(d) raises the gravest of constitutional concerns: not only is the detention indefinite, but there is no additional special circumstance accompanying the dangerousness rationale. *See infra* Part II. Further, and critically, § 241.14(d) lacks all of the rigorous protections that the Supreme Court has demanded for indefinite detention in the exceedingly narrow circumstances in which the Court has allowed it, including requiring that the government establish its burden by at least clear and convincing evidence, that the detainee be given a meaningful opportunity to confront and challenge the government's evidence, and that the detainee receive a hearing before a neutral decisionmaker. *See infra* Part III.[5]

This Court should accordingly interpret § 1231(a)(6) not to allow for indefinite detention to avoid confronting these grave constitutional problems, just as *Zadvydas* avoided grave constitutional problems by interpreting the same statute not to permit indefinite detention.

II. MR. HASSOUN'S DETENTION UNDER THE REGULATION VIOLATES THE FUNDAMENTAL GUARANTEES OF SUBSTANTIVE DUE PROCESS BY PURPORTING TO AUTHORIZE INDEFINITE DETENTION BASED SOLELY UPON FUTURE "DANGEROUSNESS."

Mr. Hassoun's detention violates substantive due process—and, at the very least, the substantial constitutional question it raises under the Fifth Amendment requires this Court to read 8 U.S.C. § 1231(a)(6) not to permit his detention. *See supra* Part I.B.

[5] The Tenth Circuit found that indefinite detention under § 241.14(f) did not raise a serious constitutional problem. *Hernandez-Carrera*, 547 F.3d at 1249. But even if correct, that provision—unlike § 241.14(d)— contains at least some similar safeguards to forms of preventive detention of mentally ill, dangerous individuals that the Supreme Court has upheld, including by providing a hearing before an immigration judge where the detainee has the "opportunity to examine evidence against him, present evidence in his behalf, and cross-examine witnesses," *id.* at 1253–54, and by requiring the agency to prove "special danger" by "clear and convincing evidence," *id.* at 1255. Section 241.14(d) entirely lacks any such safeguards.

At the core of substantive due process is the constitutional prohibition on arbitrary government action, and as the Supreme Court has repeatedly explained, noncriminal confinement is among the applications of government power that most hazard violating that proscription. *See, e.g.*, *Zadvydas*, 533 U.S. at 692; *Clark*, 543 U.S. at 384; *United States v. Salerno*, 481 U.S. 739, 747 (1987). Because of the grave risk that the government could seek to detain an individual outside of the criminal process as a substitute for criminal punishment that it could not lawfully obtain, substantive due process requires courts to determine whether noncriminal confinement "amount[s] to punishment of the detainee," *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Under our Constitution, "[i]t is 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." *Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)). Even absent an express intent to punish, detention may violate substantive due process if it is not tied to a rational, non-punitive purpose, or if it appears to be "excessive in relation to [such a] purpose." *Salerno*, 481 U.S. at 747.

It is no surprise, then, that the only "types of permissible *non* criminal detention" the Supreme Court has upheld "f[all] into a limited number of well-recognized exceptions—civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious." *Hamdi*, 542 U.S. at 557 (Scalia, J., dissenting). As the Court has made clear, these are among the exceedingly few kinds of "special and 'narrow' nonpunitive 'circumstances' . . . where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), and *Hendricks*, 521 U.S. at 356).

A. The Supreme Court's "dangerousness-plus" bar for indefinite civil detention is not met here.

The regulation violates substantive due process because it authorizes indefinite noncriminal detention on the basis of perceived dangerousness alone. The Supreme Court made clear in *Zadvydas* that when "preventive detention is of potentially *indefinite* duration," the Constitution "demand[s] that [a] dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." 533 U.S. at 691 (emphasis in original). While the Court has upheld indefinite detention where such special circumstances were present alongside dangerousness, *see Hendricks*, 521 U.S. at 356 (mental abnormality); *Addington v. Texas*, 441 U.S. 418, 420 (mental illness) (1979), it has rejected forms of indefinite detention that lacked them, *see Foucha*, 504 U.S. at 83; *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (holding that proof of a repeat sex offender's dangerousness is not a sufficient ground for indefinite civil commitment).

Critically, the Court has narrowly circumscribed the category of "special circumstances" that could ever justify indefinite civil detention. To justify such detention, it has repeatedly and uniformly required the government to show "proof of some additional factor . . . . that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Hendricks*, 521 U.S. at 358. In other words, the "dangerousness-plus" bar for indefinite civil detention has only *ever* been met where detained individuals "suffer from a volitional impairment rendering them dangerous beyond their control." *Id.*; *accord Zadvydas*, 533 U.S. at 691 ("In cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger."); *Crane*, 534 U.S. at 413 ("[T]here must be proof of

serious difficulty in controlling behavior").[6] This is an essential and well-reasoned limitation: it prevents the government from relying on civil detention as the principal means of controlling potential recidivists or other persons whose past behavior the government believes warrants an inference of future dangerousness, *see Crane*, 534 U.S. at 413; *Foucha*, 504 U.S. at 82–83, and it ensures that there be a completed criminal offense for which an individual may constitutionally be punished, *see Robinson v. California*, 370 U.S. 660, 666 (1962).

