[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 20-5191

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADHAM AMIN HASSOUN,

Petitioner–Appellee,

v.

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

Respondent–Appellant.

On Appeal from the United States District Court
for the Western District of New York

PETITIONER–APPELLEE'S OPPOSITION TO RESPONDENT'S EMERGENCY MOTION FOR A STAY OF PETITIONER'S RELEASE PENDING APPEAL

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INTRODUCTION

Staying Mr. Hassoun's release would be a manifest injustice.

Mr. Hassoun has been detained for seventeen months based on executive "certifications" that he poses a danger to national security. According to the government, these certifications are sufficient to justify Mr. Hassoun's indefinite detention under a never-before-used statute and a rarely used regulation, and no court has authority to review the allegations upon which the certifications are based. Incredibly, it takes these positions—and asks for extraordinary relief from this (and, simultaneously and perhaps unprecedentedly, its sister) Court—even though discovery below exposed those allegations as outright lies and wholly unreliable, and even though the government abandoned them on the eve of trial.

The government is deeply, disturbingly wrong. After a year and a half of proceedings, the district court summarized this case in no uncertain terms: "Distilled to its core," the court wrote, the government's "position is that [it] should be able to detain Petitioner indefinitely based on the executive branch's say-so, and that decision is insulated from any meaningful review by the judiciary." Stay Denial 15 (ECF 256, attached as Exhibit A).[1] But "[t]he record in

[1] All ECF references are to the W.D.N.Y. docket.

this case demonstrates firsthand the danger of adopting [the government's] position." *Id.*

This Court should reject the government's motion for an emergency stay of the order to release Mr. Hassoun, which includes extreme conditions of supervision, home confinement, and surveillance. As the district court found, "when the case as a whole is examined, it becomes clear that [the government] cannot demonstrate [it] is likely to prevail on appeal, or even that there is a substantial case on the merits." *Id.* And even if the government's arguments for detention by executive fiat were plausible, the equities would weigh decisively in favor of Mr. Hassoun's release. Particularly given the severe conditions of release, the government will suffer no irreparable harm from the release of Mr. Hassoun, whose supposed dangerousness the government has now conceded it cannot prove after seventeen months of trying. Conversely, given what the government has put him through, Mr. Hassoun would suffer greatly if he is detained after winning his freedom. And the public interest strongly supports preserving the effectiveness of the habeas remedy in these circumstances.

Enough is enough. The Court should deny the government's motion.

PROCEDURAL HISTORY & FACTS

I. The government "certifies" Petitioner and the district court issues procedural rulings.

Petitioner, a stateless Palestinian, completed his criminal sentence in October 2017 following his conviction for conspiracy and material support for terrorism predicated on—in the words of the sentencing court—"provid[ing] support to people sited in various conflicts involving Muslims around Eastern Europe, the Middle East and Northern Africa," where there was "no evidence that these defendants personally maimed, killed or kidnapped anyone in the United States or elsewhere," where "the government . . . pointed to no identifiable victims," and which was "limited to issues abroad and not in the United States." ECF 248-16 at 6, 14. The sentencing court found Mr. Hassoun's "motivation to violate the statutes in this case" was his empathy for people who "live[d] through armed conflict and religious persecution." *Id.* at 7. The court rejected "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" and imposed a 188-month sentence—nearly fifteen years *below* the guideline range of thirty years to life. *Id.* at 8, 16–17.

After completing his sentence, Petitioner was immediately placed in immigration detention at the Buffalo Federal Detention Facility ("BFDF"), pending removal. In February 2019, after Petitioner won his first habeas petition

because his removal was not reasonably foreseeable, *Hassoun v. Sessions*, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) (applying *Zadvydas v. Davis*, 503 U.S. 678 (2001)), the government moved to certify him for indefinite detention as dangerous to national security. Stay Denial 3–4. The government initially indicated it would rely upon a regulation, 8 C.F.R. § 241.14(d), and then (months later) formally certified him under that regulation as well as the provision of the PATRIOT Act at issue in this appeal, 8 U.S.C. § 1226a. Petitioner filed this habeas petition challenging his detention under both authorities.

