[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADHAM AMIN HASSOUN,

Appellee-Petitioner,

v.

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

Appellant-Respondent.

No. 20-5191

APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL ACTION REQUESTED BY 12:00 PM JULY 2, 2020

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INTRODUCTION

This Court should stay pending appeal the district court's final judgment ordering the Department of Homeland Security (DHS) to release from custody, by noon on July 2, 2020, petitioner Adham Amin Hassoun, a three-time convicted terrorist who has been ordered removed from the United States, who indisputably has no right to remain in this country, who the Director of the Federal Bureau of Investigation (FBI) has determined is a national-security threat, and whose continued detention has been certified, in accordance with federal law authorizing preventive detention for profoundly dangerous aliens, by the Acting Secretary of Homeland Security as necessary for national security. The Court should also expedite this appeal and enter an administrative stay of the district court's judgment while the Court considers this stay request.

Counsel for the parties met and conferred regarding this motion on June 30, 2020. Counsel for Hassoun agreed to an administrative stay to allow for the following agreed briefing schedule: Hassoun will respond to the motion by 5 p.m. EST, July 10, 2020, and the government will file a reply by 5 p.m. EST, July 15, 2020. Hassoun otherwise opposes a stay.

Federal law authorizes the Secretary to detain an alien whom the Secretary certifies as having engaged in terrorist activity and to continue to detain that alien "if release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). The Acting Secretary has, in

accordance with that provision and in light of the FBI Director's considered assessment of Hassoun's dangerousness, certified that Hassoun's release will threaten national security or the safety of the community. That decision was well grounded. As the FBI Deputy Director determined, Hassoun's "release would threaten the national security of the United States and the safety of the community." June 5, 2020 FBI Memo. (Dkt. 253-2).

Although the Executive Branch is entitled to significant deference in this context, the district court ruled that the Acting Secretary's certification and the FBI Director's assessment did not justify Hassoun's continued detention. The court believed that the government could not rely solely on the determinations of the Acting Secretary, Acting Immigration and Customs Enforcement (ICE) Director, and FBI Director and Deputy Director, but rather that the government needed to carry a clear-and-convincing-evidence burden, at an evidentiary hearing, to justify Hassoun's continued detention. The court then excluded evidence that the government needed to make this burden.

The district court's judgment rests on profound errors of law and risks serious harm to the United States and the public. A stay pending appeal is warranted.

First, the district court erred in holding that the record failed to justify Hassoun's detention and that an evidentiary hearing was necessary. The administrative record—including the Acting Secretary's certification—conclusively justified Hassoun's detention under § 1226a. That statute, which authorizes continued detention if "release of the alien will threaten the national security of the United States or the safety of the

community or any person," 8 U.S.C. § 1226a(a)(6), is satisfied because the FBI has concluded that Hassoun's release "would threaten the national security of the United States and the safety of the community." June 5, 2020 FBI Memo. 4. That is the end of the matter, and the district court was wrong to require an evidentiary hearing.

Second, the district court erred in placing the burden of proof on the government and setting a clear-and-convincing-evidence standard. The traditional rule is that the habeas petitioner must establish that his detention is illegal. Nothing in § 1226a suggests a departure from this rule. Even if the burden were on the government, a burden-shifting framework is more appropriate, which, once the government puts forth credible evidence that the petitioner meets the relevant criteria, shifts the burden "to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

Third, the district court erred in excluding critical evidence. The government sought to present statements considered in the FBI's threat assessment of Hassoun. This evidence was critical because it supported—indeed it was referred to in—the FBI's threat assessment. Yet the court improperly excluded the evidence as impermissible hearsay. In a habeas proceeding, hearsay evidence "is always admissible"; by excluding this evidence, the court erred and so never considered the weight this important evidence was due. *See Al-Bihani v. Obama*, 590 F.3d 866, 879-880 (D.C. Cir. 2010).