The government may not invoke "terrorism" as a qualifying "special circumstance" under this line of cases without exceeding the constraints the Supreme Court has imposed in this context. National security or terrorism concerns are not the kind of innate, volitional factors that could "help[] to create the danger" that might justify indefinite detention. *Zadvydas*, 533 U.S. at 691.

Rather, those concerns *are* the danger—and that is precisely what the Court has repeatedly held to violate substantive due process. As Justice Kennedy pointed out in his *Zadvydas* dissent, the notion that terrorism might qualify as a "special circumstance" under the Court's substantive due process jurisprudence concerning indefinite civil detention is incompatible with the long-standing (and frequently applied) principle, endorsed by the *Zadvydas* majority, that "an assessment of risk" alone is insufficient to justify indefinite detention. *Id.* at 714–15 (Kennedy, J., dissenting).[7] Any other conclusion would risk invitation to the executive branch to stretch to tag certain types of "dangerous" noncitizens as presenting

[6] To the extent that quarantine may result in indefinite confinement, it can be justified by the same rationale—the detainee's inability to control the spread of the dangerous contagion. *See Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting) ("well-recognized exception" for "temporary detention in quarantine of the infectious").

[7] Justice Kennedy was replying to the *Zadvydas* majority's explicit (and appropriate) decision to decline to address "terrorism" in its holding. *See* 533 U.S. at 696.

"terrorism concerns," 8 C.F.R. § 241.14(d), in order to justify their indefinite (and otherwise unconstitutional) detention. And this is no paranoid fantasy: indeed, it is a tactic that the Ninth Circuit forcefully rejected in *Tuan Thai*. *See* 366 F.3d at 796 (dismissing government's invocation of "national security" to justify indefinite detention of "an ordinary violent criminal" based on future dangerousness).

B. The regulation lacks the durational limitations required for civil detention based on dangerousness.

Even where the Supreme Court has found that dangerousness justifies civil detention, it has done so only in pretrial detention, where there are meaningful durational limitations. *See, e.g.*, *Schall v. Martin*, 467 U.S. 253 (1984) (upholding pretrial detention of juvenile delinquents only because the "maximum possible detention" was 17 days); *Salerno* 481 U.S. at 741 (upholding a law providing for adult pretrial detention of arrestees only upon proof that no release condition would reasonably assure the safety of others or of the community, and because "the maximum length of pretrial detention is limited by the stringent time limitations [generally 90 days] of the Speedy Trial Act"). By contrast, the Court has invalidated indefinite-detention schemes (or fashioned durational limits itself) by specifically pointing to those very cases. *See Foucha*, 504 U.S. at 82 (invalidating scheme) (citing *Salerno*, 481 U.S. at 747; *Schall*, 467 U.S. at 269); *Zadvydas*, 593 U.S. at 682, 690–91 (avoiding "serious constitutional concerns" by construing a federal statute to contain "an implicit 'reasonable time' limitation" to the government's power to detain noncitizens subject to a final order of removal) (citing *Salerno*, 481 U.S. at 746–47, 750–52).

Any such limits are lacking in § 241.14(d). The regulation does not place any limit on the duration of detention. That feature of the regulation is not saved by the scheme's requirement of periodic, semi-annual "review" of a determination that an individual qualifies for detention under

its authority. Such review is plainly not a durational limit in and of itself. *See Zadvydas*, 533 U.S. at 684–84, 691 (finding that "civil confinement here at issue is not limited, but potentially permanent" even though it provided annual review by the agency). Nor does the regulation require that detention continued pursuant to such review be based on justifications post-dating the initial detention determination. As a result, an individual like Mr. Hassoun could potentially remain in government custody *forever*, based on the same "evidence" that now resides in the Administrative Record, simply because the government is unable (or unwilling) to find a suitable location into which it can effectuate his removal.[8]

C. The regulation allows the government to unconstitutionally substitute indefinite civil detention for criminal prosecution.

Third, this case exposes the dangers to constitutional liberties that would ensue if the carefully delineated "special circumstance" rule regarding indefinite detention were cast aside. Without that rule, the executive branch would acquire a potent tool to punish past criminal conduct by resorting to noncriminal means. And further, it could—as Justice Scalia warned in *Hamdi*—"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." *Hamdi*, 542 U.S. at 557 (Scalia, J., dissenting) (citing *Hendricks*, 521 U.S. at 358).

Both risks are highlighted by Mr. Hassoun's ongoing detention under § 241.14(d). The ostensible justification for his detention—the Administrative Record—is made up almost entirely of allegations for which Mr. Hassoun has already been charged, tried, and served a 188-month

[8] The regulation does not even require the government to continue looking for a country to which it can remove Mr. Hassoun. *See* 8 C.F.R. § 241.14(a), (d). It purports to permit indefinite detention whether or not the government makes any further efforts to effectuate removal. *Id.*

criminal sentence.[9] That record consists of Board of Immigration Appeals decisions in Mr. Hassoun's original immigration case (which he does not contest); Mr. Hassoun's criminal indictment and conviction order (for which he has already served his sentence); the Eleventh Circuit's decision on the appeal following the criminal conviction of Mr. Hassoun and his co-defendants; press releases and news reporting about Mr. Hassoun's trial and sentence; and an unsworn FBI letter in which the government bases its assessment of risk and threat on Mr. Hassoun's prior criminal conviction, his lack of cooperation with law enforcement, and his purported failure to accept responsibility for his crimes of conviction, in addition to more recent allegations sourced to unidentified jailhouse informants. *See* Am. Ver. Pet. ¶¶ 77–78.