Addressing the regulation first, the district court held that 8 C.F.R. § 241.14(d) was *ultra vires* because the Supreme Court interpreted the authorizing statute, 8 U.S.C. § 1231(a)(6), "not [to] allow for indefinite detention of any class of aliens that it covers," and because it lacked fundamental due process safeguards, such as a neutral decisionmaker and a clear burden and standard of proof. Regulation Ruling 25 (ECF 55, attached as Exhibit B). With respect to the statutory detention authority, the court reserved decision on Petitioner's constitutional challenges and ordered an evidentiary hearing. Regulation Ruling 26–27.

The Court subsequently issued a ruling defining the parameters of that hearing. It held, first, that the hearing would focus on whether the factual predicate for indefinite detention was met, PATRIOT Ruling 3 (ECF 75, attached as Exhibit

C) (citing 8 U.S.C. § 1226a(a)(6)); second, that due process required the government to bear the burden of proof by clear and convincing evidence, *id.* at 6–12; third, that the Secretary's determination need not be given conclusive deference because "Congress affirmatively chose to provide for judicial review of the merits of determinations made under § 1226a(a)(6)," *id.* at 13; fourth, that hearsay evidence was admissible if it met the test applied in Guantánamo Bay habeas proceedings, *id.* at 17; and, fifth, that the government could attempt to shield the identity of confidential informants, *id.* at 17–18. The court also permitted limited discovery. ECF 58.

II. The district court determines that the government's allegations are not a "credible basis" for Petitioner's continued detention and reflect government misconduct that remains the subject of a pending sanctions inquiry.

The factual basis for Petitioner's detention rests solely on an "administrative record" that includes *nothing* postdating Petitioner's criminal conviction except an FBI "letterhead memorandum . . . summarizing allegations that various other detainees at the BFDF had made against Petitioner." Stay Denial 19 (discussing Admin. Record, ECF 17-2, Ex. A, Attachment 1 ("2019 FBI Memo")). The district court found that these allegations were "an amalgamation of unsworn, uninvestigated, and now largely discredited statements by jailhouse informants, presented as fact," *id.* at 24, that "cannot bear meaningful scrutiny," *id.* at 20.

The government's conduct in this case has shown a shocking lack of concern for truth and the judicial process. As the district court found, "the facts on which the government relied to certify Petitioner for potentially indefinite detention flowed in large part from a witness who a cursory investigation revealed to be unreliable, yet Respondent repeatedly urged the Court to resolve this matter without making any further inquiry." Pretrial Ruling 24–25 (ECF 225, attached as Exhibit D). In particular, Petitioner's counsel independently unearthed government documents showing the government's central informant had cut-and-pasted false allegations against Petitioner that were *identical* to allegations he made against other people years earlier. *Id.* at 22. The documents also revealed that he, rather than Petitioner, had independent knowledge necessary to fabricate many allegations and that he had a well-documented history of repeatedly exploiting his position as an FBI informant to commit fraud. *Id.* Confronted with its own documents, the government "determined not to call [him] as a witness, acknowledging that there are 'concerns about his credibility and ability to truthfully testify.'" *Id.* at 24.

Astonishingly, the government *still* argues to this Court that the administrative record containing these *same* false allegations "conclusively justifies Hassoun's detention under the statute." Stay Mot. 11. The district court has ordered sanctions proceedings for the government's "failure to produce

evidence related to the credibility of [this informant] and other witnesses," and for advancing another false allegation in a manner that was "at the very least sloppy, and possibly intentionally misleading." Pretrial Ruling 24–25.[2]

Although Petitioner remains "certified" under the 2019 FBI Memo, the FBI issued a new memo last month in an attempt to paper over the government's previous misconduct. ECF 261-2, Ex. A ("2020 FBI Memo"). But, as the district court found, that memo "suffers from many of the same infirmities as the [earlier] FBI Memo, in that it merely asserts as fact a hodgepodge of allegations by jailhouse informants, without any independent corroboration." Stay Denial 34–35. The new memo simply repeats most of the same unreliable allegations. *Id.* For example, it parrots another informant's "claim[] to have overhead Petitioner discussing making explosives with another detainee" even though "[1] the record revealed that the overheard conversations were in Arabic, a language in which [the informant] was not fluent; [2] [the] report was uncorroborated; . . . [3] [the informant] was offered a benefit in exchange for the information; . . . [4] ICE released the detainee with whom Petitioner was allegedly speaking, and [5] *the FBI apparently investigated the allegation and closed the file*." *Id.* at 23 (emphasis

[2] It remains unclear how the government can, consistent with its ethical obligations, continue to rely on the 2019 FBI Memo in this Court after explicitly repudiating the informant that is the sole source for that memo's central allegations. *See* Fed. R. Civ. P. 11(b)(3).

added). Similarly, the FBI omits any mention of exculpatory and "flatly contradict[ory]" statements given by other informants—even though the government had designated some of those informants as its own trial witnesses. *See, e.g.*, *id.* at 22–24, 34–35. Ineluctably, the district court found that the new memo "does not provide a credible basis for concluding that Petitioner is so dangerous that his release on strict conditions of supervision will cause irreparable harm." *Id.* at 35.