Considerations of irreparable harm and the equities strongly favor a stay. The FBI has concluded that Hassoun's release would threaten the national security of the

United States or the safety of the community. *See* June 5, 2020 FBI Memo. Given Hassoun's dangerousness and the need to mitigate the threat he poses, his release will profoundly burden the law enforcement agencies tasked with monitoring Hassoun. The FBI has warned that "it is not possible to fully mitigate the threat poses by [Hassoun's] release." *See* Glasheen Decl. ¶ 8 (Dkt. 242-1).

This Court should grant a stay to maintain the status quo while this Court considers and resolves the important legal questions presented and to avert the profound harms that could result if the district court's judgment takes effect.

STATEMENT

Legal Background. This case involves two sets of authorities for detaining aliens who have been ordered removed from the United States.

The first authority is a statute that permits preventive detention for dangerous aliens who have been ordered removed, 8 U.S.C. § 1226a. Section 1226a authorizes the Secretary of Homeland Security to detain any alien whom the Secretary certifies, under § 1226a(a)(3), as being "described in" various terrorism-related inadmissibility provisions or being "engaged in any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1), (3). (The district court in this case recognized that § 1226a(a)(3)'s factual requirement is satisfied with Hassoun's criminal conviction. Jan. 24, 2020 Order (Dkt. 75).) Section 1226a(a)(6), in turn, provides that "[a]n alien detained solely under [§ 1226a(a)(1)] who has not been removed under section 1231(a)(1)(A) of this title [the general authority authorizing removal after that

alien has been ordered removed], and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6). Thus, to authorize detention under § 1226a(a)(6), the Secretary must determine that the alien's release "will threaten the national security of the United States or the safety of the community or any person." *Id.* The Secretary must review his certification every six months. *Id.* § 1226a(a)(7).

The second authority is a regulation that permits preventive detention for dangerous aliens who have been ordered removed, 8 C.F.R. § 241.14(d). That regulation was issued under the detention authority provided by 8 U.S.C. § 1231(a)(6), which provides that an alien "may be detained beyond the [default 90-day] removal period" if the alien is determined to be a risk to the community. The regulation permits the detention of an alien when: (1) the alien is described in certain terrorism- or national-security-related inadmissibility provisions; (2) the alien's "release presents a significant threat to the national security or a significant risk of terrorism"; and (3) there are "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism." 8 C.F.R. § 241.14(d)(1)(i)-(iii).

Factual and Procedural Background. Hassoun was born in Lebanon to Palestinian parents. Bernacke Decl. (Dkt. 17-1), ¶ 4. He was admitted to the United States in 1989 as a nonimmigrant visitor and later changed his status to a nonimmigrant

student. *Id.* He failed to comply with the requirements of his student visa, and in 2002 was ordered removed. *Id.* ¶¶ 4-5.

Before he could be removed, Hassoun was taken into custody on criminal charges, including Conspiracy to Murder, Kidnap, and Maim Persons in a Foreign County; Conspiracy to Provide Material Support for Terrorism; and Material Support to Terrorists. *Id.* ¶ 7; Judgment, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008) (Dkt. 13-3). The indictment alleged that "it was the purpose and object of the conspiracy to advance violent jihad, including supporting and participating in armed confrontations in specific locations outside the United States, and committing acts of murder, kidnapping, and maiming for the purpose of opposing existing governments." *United States v. Jayyousi*, 657 F.3d 1085, 1105 (11th Cir. 2011) (appeal in Hassoun's criminal case). Hassoun was convicted and found to have engaged in this criminal conduct beginning in 1993 and continuing beyond October 26, 2001. *Id.* at 1091-92. "[T]he record show[ed] that the government presented evidence that [Hassoun and his co-defendants] formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that [they] knew used violence in their efforts to establish Islamic states." *Id.* at 1104. "[I]n finding [Hassoun and his co-defendants] guilty, the jury rejected the ... premise that they were only providing nonviolent aid to Muslim communities." *Id.* at 1115. Hassoun was sentenced to 188 months in prison. Judgment, *Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008).