Notably, when the government tried and convicted Mr. Hassoun in criminal court, it sought a life sentence, strenuously arguing that "[o]nly a sentence of that length would adequately capture the danger posed by their misconduct and sufficiently deter others from committing similar crimes." Gov't's Sentencing Mem. & Resp. to Defs.' Objections to the Presentence Investigation Reports at 4, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Nov. 29, 2007), ECF No. 1280. The trial judge rejected the government's request outright because she determined that Mr. Hassoun did not pose any such danger. *See supra*, at 4–6. That the government now seeks to prolong Mr. Hassoun's detention indefinitely, only after Judge Geraci ordered that he must be released because there is "no significant likelihood of [Mr.

[9] This overlap raises constitutional concerns beyond substantive due process, including Mr. Hassoun's right against double jeopardy. *See* U.S. Const. Art. V cl. 2 ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."); *see also United States v. Ward*, 448 U.S. 242 (1980) (explaining that purportedly "civil" penalties may be considered criminal and subject to the Fifth Amendment's Double Jeopardy Clause when certain factors—including "whether the behavior to which the penalty applies is already a crime"—are met (alterations and quotation marks omitted) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

Hassoun's] removal in the reasonably foreseeable future," *Hassoun*, 2019 WL 78984, at *4, suggests that the government's attempt to indefinitely detain him under § 241.14(d) is an end-around the punitive sentence the government did not obtain after trial. *See Crane*, 534 U.S. at 413; *Foucha*, 504 U.S. at 82–83.

Moreover, the elements of the Administrative Record that stand apart from Mr. Hassoun's past criminal conduct—which, as noted above, are either entirely unattributed to any source or are attributed solely to anonymous jailhouse informants without a single piece of corroborating evidence or testimony—are rife with suggestions that the government's designation of him under the regulation falls on the punitive side of the "punitive/regulatory . . . dichotomy," *Salerno*, 481 U.S. at 747. For example, the FBI letter explicitly states that one of the bases for the government's "assessment" that Mr. Hassoun should continue to be detained is his purported failure to cooperate with law enforcement—apparently referring to his unwillingness to serve as a cooperating witness or informant more than a decade ago, prior to his trial and conviction. *See* Am. Ver. Pet. ¶ 77. But it is difficult to understand why that assertion has anything to say about Mr. Hassoun's alleged present dangerousness, or is relevant to any rational non-punitive, noncriminal government purpose. *Salerno*, 481 U.S. 747 (detention may violate substantive due process when "excessive in relation to [such] purpose"). In addition, the more recent, anonymous allegations attributed to jailhouse informants describe precisely the kinds of activities that the government would ordinarily use to justify criminal prosecution,[10] yet the government instead seeks to use those anonymous, uncorroborated (and false) allegations to

[10] *See, e.g.*, Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* 31–60 (2008) (detailing expansive ability of federal prosecutors to engage in preventive prosecution of an array of suspected terrorist activity), https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf.

justify Mr. Hassoun's imprisonment without subjecting them to the scrutiny of the criminal process. *Id.* ¶¶ 78–82.

The allegations, in short, are a transparent attempt to do precisely what Justice Scalia warned about in *Hamdi*: to incapacitate an individual on executive say-so for essentially criminal conduct that, for whatever reason, the government decides not to punish criminally (with all the attendant substantive and procedural protections). *See* 542 U.S. at 554–57 (Scalia, J., dissenting).

Indeed, the government cannot show that whatever legitimate interests it has in Mr. Hassoun's detention cannot be served by the criminal process. *See Foucha*, 504 U.S. at 82. The civil detentions that the Supreme Court has allowed involve two types of situations: first, conditions or status that could not constitutionally be criminalized—for example, mental illness or infectious disease, *see Hendricks*, 521 U.S. at 356; or, second, an ongoing criminal process, *see Salerno*, 481 U.S. at 741. Both differ fundamentally from Mr. Hassoun's indefinite detention under the regulation here, where the government's asserted basis for detention has already served as the basis for criminal prosecution or, if Mr. Hassoun's supposed actions while in detention merited it, would warrant his prosecution now.[11]

For these reasons, Mr. Hassoun's detention violates substantive due process, and the substantial constitutional question it raises require, at a minimum, that this Court read 8 U.S.C. § 1231(a)(6) not to authorize his continued detention to avoid addressing that question.