III. The government forfeits the evidentiary hearing, then seeks a stay.

Six days before the evidentiary hearing, the government moved to cancel it. ECF 226. In so doing, the government abandoned its opportunity to examine Mr. Hassoun under oath. Pretrial Ruling 13. The government conceded on the record that it could not have proved its case by clear and convincing evidence, ECF 241 at 6:6–7, or even by a preponderance of the evidence, ECF 244 at 9:19–21. *See* Stay Denial 30 & n.11. Petitioner subsequently agreed to all of the extraordinarily strict conditions the government proposed in the event of his release from custody. ECF 240.

But rather than release him, the government sought a stay. The district court denied the stay, concluding that the government "has not demonstrated a likelihood of success on the merits or even a substantial case that supports imposition of a stay pending appeal," Stay Denial 33, and that all three equitable factors favor

Petitioner, *id.* at 33–42. The government now seeks emergency stays in this Court and the Second Circuit.

LEGAL STANDARD

When a habeas petitioner prevails, there is a "preference for release" pending appeal. *Hilton v. Braunskill*, 481 U.S. 770, 777–78 (1987); *accord* Fed. R. App. P. 23(c). Overcoming that preference through a stay requires an exercise of the Court's "extraordinary injunctive powers." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Indeed, as the Supreme Court has explained, a stay pending appeal represents an "intrusion into the ordinary processes of administration and judicial review[.]" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted).

An application for a stay is evaluated under a demanding multi-factor test akin to a motion for preliminary injunction. *See, e.g.*, *id.* at 434. That test encompasses four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 426 (cleaned up). Notably, any of the district court's factual findings against the government relevant to these factors must be accepted unless "clearly erroneous." Fed. R. Civ. P 52(a)(6).

Traditionally, this Circuit has weighed the stay factors on a "sliding-scale." *See, e.g.*, *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Under this approach, parties can satisfy the first factor by showing that their appeal raises a substantial legal question—but only if *all three* of the other factors "*strongly* favor interim relief." *Wash. Metro Area Transit Comm'n*, 559 F.2d 841, 843–44 (D.C. Cir. 1977) (emphasis added).

Here, the government cannot show that *any* of the three other factors tip in its favor—much less *strongly*. Therefore, whether or not the sliding-scale approach remains viable after *Nken*, *see Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014), the government cannot obtain a stay without establishing that it is likely to succeed on the merits. Its legal positions are so extreme that they do not even raise a substantial question on the merits.

ARGUMENT

I. The government cannot establish a likelihood of success on the merits.

The government's argument that the district court lacked authority to order an evidentiary hearing is incompatible with the plain language of § 1226a. Its argument that the district court erred by requiring the government to prove its case by clear and convincing evidence is contrary to decades of caselaw, and the government anyways conceded that it could not even have met a preponderance

standard. Its argument that the district court abused its discretion in issuing various evidentiary rulings (and that any error was not harmless) ignores the district court's detailed assessment of the reliability of the government's evidence.

A. The district court had authority to order an evidentiary hearing.

The government argues that the district court was powerless to order an evidentiary hearing to test the factual predicate for Petitioner's detention because "the administrative record conclusively justifies Hassoun's detention under the statute." Stay Mot. 11.

Yet, as the district court pointed out, "the plain language of § 1226a . . . explicitly anticipates 'judicial review of the *merits* of a determination made under subsection (a)(3) or (a)(6)' in a habeas proceeding" under 28 U.S.C. § 2241. Stay Denial 26 (emphasis added) (quoting 8 U.S.C. § 1226a(b)(1)). It is impossible to reconcile this text with the government's position—and the government barely tries. *See* Regulation Ruling 26–27 (citing cases and habeas statute).