Following Hassoun's release from prison in October 2017, ICE detained him in Batavia, New York, under § 1231(a)(6). Bernacke Decl. ¶ 8; *Hassoun v. Sessions*, No. 18-cv-0586, 2019 WL 78984, at *1 (W.D.N.Y. Jan. 2, 2019). The district court concluded that there was no significant likelihood of Hassoun's removal in the reasonably foreseeable future (which the Supreme Court has concluded to be a limit on detention under § 1231(a)(6), *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)), and that, therefore, the government had "exceeded its authority to detain [Hassoun]." *Id.* at *8. The court ordered his release. *Id.*

On August 9, 2019, the Secretary invoked the two authorities at issue here to detain Hassoun. Relying in part on recommendations from the FBI Director and ICE Director, the Secretary certified Hassoun for continued immigration detention under the authority of both 8 C.F.R. § 241.14(d) and 8 U.S.C. § 1226a. *See* Dkts. 26-1, 26-2 (certification orders). Hassoun challenged his detention in this habeas petition.

In December 2019, the district court issued an order concluding that (1) Hassoun's continued detention is not lawfully authorized by 8 C.F.R. § 241.14(d) and (2) an evidentiary hearing would be necessary regarding whether his continued detention is lawfully authorized by 8 U.S.C. § 1226a(a)(6). Dec. 13, 2019 Order at 1-2 (Dkt. 55). The district court rejected the government's argument that the administrative record, under a "properly deferential standard of review," demonstrated the lawfulness of Hassoun's detention. *Id.* at 32. The court ruled that "the current record"—which

included the Acting Secretary's certification that Hassoun must be detained—is "insufficient" and ordered an evidentiary hearing on the statute. *Id.* at 27.

In January 2020, the district court issued an order addressing the parameters of the evidentiary hearing. Jan. 24, 2020 Order. The court clarified that the hearing would be limited to whether the factual basis for continued detention under § 1226a(a)(6) is satisfied that is, "whether Hassoun's release would threaten the national security of the United States or the safety of the community or any person." *Id.* at 5. On that issue, the court rejected the government's argument that Hassoun should bear the burden of proving by a preponderance of the evidence that his release would not threaten national security or safety. Rather, the court held that the government bears the burden of proving by clear and convincing evidence that the factual basis for continued detention under § 1226a is satisfied. *Id.* at 5-12. The court also rejected the government's argument that, "[r]egardless of the burden and the standard of proof, the district court should grant broad deference to the factual conclusions drawn by the Acting Secretary." *Id.* at 12 (citation omitted). The court thought such deference inappropriate because the administrative record in Hassoun's case had not been developed after an adversarial proceeding. *Id.* at 13. The court also concluded that such deference is inconsistent with § 1226a(b)(1)'s authorization of judicial review of the "merits." *Id.*

In February 2020, six months after the Acting Secretary's initial certification of Hassoun's detention, the Acting Secretary re-certified Hassoun's continued detention under 8 U.S.C. § 1226a(a)(6). Dkt. 226-1.

On June 18, 2020, the district court issued an order denying the government's request to rely on out-of-court hearsay statements from three witnesses—Ahmed Abdelraouf, Hector Rivas Merino, and Abbas Raza. June 18, 2020 Order at 41 (Dkt. 225). Abdelraouf's statements were within an FBI interview report wherein he stated Hassoun affirmed it was good to kill women and children for religion. *See* Abdelraouf FD-302 (Dkt. 169-3). Rivas Merino's statements were also within an FBI interview report wherein he stated "Hassoun talked about how to make explosives and to plan attacks." *See* Rivas Merino FD-302 (Dkt. 169-8). Raza's statements were reported in emails from an ICE officer where Raza indicated Hassoun had "pledged support for ISIS." June 18, 2020 Order at 31. The court concluded that it would not "be unduly burdensome to present Abdelraouf's testimony by nonhearsay means," *id.* at 28, and that Rivas Merino's and Raza's statements were "insufficiently reliable to be given probative weight," *id.* at 29; *see id.* at 31.

On June 18, the government moved the district court to cancel the evidentiary hearing. Dkt. 226. The government maintained that "under the law, [the government] has met [its] burden of justifying [Hassoun's] continued detention," but explained that, in light of "th[e] Court's prior rulings" on legal and evidentiary matters to which the government maintained its objections, the government could not "meet the burden and standard of proof that th[e] Court has held to apply in this case." *Id.* at 1, 3. The court canceled the evidentiary hearing. Dkt. 238.