III. THE REGULATION VIOLATES PROCEDURAL DUE PROCESS.

The test for procedural due process requires a reviewing court to balance the (1) importance of the interest at stake; (2) risk of an erroneous deprivation of the interest because of

[11] Additionally, the government has failed to demonstrate that no set of conditions could sufficiently mitigate any potential risk Mr. Hassoun's release would pose, thus rendering his continued detention excessive for that reason as well. *See Salerno*, 481 U.S. at 747; *infra* Part VI.

the procedures used, and the probable value of additional procedural safeguards; and (3) government's interest, such as fiscal or administrative burdens, in dispensing with particular procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The liberty interests at stake in this case are so fundamental and the risk of erroneous deprivation so great that the Constitution requires rigorous procedural protections. Any burdens on the government that these procedures may impose are minimal, episodic, and outweighed by the constitutional obligation to provide fair adversarial process when imposing what could amount to an administrative life sentence on an individual.

The government claims the power to consign Mr. Hassoun to detention for the rest of his life without any decision by a neutral decision-maker, without meeting any standard of proof, without providing access to the evidence against him, and without affording him an opportunity to challenge the actual evidence or witnesses against him—or even to know who those witnesses are. Instead, the government asserts that a politically appointed cabinet official—the same one who is currently responsible for jailing Mr. Hassoun and investigating him—has the unilateral power to consign him to imprisonment, potentially forever, following an effectively predetermined bureaucratic process that systematically rejects all of the guarantees that our Constitution demands to prevent governmental abuse and error. Because Mr. Hassoun's continued detention under the regulation is unlawful, he should be released from custody.

A. Due Process demands the most stringent protections because the regulation imposes an indefinite, potentially endless deprivation of liberty.

The interest at stake in this case could hardly be more significant: the government seeks to deprive an individual of his freedom from detention with potentially no end. This interest "lies at the heart of liberty" that the Fifth Amendment's Due Process Clause protects. *Zadvydas*, 533 U.S. at 690. That the detention authorized by § 241.14(d) is indefinite means that it constitutes a

greater deprivation of liberty—and so demands greater procedural protections—than time-limited forms of detention like pre-trial criminal detention, *see Salerno*, 481 U.S. 739, or detention pending the outcome of ongoing immigration proceedings, *see, e.g.*, *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). In this respect, it is most akin to the indefinite detention of mentally ill and dangerous people, which has consistently required the most robust safeguards short of a criminal trial, *Hendricks*, 521 U.S. 346; *Addington*, 441 U.S. 418; *Foucha*, 504 U.S. 71. *See infra* Part III.B.[12]

B. The regulation is unconstitutional on its face and as applied because it lacks the procedural protections demanded by the Constitution and the risk of erroneous deprivation of liberty is high.

As courts have repeatedly held, the irreducible requirements of fair process when liberty is at stake—even when the loss of liberty is finite—include: (1) the presence of a neutral decision maker; (2) the presence of a clear burden and adequate standard of proof; and (3) the ability to meaningfully examine and refute the government's evidence and witnesses, and to present evidence. *See e.g.*, *Foucha*, 504 U.S. at 79; *Salerno*, 481 U.S. at 751. The regulation here fails on all three counts. Indeed, a regulation could hardly be designed to give the government greater latitude to detain a person, potentially for life, based on decisions that are arbitrary, erroneous, and unrestrained by any semblance of a fair, truth-seeking processes.

[12] The fact that this case initially arose in the immigration context does not reduce procedural due process protections. The regulation applies to noncitizens who enjoy the full protection of the Constitution's Due Process Clause because of their long and deep ties to the United States. *See Zadvydas*, 533 U.S. at 693–94; *Abdi v. Duke*, 280 F. Supp. 3d 373, 411 (W.D.N.Y. 2017) (observing that a law that applies to lawful permanent residents must be interpreted to comply with full constitutional guarantees). In Mr. Hassoun's case, prior to his detention in 2002, he spent 13 years lawfully living, working, and raising a family in the United States. *See supra*, at 2–3.

1. The decision to detain is not made or reviewed by a neutral decision-maker.

"[D]ue process requires a neutral and detached judge in the first instance." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993). Time and again, where the government seeks to imprison a person—whether in civil or criminal detention—the Supreme Court has required that the decision be made by an independent judge. *See, e.g.*, *Foucha*, 504 U.S. at 81–83 (holding that State cannot continue to civilly detain an individual absent a determination of dangerousness made in a judicial civil commitment proceeding); *Addington*, 441 U.S. at 421 (involuntary commitment of mentally ill followed proceeding before judge and jury); *Salerno*, 481 U.S. at 750–51 (upholding pretrial detention scheme with a custody hearing before a judge); *see also, e.g.*, *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013) (requiring "neutral decisionmaker" and "adversarial hearing" prior to civil commitment); *cf. Hamdi*, 542 U.S. at 533 (even in context of military detention of enemy combatant during wartime, due process requires "fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker").

However, the decision to consign Mr. Hassoun to detention under the regulation rests solely in the hands of the politically appointed Secretary of Homeland Security or, on subsequent review, his or her deputy. 8 C.F.R. § 241.14(d)(6)–(7).[13] The Secretary of Homeland Security is not a judge and is neither neutral nor independent. The Secretary is the head of the agency that is responsible for writing the regulation in question, for detaining Mr. Hassoun, for investigating

[13] The regulation specifically forbids even immigration judges from reviewing decisions to detain. 8 C.F.R. § 241.14(d)(a)(2) ("[I]mmigration judges and the Board do not have jurisdiction with respect to aliens described in paragraphs (b),(c), or (d) of this section.").

him, for preparing the evidence against him, and for making both the initial and final determination to detain indefinitely. *See id*. §§ 241.14(d)(2)–(6).