Amazingly, the government continues to insist that its now-discredited memo is enough to justify Petitioner's detention for life. According to the government, the district court committed legal error by not accepting the 2019 FBI Memo as "conclusive[] justifi[cation of] Hassoun's detention." Stay Mot. 2. But the centerpiece of that memo was a set of allegations so obviously false that the government withdrew all reliance on them. The government's argument boils

down to this: once the Secretary asserts that § 1226a is satisfied, "[t]hat is the end of the matter" Stay Mot. 3. Indefinite detention is permitted, *even if the supposed facts on which the Secretary relied are demonstrably untrue*. This argument is repugnant to the Constitution, contradicts Congress's express command, and must be among the most extreme and unapologetic arguments for unreviewable executive power the government has ever put to paper.

The government's attempt to render this case "a standard immigration habeas proceeding, where the Court's ability to review the administrative determination is circumscribed" fails. Stay Denial 27. This is not a case in which habeas review comes after adversarial administrative proceedings. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004), and *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008)). Indeed, the Supreme Court recently rejected a similar effort to collapse core habeas challenges and review of immigration removal decisions. *See DHS v. Thuraissigiam*, 2020 WL 3454809, at *12 (U.S. June 25, 2020); *see also* Stay Denial 19 n.8 (rejecting government's invocation of *Thuraissigiam*).

Finally, it is worth noting that if the government were correct, a civilian held in the United States subject to § 1226a would have significantly fewer procedural rights than wartime detainees captured on a foreign battlefield and held outside sovereign U.S. territory at Guantánamo—even though it remains unclear whether the latter are entitled to the protections of the Due Process Clause. *See, e.g.*,

Qassim v. Trump, 927 F.3d 522, 527–29 (D.C. Cir. 2019); *Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010). It cannot be that Petitioner, to whom the Due Process clause indisputably applies, has fewer procedural rights than those detainees—yet that is the government's position.

B. The government bears the burden of proof under the statute.

In every instance in which the government has sought to confine an individual in civil detention, including individuals who allegedly pose a danger to the public, the government has borne the burden of proof—because the Due Process Clause requires as much. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997); *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Addington v. Texas*, 441 U.S. 418, 431 (1979). Quite simply, when the government detains an individual indefinitely, the heavy weight of the liberty interest at stake requires that the government bear the burden of justifying the detention. *See Foucha*, 504 U.S. at 86. Even "in the case of non-citizen aliens held as enemy combatants at Guantánamo Bay, the D.C. Circuit has approved the imposition of a preponderance of the evidence standard on the government." Stay Denial 28 (citing this Court's case law).

C. The standard of proof is, at a minimum, clear and convincing evidence.

The district court correctly determined that the government must prove that a detainee satisfies the requirements of the statute by, at a minimum, clear and

convincing evidence. *See Addington*, 441 U.S. at 431; *Foucha*, 504 U.S. at 86; *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Woodby v. INS*, 385 U.S. 276, 285–86 (1966); *Chaunt v. United States*, 364 U.S. 350, 353 (1960). Even if that standard were too high—and it is not—the government would be unable to prevail. As the district court explained, the appropriateness of the clear and convincing standard is "academic at this stage because Respondent has conceded that he could not meet even the preponderance standard." Stay Denial 30; *see* ECF 244 at 9:4–21 (government counsel stating he "definitely agree[s]" that the government could not meet a preponderance standard in this case).[3]

The government argues that because Petitioner is a non-citizen, the Court should have applied the "burden-shifting framework" from *Hamdi*—under which the government need only put forth credible evidence to shift the burden back to the detainee—and that he is entitled to even less process than Hamdi was. Stay Mot. 14–15. But Petitioner's non-citizen status does not "impact[] the *Mathews* calculus sufficiently to warrant a lesser level of process than that afforded to Hamdi." PATRIOT Ruling at 8–9. "In particular, Petitioner's non-citizen status does not change the significance of his liberty interest, the risk of erroneous

[3] Petitioner reserves his argument that the proper standard of proof in the context of indefinite detention based solely on an individual's alleged dangerousness is the reasonable-doubt standard. *See* ECF 60 at 8–11.

deprivation, or the burden to the government of providing additional process." *Id.* at 9. The district court instead correctly concluded that *Hamdi* merely establishes a floor, and that the *Mathews* calculus requires affording civilians arrested and detained inside the United States more rigorus safeguards than combatants captured by the military on overseas battlefields. *Id.*; *see Al-Marri v. Pucciarelli*, 534 F.3d 213, 267–74 (4th Cir. 2008) (Traxler, J., concurring in judgment in the controlling opinion) (urging more robust protections than *Hamdi* for non-citizens seized and held in the United States, even when detained as enemy combatants under wartime powers). Moreover, because of its last-minute abandonment of its case, even under the *Hamdi* framework, the government loses: it produced *no* evidence in this case to rebut.