On June 29, 2020, the district court granted the habeas petition and ordered Hassoun's release. Dkt. 256. The court imposed several conditions on that release, *id.*, which are in addition to those conditions of supervision ordered in Hassoun's criminal case. *See* Judgment, *Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008). The court denied the government's motion for a stay pending appeal. Dkt. 256.

JURISDICTION[1]

This habeas case arises from the Western District of New York, but a special appellate venue provision applies to certain issues in this case: "Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in [8 U.S.C. § 1226a(b)(1)] before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals." 8 U.S.C. § 1226a(b)(3).

ARGUMENT

This Court should stay the district court's final judgment ordering Hassoun's release. The government is likely to prevail on appeal and considerations of harm and the equities favor a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This appeal also warrants expedited consideration, including expedited consideration of this stay

[1] Appeals from rulings under 8 U.S.C. § 1226a must be taken to this Court. 8 U.S.C. § 1226a(b)(3). The government is pursuing an appeal from the district court's regulatory ruling to the Second Circuit, as well as an emergency stay pending appeal. *See Hassoun v. Searls*, No. 20-2056 (2d Cir. filed June 30, 2020).

request, and this Court should grant an administrative stay while it considers this stay request.

A. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS

The district court should not have ordered Hassoun's release. The court's judgment rests on serious errors of the law, and the government is likely to prevail on appeal. A stay is particularly warranted here because the appeal will raise novel and "difficult legal question[s]." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Accordingly, here, the government need show only "a substantial case on the merits [because] a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay," *LaRouche v. Kezer*, 20 F.3d 68, 72-73 (2d Cir. 1994) (internal quotation marks omitted).

First, the district court erred in ordering an evidentiary hearing, because the administrative record conclusively justifies Hassoun's detention under the statute. Dec. 13, 2019 Order at 27. The court should have ruled based on the record. Judicial review of an executive immigration decision in a habeas case—as here—is limited. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) (discussing the heavy deference to administrative factfinding in immigration habeas cases). The Supreme Court has been "clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers." *Id.* at 233-34. A habeas court reviewing an administrative immigration decision must accept the agency's factual findings unless, at most, "some essential finding of fact is unsupported by the evidence." *United States ex rel. Bilokumsky*

v. Tod, 263 U.S. 149, 153-54 (1923). Further, Hassoun, not the government, bears the burden of showing that it is more likely than not that the government's factual determinations fail to meet that deferential standard. *See Miller v. Cameron*, 335 F.2d 986, 987 (D.C. Cir. 1964).

The national-security implications of this case support the conclusion that this case should have been decided on the administrative record. Where national-security, foreign-relations, and immigration matters converge—as they do here—a court owes deference to the fact-finding and decision-making of the Executive Branch. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations."). Deference should extend to § 1226a determinations because the statute's authorization of judicial review does not displace the principles of deference to agencies "in matters that invoke their expertise." *Zadvydas*, 533 U.S. at 700.

And nothing in 8 U.S.C. § 1226a suggests that an evidentiary hearing is appropriate. In *Zadvydas*, the Supreme Court recognized "special circumstances where special arguments might be made ... for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. In those situations, "[o]rdinary principles of judicial review in this area recognize primary Executive Branch responsibility" and "counsel judges to give expert agencies decision-making leeway in matters that invoke their expertise." *Id.* at 700. Section 1226a(b)(1)'s

authorization of judicial review does not displace those ordinary principles. Congress enacted § 1226a, just four months after *Zadvydas*, against the backdrop of those principles. *See Clark v. Martinez*, 543 U.S. 371, 386 n.8 (2005) (citing § 1226a as Congress' response to *Zadvydas*).