The Secretary or his subordinates thus function, in effect, as legislator, judge, jury, prosecutor, investigator, and jailer—all at the same time. Our Constitution does not allow the government to arrogate all of this power in executive branch officials without any obligation to make its case before a judge. *See Foucha*, 504 U.S. at 86. For this reason alone, the regulation should be invalidated and Mr. Hassoun ordered released.

2. The regulation imposes no burden or standard of proof on the government.

The regulation places no burden of proof on the government, providing only that the Secretary "may certify that an alien should continue to be detained on account of security or terrorism grounds as provided in [the regulation]." 8 C.F.R. § 241.14(d)(6). The failure to impose the burden of proof on the government and to ensure that the burden is adequate violates the Fifth Amendment.

First, the government must bear the burden of proof in civil detention. *See, e.g.*, *Foucha*, 504 U.S. at 72 ("[T]he State may confine a person if it shows by clear and convincing evidence that he is mentally ill and dangerous."); *Hendricks*, 521 U.S. at 353 (burden on the state in sexual predator civil detention scheme); *Salerno*, 481 U.S. at 750 (government has burden in the pre-trial detention context). This is true, too, in the context of immigration detention, as district courts in the Western and Southern Districts of New York have recognized repeatedly. *See, e.g.*, *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018) (collecting cases); *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794, at *15 (S.D.N.Y. Dec. 27, 2018) (citing cases). Because Mr. Hassoun's detention under the regulation is indefinite, it is particularly essential that the government bear the burden of proof.

Second, the absence of a standard of proof in the regulation directly violates the Supreme Court's command that prolonged detention must be justified, at minimum, by a showing of clear and convincing evidence—the most stringent standard of proof short of the reasonable-doubt standard in criminal cases. "[T]he Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma." *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quotation marks omitted). In *Foucha*, for example, the court held that indefinite civil commitment of a mentally ill and dangerous person was unconstitutional unless the government "establish[es] the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence." 504 U.S. at 86. Similarly, in *Addington*, the Court held that the state must meet a standard of proof "equal to or greater than the 'clear and convincing' standard" in order to consign a person to indefinite civil commitment. 441 U.S. at 433; *see also Hendricks*, 521 U.S. at 352–53 (state must establish "beyond a reasonable doubt" that individual is a sexually violent predator to commit him civilly).

Even in the context of pre-trial criminal detention, where the length of detention is limited both by the pendency of criminal proceedings and speedy trial guarantees, the government must "prove[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" and that "no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750–51. Similarly, in immigration cases where the government seeks to hold noncitizens for extended periods while their petitions for review are pending in federal court, due process requires that the government meet a clear and convincing evidence standard to prove that prolonged detention is necessary, as district courts in this Circuit have consistently recognized.

See, e.g., *Hechavarria*, 2018 WL 577642, at *8; (collecting cases); *Bermudez Paiz*, 2018 WL 6928794, at *15; *Singh v. Whitaker*, 362 F. Supp. 3d 93, 105 & n.11 (W.D.N.Y. 2019). The need for a stringent standard of proof is even stronger in this case, where the length of detention is not linked to the pendency of judicial proceedings but is designed to last for as long as the government deems appropriate, potentially forever. *Zadvydas*, 533 U.S. at 692.

3. The regulation denies Mr. Hassoun a meaningful opportunity to review and challenge the evidence against him.

"The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quotations and citations omitted). The process here is invalid because it lacks any meaningful adversarial testing of the government's evidence, including the opportunity to confront and cross-examine any government witnesses and to compel the production of witnesses. The right to confront evidence and examine witnesses is particularly essential in the context of prolonged detention, and courts have upheld such schemes only when they allow robust adversarial proceedings. *See, e.g.*, *Addington*, 441 U.S. at 421 (detainee had right to confront witnesses before judge and jury); *Kansas*, 521 U.S. at 353 (detention scheme offered "the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State"); *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980) (requiring, before inmate could be transferred to mental hospital, "an opportunity . . . to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding . . . of good cause").

The regulation states that the detainee "shall have a reasonable opportunity to examine evidence against him or her" but only "to the greatest extent consistent with protection of the national security and classified information." 8 C.F.R. § 241.14(d)(2)(ii). It does not permit Mr.

Hassoun to examine any witnesses against him or to compel the production of witnesses in his favor. Nor does it require the government to provide Mr. Hassoun with an opportunity to review and challenge the actual evidence underlying its allegations. For example, as noted above, the Administrative Record includes a letter from the FBI Director that relies heavily on damaging (and false) allegations apparently made by three fellow detainees against Mr. Hassoun. Am. Ver. Pet. ¶¶ 78–80. The underlying witness statements, however, are not in the record. *Id.* ¶ 81. Indeed, the FBI letter pointedly omits the names of any of the jailhouse informants upon whom it is relying. *Id.* ¶¶ 78, 80–81. Instead, the letter cherry-picks from the underlying statements and offers its "assessment" of their import without providing access to the actual statements. This unsworn letter amounts to third-hand descriptions of secret "evidence," written for the express purpose of persuading the Secretary of Homeland Security to order Mr. Hassoun to be kept in detention. *See id.* ¶¶ 77, 80.