D. The district court's evidentiary rulings were not abuses of discretion—and if they were, they were harmless.

The district court accurately assessed that the government does not have "a serious chance of convincing an appellate court that its evidentiary rulings—many of which favored [the government]—so hamstrung [the government's] presentation of evidence as to warrant reversal" of the court's judgment. Stay Denial 31.

District courts have wide latitude to admit or exclude evidence; their evidentiary rulings are reviewed for abuse of discretion. *See Kapche v. Holder*, 677 F.3d 454, 468 (D.C. Cir. 2012). An evidentiary ruling constitutes an abuse of discretion only when it is "clearly unreasonable, arbitrary, or fanciful." *Id.* at 468.

And even when a district court abuses its discretion in admitting or excluding evidence, the error is harmless unless the error affected an appellant's substantial rights. *Bowie v. Maddox*, 642 F.3d 1122, 1134 (D.C. Cir. 2011).

The government argues that the district court erred in excluding certain hearsay statements. It cites *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010), for the proposition that hearsay "is always admissible" in a habeas proceeding. Stay Mot. 3, 16. But the government reads that opinion too broadly. First, as the district court recognized, this habeas proceeding "is distinct from cases brought by Guantánamo detainees." Pretrial Ruling 28. Second, as this Court has already explained, "*Al-Bihani* stands for the proposition that 'hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable.'" *Barhoumi*, 609 F.3d at 422 (quoting *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010)); *see* Pretrial Ruling 27. *Al-Bihani* does not categorically require a district court to admit hearsay evidence that has no probative value at all.[4]

In any event, even if the government could establish that the district court erred in excluding unreliable hearsay, the government would be unable to establish

[4] The government also asserts that the district court erred in denying its last-minute request to amend its witness and exhibit lists. Stay Mot. 16. The court denied that motion because the government failed to offer any convincing reason for its failure to comply with the court's case-management deadlines. *See* Stay Denial 33. The government does not even attempt to explain how that ruling was erroneous.

that the error affected its substantial rights. The district court exhaustively assessed the proffered hearsay's reliability, concluding that it was "so unreliable on its face as to be of no use to the Court in making its factual determinations." Stay Denial 32; *see* Pretrial Ruling 28–36. Thus, despite the government's protestations, it is simply not true that the proffered hearsay "directly answered the pertinent question," Stay Mot. 16; on the contrary, it was so unreliable that it answered nothing. If the district court had not excluded it as a gatekeeping matter, it would have been useless to the government on the merits.

It bears repeating that the government presented no case on the merits at all. In fact, the government informed the district court that it would not put on evidence even if required to move forward with the hearing. ECF 244 at 9. Thus, to prevail on its appeal of the district court's evidentiary rulings, the government would need to establish that the exclusion of hearsay statements lacking any probative value tainted the outcome of an evidentiary hearing that never happened because the government refused to participate in it. That position is not only wrong, but makes a farce of the emergency-stay process, and this Court.

II. The government will not be injured—let alone irreparably—if Petitioner is released pending appeal under extreme supervisory conditions.

The government will suffer no harm if Petitioner is released pending appeal, and its assertions to the contrary are baseless.

First, the government relies on the two FBI memos recommending that Petitioner be certified as a "threat to national security." *See* Stay Mot. 17. As the district court concluded, "[f]ar from demonstrating that Petitioner is so dangerous that he must be detained" the memos "illustrate[] a more potent danger—the danger of conditioning an individual's liberty on unreviewable administrative factfinding." Stay Denial 34–35.

Moreover, the FBI's assessment does not account for the extreme conditions of supervision to which Petitioner will be subject upon release. Though the details remain under seal (and can be provided at the Court's request), the FBI memos explicitly evaluated Petitioner's dangerousness based on assumptions about his freedoms upon release that are entirely foreclosed by the strict conditions of supervision now in place. The conditions Petitioner has agreed will make him the most surveilled "free" man in Florida, if not the country. He will wear an ankle monitor. His every electronic communication will be monitored. He will not leave his residence without pre-approval, except in a medical emergency. All visitors

except for his sister's immediate family members must be pre-approved. The government will even approve where he goes to pray.