Under these principles, the administrative record justified Hassoun's continued detention under § 1226a(a)(6). That statute provides for continued detention "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). That statute is satisfied here: the FBI has concluded that "the release of [Hassoun] poses a significant threat to national security and significant risk of terrorism" and that "his release would threaten the national security of the United States and the safety of the community." June 5, 2020 FBI Memo. 4; *accord* Feb. 7, 2020 Continued Detention Certification Order (Dkt. 226-1). The FBI's assessment is supported by detailed factual summaries provided in the memorandum, which show Hassoun remains a significant threat to national security. *Id.* at 2-3. The district court erred in ordering an evidentiary hearing, having concluded it "imperative to have a full and complete record before reaching any conclusions regarding the constitutionality of § 1226a" and finding the FBI memorandum insufficient. *See* Dec. 13, 2019 Order at 26-27. That ruling failed to grant deference to the Executive in an area of its expertise: determination of threats to national security. *See supra*. A stay is warranted on this ground alone.

Second, independently of whether the district court agrees on the first statutory argument above, the district court erred in its rulings on the placement of the burden of proof and the standard of proof.

To start, Hassoun—not the government—should bear the burden of proving by a preponderance of the evidence that his detention is unlawful. "[T]he traditional rule in habeas corpus proceedings is that the [habeas petitioner] must prove, by the preponderance of the evidence, that his detention is illegal." *Bolton v. Harris*, 395 F.2d 642, 653 (D.C. Cir. 1968); *see, e.g.*, *Al-Bihani*, 590 F.3d at 878 (holding "constitutionally adequate," in the Guantanamo context, a "'burden-shifting scheme' in which the government need only present 'credible evidence that the habeas Appellee meets the enemy-combatant criteria' before 'the onus could shift to the Appellee to rebut that evidence'"). Section 1226a should operate no differently than the standard in habeas proceedings. Nothing in § 1226a(a)(6) shows an intent to depart from the traditional rule. Employing this standard provides a robust procedure protection: judicial review by a federal judge. *See* 8 U.S.C. § 1226a(b)(1).

Even if the burden did lie with the government, the *Hamdi* burden-shifting framework would apply. *Hamdi*, 542 U.S. 507. *Hamdi* does involve a different context: detention of *U.S. citizens*, not removable terrorist aliens such as Hassoun. But *Hamdi* is instructive in establishing an evidentiary process that balances the "risk of an erroneous deprivation" of a detainee's liberty interest with undue procedural burdens on the government. *Hamdi*, 542 U.S. at 534 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335

(1976)). Under that scheme, "once the Government puts forth credible evidence that the habeas petitioner meets" the relevant criteria, "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* The government's administrative record supporting § 1226a detention makes a prima facie *Hamdi* case, and the burden should then shift to Hassoun "to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Hamdi*, 542 U.S. at 534.

The court concluded that the government bears a "clear and convincing evidence" burden, because *Hamdi* was only "setting a floor for the process." Jan. 24, 2020 Order at 8-9. Analogizing to civil commitment cases using the clear and convincing standard, the court held that standard was appropriate here. *Id.* (relying on *Addington v. Texas*, 441 U.S. 418 (1979)). But in *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court cautioned against equating all civil commitment candidates where the risk was not equally borne by all members of society. The Court adopted a preponderance-of-the-evidence standard where an individual's civil commitment was supported by proof that the petitioner has committed a criminal act as a result of his mental illness. *Id.* at 367. Because a criminal act was "not within a range of conduct that is generally acceptable," the Court concluded that the risk of commitment for "mere idiosyncratic behavior"—the reason *Addington* adopted the heightened standard—was eliminated. *Id.* (quotations omitted). Using a clear-and-convincing

standard fails to recognize the crucial distinction applicable here that was articulated in *Jones*.

Third, after ruling that the government could not rest on the administrative record and after imposing a heightened burden on the government at the evidentiary hearing, the district court made the further critical error of excluding evidence that the government needed at the hearing. Tr. of June 12, 2020 Hr'g at 38:12-18, 39:9-13 (Dkt. 218) (excluding, as inadmissible hearsay, witness statements); June 18, 2020 Order (denying government's motion to amend witness and exhibit lists).