Mr. Hassoun forcefully denies these allegations. But the government has deprived Mr. Hassoun of any meaningful way to challenge their veracity through cross-examination or otherwise, and thus denied him any semblance of a fair process.[14]

[14] The regulation provides that if the alien was "ordered removed on grounds other than national security or terrorism," then "an immigration officer shall, *if possible*, conduct an interview in person and take a sworn question-and-answer statement from the alien." 8 C.F.R. §241.14(d)(3)(i) (emphasis added). This "interview" however, is not conducted before the actual decision-maker, nor is the detainee permitted to call or present his or her own witnesses—let alone cross-examine the government's witnesses. The "interview" amounts to an interrogation, apparently conducted by an ICE deportation officer to gather facts the officer can present to the Secretary. This is not a procedural protection for the detainee but rather an investigatory tool for the government. For these reasons, and because the regulation as a whole is *ultra vires* and unconstitutional, Mr. Hassoun has, through counsel, declined to participate in an "interview" pursuant to the regulation.

C. No government interest justifies dispensing with these time-honored procedural protections in Mr. Hassoun's case.

The government does not have any interest that could justify the lack of fair procedures. *See Mathews*, 424 U.S at 335. For detainees like Mr. Hassoun facing possible lifetime detention under this regulation, the liberty interests are so high and the risk of erroneous deprivation so great that they outweigh any government burden that would result in providing meaningful procedural protections.

The government's invocation of "national security" does not render procedural safeguards unduly burdensome or otherwise impracticable. To Petitioner's knowledge, this case is only the second time that the government has invoked § 241.14(d) since it was promulgated in 2001.[15] Providing adequate procedural protections to a small group of individuals would not be a significant burden on the government, and would in fact serve the salutary function of ensuring that the government deploy this extraordinary detention authority only after determining that it has sufficient evidence to meet the rigors of a fair and meaningful process. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these being freedom from arbitrary and unlawful restraint.").

This Court should declare the regulation unconstitutional and order Mr. Hassoun released.

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[15] Apparently, the first and only other time the government invoked this regulation was in May 2015, when it informed Mohammed Rashed that it planned to continue detaining him under the regulation. *See* Government's Supplemental Brief at 3, *Rashed v. United States*, No. 15-cv-00888 (W.D.N.Y. May 11, 2016), ECF No. 29. On January 15, 2016, the Secretary of Homeland Security certified Mr. Rashed's detention under the regulation for a six-month period. *Id.* Mr. Rashed filed a habeas petition, challenging the constitutional validity of the regulation. Apparently, the country of Mauritania accepted Mr. Rashed for removal before his habeas petition was resolved. *See* Phil Fairbanks, *Terrorist bomber held here finds new home in West Africa*, The Buffalo News, Nov. 26, 2016, https://buffalonews.com/2016/11/26/buffalo-west-africa-new-home-former-terrorist.

IV. THE REGULATION IS UNCONSTITUTIONALLY VAGUE.

The Constitution forbids the government from depriving a person of life, liberty, or property without "[f]air notice of the law's demands," which is "the first essential of due process." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (quotation marks omitted). This restriction on the government's authority applies to severe deprivations of liberty in the immigration context no less than in the criminal one. *Id.* at 1213; *Jordan v. De George*, 341 U.S. 223, 231–32 (1951). Here, the government is now depriving Mr. Hassoun of his liberty based on a regulation that—in its incorporation of standardless risk assessments and undefined terms like "national security" and "terrorism"—is impermissibly vague.

Under the Fifth Amendment, "[a] statute or regulation—whether civil or criminal—must give "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "Clarity in regulation," the Supreme Court has held, "is essential to the protections provided by the Due Process Clause of the Fifth Amendment," which "requires the invalidation of laws that are impermissibly vague." *Id*. Vague measures are invalidated to prevent: (1) penalizing people for behavior that they could not have known was proscribed; (2) subjective, arbitrary, and discriminatory enforcement of laws; and (3) any chilling effect on the exercise of First Amendment freedoms. *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). A law is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Where the Supreme Court has encountered measures that required a similarly inchoate assessment of risk as in this case, it has not hesitated to invalidate them, including in the immigration context. *See Johnson v. United States*, 135 S. Ct. 2551, 2557–60 (2015); *Dimaya*, 138 S. Ct. at 1223. In *Johnson*, the Court invalidated the "residual clause" of the Armed Career

Criminal Act of 1984, which defined "violent felony" to include any felony that "involves conduct that presents a *serious potential risk* of physical injury to another." 135 S. Ct. at 2555–56 (citing 18 U.S.C. § 924(e)(2)(B)) (emphasis added). The Court concluded that the residual clause "leaves grave uncertainty about how to estimate the risk posed by a crime," *id.* at 2557, and that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates," *id.* at 2558. In *Dimaya*, the Court followed *Johnson*, invalidating as unconstitutionally vague a federal immigration statute that had a similar "residual clause" that incorporated the term "crime of violence" to mean a felony "that, by its nature, involves a *substantial risk* that physical force against the person or property of another may be used in the course of committing the offense." 138 S. Ct. at 1211 (quotation marks omitted). The Court concluded that because the statutes at issue in both *Johnson* and *Dimaya* had "an ill-defined risk threshold," they "necessarily devolved into guesswork and intuition, invited arbitrary enforcement, and failed to provide fair notice." *Id.* at 1223 (alterations and quotation marks omitted).