Second, the government invokes Petitioner's past criminal conviction. Calling him a "three-time convicted terrorist," Stay Mot. 1—by which it means convicted on three counts during a single trial—the government repeatedly recites the formal names of his crimes, but assiduously avoids discussing his conduct. It did the same thing in the district court, and that court had none of it. *See* Stay Denial 39 (chiding the government for "cavalierly disregard[ing]" the facts surrounding Petitioner's criminal conviction). Noting that Petitioner's criminal conduct "ended almost twenty years ago," *id.* at 37, the district court explained that the judge who presided over Petitioner's criminal case had expressed, in writing, "a clear view that while Petitioner's crimes of conviction were serious, they did not warrant a sentence anywhere near the recommended Guidelines sentence of 360 months to life," *id.* at 38. The court emphasized the sentencing court's bottom line: that Petitioner did not, in fact, "pose[] such a danger to the community" as to justify a life sentence. *Id.* at 39. The government did not appeal Petitioner's sentence even as it appealed the sentence of his co-defendant. *Id.* at 38.

Because the government has not shown irreparable harm, its bid for a stay must fail. *See Sherley*, 644 F.3d at 405.

III. A stay of Petitioner's release would substantially injure him.

As the district court recognized, Petitioner's liberty interest is of the highest order. Stay Denial 41. The story of this matter is as unconscionable as it is unbelievable. As explained above, Petitioner has remained detained on false allegations for seventeen months. He has been accused of fantastical plots recycled by a patently unreliable witness who the government abandoned at the eleventh hour. And when his hearing was about to begin, the government admitted that it could not win—yet it refused to consent to Petitioner's release while it appealed. To prolong Petitioner's detention in these circumstances would cause him severe injury.

IV. A stay of Petitioner's release pending appeal after the government gave up trying to prove his "dangerousness" would harm the public interest by damaging the public's faith in the judiciary and judicial remedies, including the Great Writ.

The Supreme Court has emphasized that "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," and that "the test for determining the scope of this [remedy] must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008). The government's position in this case, as much as any in memory, challenges these principles, and undermines the public interest in an independent judiciary. *See* Stay Denial 34.

The writ of habeas corpus is the "stable bulwark of our liberties." 3 W. Blackstone, *Commentaries on the Laws of England* 137 (1768). Its role and value—demonstrated so clearly in this case—is "to test the power of the state to deprive an individual of liberty in the most elemental sense." *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806 (D.C. Cir. 1988).

To stay Petitioner's release would profoundly compromise public faith in not only the habeas remedy, but in the judiciary's truth-seeking function. So far, that function has produced a "record [that] raises serious concerns about governmental conduct," some of which was "possibly intentionally misleading," Pretrial Ruling 24–25; it produced a concession from the government that it "cannot even show that it is more likely than not that the necessary conditions for ongoing detention are met," Stay Denial 41; and it resulted in a judicial finding that the allegations "do[] not provide a credible basis" for continued detention pending appeal, *id.* at 35. Granting a stay would undermine the importance of judicial review in habeas; were the public to see the habeas remedy manipulated and undermined in the manner the government's motion proposes, an essential constitutional protection would be outed as inert and illusory.

The government's impoverished view of "the public interest" is both trivial and wrong. The government contends that Petitioner's release is not in the public interest because Petitioner's home confinement will require attention from

government officials tasked with supervising his terms of release. Stay Mot. 19–20. But the public has no interest in "saving resources" by jailing someone unnecessarily—especially when it is already spending untold resources keeping him locked up.

The government's national-security interests are real. But those interests have no applicability to this case—as the government effectively conceded when it slunk away from the chance to make its case in court. The only public interest truly at stake here is the interest in government accountability that the Founders so wisely established long ago.

CONCLUSION

The Court should deny the motion for a stay and permit the district court's order of Petitioner's release to take effect.

Dated: July 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system. No party is unrepresented in the appellate CM/ECF system.

Date: July 10, 2020

/s/ *Jonathan Hafetz*
Jonathan Hafetz
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,929 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: July 10, 2020

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