The district court's evidentiary rulings defy the rule that, in a habeas proceeding, hearsay "is always admissible." *Al-Bihani*, 590 F.3d at 879. The question the district court should have asked is "what probative weight to ascribe to whatever indicia of reliability it exhibits." *Id.* The district court's exclusion of this evidence severely hampered the ability of the evidentiary hearing to answer the one question before the court in a habeas case: is detention lawful? *See id.* at 880. The excluded evidence directly answered the pertinent question by supporting the government's determination that Hassoun's release would threaten national security. These statements, including that "Hassoun talked about how to make explosives and to plan attacks," Rivas Merino FD-302, and that Hassoun "pledged support for ISIS," June 18, 2020 Order at 31, support the government's assessment. Indeed, these statements are all referred to in the recent FBI memorandum assessing Hassoun's threat. *Compare* June 5, 2020 FBI Memo. 2-3, *with* Rivas Merino FD-302, Abdelraouf FD-302.

B. ALL REMAINING CONSIDERATIONS DECISIVELY SUPPORT A STAY

Considerations of irreparable harm and the equities also strongly favor a stay of Hassoun's release pending appeal.

Irreparable Harm. The denial of a stay threatens significant and irreparable harm to the United States. Hassoun has already been indicted, prosecuted, and convicted in federal district court of conspiracy to murder, kidnap, and maim persons in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists. *United States v. Hassoun*, 476 F.3d 1181, 1183 (11th Cir. 2007). The Acting Secretary of DHS, the Director of FBI, and the Acting Director of ICE concluded that Hassoun poses a threat to the nation. *See, e.g.*, Feb 21, 2019 FBI Memo. (Dkt. 147, Ex. B) ("As the FBI Director, I ... assess that release of Hassoun poses a significant threat to national security and significant risk of terrorism that cannot be mitigated or avoided by conditions of release."); Feb. 7, 2020 Continued Detention Certification Order (Acting Secretary determining that Hassoun "has engaged in terrorist activity or will likely engage in any other activity that endangers the national security," "his release presents a significant threat to the national security or a significant risk of terrorism," and "no conditions of release can reasonably be expected to avoid those threats"). The FBI recently reiterated this conclusion. June 5, 2020 FBI Memo. 1 ("release would threaten the national security of the United States and the safety of the community.").

Given Hassoun's past conduct, Hassoun's likelihood of reoffending is high. *See United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) ("[E]ven terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation."); *see also Jayyousi*, 657 F.3d at 1117 (Hassoun's direct appeal; quoting *Meskini*). Release would allow the irreparable harms that the Executive Branch has sought to prevent. Hassoun's recent conduct supports the view that he continues to refuse to conform his conduct to the law. While detained and during this litigation, he violated the protective order by intentionally revealing the identity of a confidential informant against him. *See* June 18, 2020 Order at 18. The district court "d[id] not find plausible" Hassoun's explanation that he lacked knowledge of his conduct. *Id.* at 19-20.

Moreover, Hassoun is a convicted alien terrorist who has a final order of removal. *See* Bernacke Decl. ¶ 5. He does not have a right to remain in the United States, *see Jennings*, 138 S. Ct. at 837 ("Even once inside the United States, aliens do not have an absolute right to remain here."), much less be released from government custody to reside in the United States, *see Zadvydas*, 533 U.S. at 702 (Scalia, J.) (dissenting and noting that in *Shaughnessy v. United States ex rel. Mezei*, 130 U.S. 206 (1953), the Supreme Court upheld continued detention of an inadmissible alien unable to be removed as he did not have a constitutional right to release in the United States).

Considerations of harm strongly favor a stay of Hassoun's release pending appeal. Courts regularly recognize that national security concerns are so weighty that

they commonly warrant granting a stay pending appeal. *See, e.g.*, *Klayman v. Obama*, 957 F. Supp. 2d 1, 10 (D.D.C. 2013) (granting stay in light of "the significant national security interests at stake in this case and the novelty of the constitutional issues"), *rev'd in government's favor*, 800 F.3d 559 (D.C. Cir. 2015). That approach is warranted here.

Balance of Equities. "Once [the stay] applicant satisfies the first two factors, the ... inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). That balance favors a stay.