Here, the regulation's criteria entail the same kind of double-indeterminacy that causes such "grave uncertainty." *Johnson*, 135 S. Ct. at 2557. The regulation lacks any standard either for (1) measuring the "threat to national security" or "significant risk of terrorism" that an individual would pose if released, or (2) determining how much of a "threat" or "risk" one must pose to satisfy the criteria. 8 C.F.R. § 241.14(d)(i), (ii). Even worse, it fails to define "national security" or "terrorism"—terms which are notoriously malleable, capacious, and susceptible to government overreach. *See Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) ("label of 'national security' may cover a multitude of sins"); *United States v. United States District Court*, 407 U.S.

297, 313 (1972) ("Though the investigative duty of the executive may be stronger in [national security] cases, so also is there a greater jeopardy to constitutionally protected speech."). This lack of clarity allows for decision makers to decide arbitrarily what is a "national security threat" or "terrorism risk."[16] As the Supreme Court has explained, imprecise criteria are highly prone to inconsistent and discriminatory implementation. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Because the regulation's criteria lack precision, executive determinations under the regulation arise from "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *United States v. Williams*, 553 U.S. 285, 306 (2008), that "invite[] arbitrary, discriminatory and overzealous enforcement," *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 118 (D.C. Cir. 1977) (citing *Gregory v. City of Chi*., 394 U.S. 111, 120 (1969) (Black, J., concurring)).

V. THE REGULATION VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE CONSTITUTION.

Section 241.14(d) violates equal protection because it targets a subclass of removable noncitizens like Mr. Hassoun and unlawfully interferes with their fundamental liberty right to be free from constraint.

The Equal Protection Clause of the Fifth Amendment has long protected noncitizens from federal overreach. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896). ("[A]ll persons within the territory of the United States are entitled to the protection guarantied by [the Fifth

[16] Moreover, the vagueness of the regulation must be scrutinized with the First Amendment in mind. The Supreme Court has made clear that when a law interferes with the right to free speech, a more stringent vagueness test applies. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). Allowing the executive to indefinitely detain someone based merely on controversial comments or "incendiary rhetoric" creates a very real danger to our First Amendment. Am. Ver. Pet. ¶ 82.

Amendment,] even aliens."); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (equal protection applies to noncitizens). The Fourteenth Amendment provides noncitizens similar equal protection guarantees against abuses by state governments. *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (striking down Texas law denying undocumented immigrants free public education); *Dandamudi v. Tisch*, 686 F.3d 66, 69 (2d Cir. 2012) (New York regulatory scheme denying noncitizens pharmaceutical licenses violated equal protection). With exceptions not germane to the fundamental liberty analysis here, the Fifth and Fourteenth Amendments impose "indistinguishable" obligations on the federal and state governments, respectively. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (collecting cases).

The regulation applied to Mr. Hassoun singles out a subclass of removable noncitizens for discriminatory treatment. The regulation targets "removable aliens as to whom the Service has made a determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. § 241.14(a)(1). Unlike citizens—or even removable noncitizens—this removable-but-unlikely-to-be-removed subclass is subject to the indefinite detention provisions in § 241.14. In Mr. Hassoun's case, the purported government interest is "security or terrorism concerns." *Id.* § 241.14(d).

Because the regulation here discriminatorily threatens a subclass with indefinite detention, it encroaches on a fundamental right, and therefore triggers heightened scrutiny. Mr. Hassoun's "[f]reedom from physical restraint [is] a fundamental right." *Foucha*, 504 U.S. at 86; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (describing the obligation of courts to "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect"). As such, equal protection calls for something more than rational basis review here. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966)

("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *see also Zadvydas*, 533 U.S. at 692 ("[T]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." (quotation marks omitted)); *Jackson v. Indiana*, 406 U.S. 715, 729–30 (1972) (state statute violated equal protection by subjecting certain individuals to a more lenient civil commitment standard and a more stringent standard of release).

Under the regulation, people like Mr. Hassoun can be subject to indefinite, potentially lifelong detention, even while citizens (and even other classes of noncitizens) in an identical situation could not be so detained.[17] The regulation's discriminatory treatment of removable noncitizens fails to serve any legitimate governmental interest sufficiently compelling to survive heightened scrutiny. Indeed, the government's interest here is so divorced from the purpose of the regulation's discriminatory classification that it could not even satisfy rational-basis review even if the regulation did not implicate fundamental rights.[18] Nothing in the history of the regulation, for instance, shows that this subclass of removable noncitizens is somehow more of a national security concern, and therefore more deserving of indefinite detention, than others who are similarly-situated. *See, e.g.*, Notice of Memorandum, 66 Fed. Reg. 38433 (July 24, 2001) (ordering the development of new regulations after *Zadvydas*, but failing to explain why a noncitizen would pose a greater security risk). The Supreme Court, in fact, has observed that

[17] Indeed, one of Mr. Hassoun's co-defendants, a U.S. citizen who was convicted of the same crimes and sentenced by the same judge, has now served his time and is at liberty. Am. Ver. Pet. ¶ 14.

[18] At a minimum, equal protection requires that discriminatory government classifications must be rationally related to a legitimate government interest. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

U.S. citizens pose the "same threat" as noncitizens after release in similar situations. *See, e.g.*, *Hamdi*, 542 U.S. at 519.

Moreover, even if the government could identify a compelling interest here, it could not demonstrate that the regulation is sufficiently tailored to serve that interest. Despite addressing purported national security concerns, the regulation is *not* limited to noncitizens who have been convicted of a national security–related crime, for instance, or even ordered removed on national security grounds. 8 C.F.R. § 241.14(d)(3). Instead, it applies to *all* noncitizens ordered removed who will not be removed in the foreseeable future, so long as the government certifies that the noncitizen "will likely engage" in activity that endangers national security and determines that no conditions of release can "reasonably avoid" this threat. *Id*. The provision is so broad it could apply to someone with no criminal history and ordered removed for any reason, "including tourist visa violations." *Zadvydas*, 533 U.S. at 692.

Given this, there is no basis to conclude that the regulation's discriminatory classification is rational—let alone sufficiently compelling to meet heightened scrutiny, as it must in this case.

VI. EVEN IF 8 C.F.R. § 241.14(d) WERE VALID, MR. HASSOUN MAY NOT BE INDEFINITELY DETAINED UNDER ITS AUTHORITY.

Even assuming 8 C.F.R. § 241.14(d) is lawful, Mr. Hassoun cannot be detained under its authority because the government lacks evidence against him to fulfill the three elements required to justify his continued detention under the regulation. The regulation states that the government "shall continue to detain" a noncitizen who meets all of the following three criteria:

> (1) the noncitizen "is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) or (B) of the Act or . . . has engaged or will likely engage in any other activity that endangers the national security";
>
> (2) the noncitizen's release "presents a significant threat to the national security or a significant risk of terrorism"; and

> (3) "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be."

Mr. Hassoun has not engaged in and will not engage in any activity that endangers the United States' national security. Judge Cooke found at sentencing that his crimes were not violent, involved no identifiable victims, and *were never directed against the United States or anyone in this country*. Sentencing Hearing Tr., Ex. A, 6:15–19. The judge issued a sentence well below the guidelines precisely because the facts did "not support the government's argument that Mr. Hassoun is such a danger to the community that he needs to be imprisoned for the rest of his life." *Id.* 8:8–16.

Nor do the new allegations in the FBI Memo establish that Mr. Hassoun has or will engage in activity that endangers national security. All of the government's new allegations—which, again, Mr. Hassoun strongly denies—amount to anonymous and uncorroborated allegations by jailhouse informants that they either overheard or were told about in a handful of conversations that Mr. Hassoun supposedly had with other detainees after he completed his criminal sentence. Am. Ver. Pet. ¶¶ 78–81. Such evidence is insufficient to justify an assessment that Mr. Hassoun poses the kind of "significant risk to the national security or . . . of terrorism" required under the regulation to indefinitely deprive an individual of his liberty.

Most significantly, the government has provided no evidence to suggest that there are no conditions of release that could mitigate any purported risk. Mr. Hassoun is now approaching 60 years of age and suffers from multiple chronic illnesses. Am. Ver. Pet. ¶ 31. Upon Mr. Hassoun's release, he can be subject to stringent conditions of supervision including, but not limited to, monitoring his communications, movements, and financial transactions. *See* 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.13(h). Indeed, as Judge Cooke noted, this is precisely how the government monitored him before arresting him, intercepting most of his communications for

years. Sentencing Hearing Tr., Am. Ver. Pet, Ex. A, 8:8–13. Similar conditions of release would ensure that Mr. Hassoun does not have the opportunity to engage in any activity that endangers national security.

Moreover, Mr. Hassoun will already be subject to stringent requirements of his criminal sentence of supervised release, in addition to any conditions imposed by the immigration authorities. *Id*. 19:19–23. If he were to violate any condition or release or engage in any activity that endangers national security, not only could ICE re-detain him, 8 C.F.R. § 241.13(i), but Mr. Hassoun could be prosecuted and sentenced to imprisonment for violating the terms of his immigration release, 8 U.S.C. § 1253(b), or he could be returned to criminal custody for violating the conditions of his criminal supervised release, 18 U.S.C. § 3585(e); Fed. R. Crim. P. Rule 32.1.

In short, even if this Court were to find the regulation lawful, the government cannot show that Mr. Hassoun is detainable under it. The Court should order his release immediately.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court declare 8 C.F.R. § 241.14(d) unlawful and unconstitutional and order his immediate release under appropriate conditions of supervision.

Respectfully submitted,

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