First, releasing Hassoun during appeal would place a significant burden on ICE, the FBI, and others in the federal government. *See* Glasheen Decl.; Meade Decl. (Dkt. 242-3). If released, the government will not be able to assure Hassoun's reporting and compliance with any terms of release ordered and therefore prevent the threat that he poses. Aliens released from ICE custody can relocate without properly notifying the government, and significant government resources must then be expended in order to locate and apprehend an individual, especially a dangerous individual, for removal. As the FBI Deputy Director explained, if Hassoun is released from detention pending removal, he presents a significant risk of terrorism which cannot be mitigated by any conditions of release. June 5, 2020 FBI Memo. 4 (describing the FBI's risk assessment, which the court permitted to be sealed).

Even with reporting conditions that would promote basic compliance with his physical reporting requirements, these would not mitigate the particular threat posed by

Hassoun as someone known to recruit others to engage in terrorist activity and to provide material support for the commission of terrorist activity. As detailed in the underlying criminal record and the June 5, 2020 FBI memorandum, which documents Hassoun's continuing effort to recruit or encourage others to engage in terrorist activity, Hassoun's release poses a unique threat to national security because of his ability to provide logistical guidance, financial support, and ideological motivation to individuals who plan to commit violent terrorist activities. The threat posed by this behavior cannot be wholly mitigated by any conditions.

Second, the Executive has articulated Hassoun's detention to be in the public interest. The Acting Secretary, in consultation with the Acting ICE Director and the FBI Director and Deputy Director, has determined Hassoun is a significant national security threat. These administrative directives merit deference on the "public interest" prong. For the Judiciary, too, a stay serves the public interest by promoting sound judicial administration and decision-making. The authorities and issues presented in this case are novel and important. They warrant considered deliberation from the Court, rather than rushed consideration in an emergency-stay posture. By entering a stay, this Court can aid the sound resolution of important legal questions bearing on national security.

Hassoun's liberty interests do not overcome the public interests set forth above. *See Hilton*, 481 U.S. at 778-79 (due process does not prohibit "staying the release of a successful habeas petitioner pending appeal because of dangerousness"). As the

Supreme Court articulated, the "Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987). As set forth thoroughly above, that balance strongly favors staying Hassoun's release pending appeal.

CONCLUSION

This Court should stay the district court's final judgment pending resolution of this appeal, expedited this appeal, and issue an administrative stay of the final judgment while it considers this stay request.

Dated: July 1, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,200 words according to the count of Microsoft Word, excluding the materials permitted to be excluded by Rule 32(f).

s/ *Anthony D. Bianco*
ANTHONY D. BIANCO
Senior Counsel for National Security

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, I electronically filed the foregoing with the Clerk of the circuit court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ *Anthony D. Bianco*
ANTHONY D. BIANCO
Senior Counsel for National Security

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADHAM AMIN HASSOUN, Appellee-Appellee, v. JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center, Appellant-Respondent.	No. 20-5191

CERTIFICATE OF PARTIES

Appellee/ Petitioner & Counsel

Hafetz, Jonathan: Counsel for Appellee- Petitioner

Hallett, A. Nicole: Counsel for Appellee- Petitioner

Hassoun, Adham Amin: Appellee-Petitioner

Hogle, Charles: Counsel for Appellee-Petitioner

Kaufman, Brett Max: Counsel for Appellee- Petitioner

Manes, Jonathan: Counsel for Appellee- Petitioner

Perez, Celso Javier: Counsel for Appellee- Petitioner

Rabinovitz, Judy: Counsel for Appellee- Petitioner

Appellant/Respondent & Counsel

Belsan, Timothy M.: Counsel for Appellant-Respondent

Bianco, Anthony D.: Counsel for Appellant-Respondent

Carilli, Joseph F., Jr.: Counsel for Appellant-Respondent

Connolly, Kathleen A.: Counsel for Appellant-Respondent

Hunt, Joseph H.: Counsel for Appellant-Respondent (Assistant U.S. Attorney General)

Inkles, John J.W.: Counsel for Appellant-Respondent

Kennedy, James P., Jr.: Counsel for Appellant-Respondent (U.S. Attorney, Western District of New York)

Peachey, William C.: Counsel for Appellant-Respondent

Platt, Steven A.: Counsel for Appellant-Respondent

Searls, Jeffrey: Appellant-Respondent