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

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

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INTRODUCTION

There are some cases where parties warn that if the executive branch is given unreviewable authority, it will abuse that power. This case proves these warnings right.

To the government, this case is not about evidence, or about a human being—it is about executive power. The government is wrong on many levels, but it is right in one sense. It takes a pernicious view of executive power to ask this Court (and perhaps two or three more) to conclude not only that its basis for Mr. Hassoun's detention should not be reviewed, but that it should not be reviewed after proceedings in this Court have exposed just how unjust such a result would be. The government asks the Court to ignore everything that has happened in the case and treat the stay application like a blank slate—to ignore the failure to disclose exculpatory evidence, to forget about the allegations the government lodged without even a cursory investigation, to excuse the destruction of evidence that could have proven Mr. Hassoun innocent, and to disregard that on the eve of trial, the government abandoned its case because it had nothing to present. The Court should reject this suggestion. The government's conduct in this case is precisely why the executive cannot be given unreviewable authority to detain a man for life. As Chief Justice John Roberts recently stated, "[m]en must turn square corners when they deal with the Government. But it is also true, particularly when so much is at stake, that the Government should turn square corners in dealing with the people." *DHS v. Regents of the Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at *11 (U.S. June 18, 2020). The government has failed that basic test here.

To grant a stay in these circumstances would be a manifest injustice. Mr. Hassoun is a human being who has waited seventeen months to establish his innocence before the government denied him that opportunity. Enough is enough. The Court should deny the government's motion.

PROCEDURAL HISTORY & FACTS

I. After the filing of this habeas action, the Court issued a series of rulings that laid out the parameters of an evidentiary hearing to determine the legality of Petitioner's detention.

Since March 1, 2019, the government has claimed the authority to detain Mr. Hassoun based on factual allegations contained in unsworn "letterhead memoranda" written by one federal agency, the FBI, to another, the Department of Homeland Security. ECF No. 17, Exh. A, Att. 1 ("First FBI Letter"). Aside from documents relating to Mr. Hassoun's criminal conviction, for which he has served his sentence, these two letters are the only documents that contain any allegations against him. They represent the essential factual basis for Mr. Hassoun's detention.

The government has maintained throughout this case that "the agency's bottom-line factual conclusion . . . is untouchable" by any Court. ECF No. 17 at 39; *see also* ECF No. 30 at 29 (arguing that the "clarity and completeness of the [administrative] record" allowed the Court to "summarily decide this case without imposing the costs and intrusions of further, unwarranted factfinding"); ECF No. 61 at 1 ("Respondent respectfully maintains a standing objection to the convening of an evidentiary hearing, as all relevant factual information necessary for judicial review is contained within the administrative record."). It has maintained this position both with respect to Mr. Hassoun's initial detention under 8 C.F.R. § 241.14(d) and then again under 8 U.S.C. § 1226a when it invoked that authority in August 2019. Petitioner challenged this breathtaking assertion of unilateral executive authority on statutory and constitutional grounds, both facially and as applied. *See* ECF No. 13.

This Court rejected the government's claims of unreviewable authority. On December 13, 2019, the Court held, first, that 8 C.F.R. § 241.14(d) was *ultra vires* and could not authorize Petitioner's detention due to the serious constitutional problems it raised. ECF No. 55 at 27. With

respect to 8 U.S.C. § 1226a, the Court reserved decision on Petitioner's constitutional and statutory argument and held that "the current record is insufficient to permit it to perform the merits review anticipated by § 1226a(b)(l)." *Id.* The Court further determined that "an evidentiary hearing is the appropriate mechanism by which to remedy this insufficiency." *Id.*

In a subsequent opinion regarding the parameters of the evidentiary hearing, the Court held that the government bore the burden of proving by clear and convincing evidence that there existed a factual predicate for Petitioner's detention under § 1226a(a)(6). ECF No. 75 at 9. The Court rejected Petitioner's argument that the facts must be proved beyond a reasonable doubt. *Id.* at 12. The Court also ruled against Petitioner in holding that hearsay evidence would be admissible at the evidentiary hearing so long as the party proffering it showed that it met the threshold test applicable to hearsay admissible in Guantanamo Bay habeas proceedings. *Id.* at 17. The Court separately determined that limited court-supervised discovery would be permitted to develop the factual record in advance of the evidentiary hearing. ECF No. 58.

II. The government has committed a pattern of misconduct and ethical violations with respect to the truthfulness of its factual allegations against Petitioner.

Seven months after the Court held that an evidentiary hearing would be required, the government now seeks a stay on its original theory that the allegations in its latest unsworn letter from the FBI are owed conclusive deference and cannot be scrutinized by any Court. But the history of this case in those months—and the evidence that has emerged through discovery and Petitioner's motions for sanctions and to compel disclosure—has demonstrated that the allegations in the FBI letter simply cannot be trusted. Indeed, the government's conduct throughout this litigation, as documented by the Court, reflects egregious disregard for truth.

The original FBI letter, dated February 21, 2019, consisted entirely of statements of unidentified jailhouse informants laundered through multiple levels of hearsay and assembled

into an ominous narrative. *See* First FBI Letter. The original letter's core allegations were stark: the FBI said Mr. Hassoun had been plotting attacks in South Florida, among other similarly alarming claims. *Id*. at 11–15. The government asserted its right to hold Petitioner on the basis of these allegations indefinitely. *Id.* at 5.

It is only because the Court ordered an evidentiary hearing and allowed discovery of the underlying documents upon which the FBI letter was constructed that Petitioner learned that the most serious allegations all came from a single detainee: Shane Ramsundar. ECF No. 225 at 24. In May of this year—fifteen months after the FBI letter was first issued—Petitioner happened to unearth a copy of Mr. Ramsundar's official Alien File ("A-File"). *Id*. Therein, Petitioner discovered direct evidence that the accusations Mr. Ramsundar was levelling against him were identical to allegations he had made against other people in the 2000s while working as an informant for the FBI. ECF No. 190 at 1–2. There was also evidence that Mr. Ramsundar was seeking immigration relief in exchange for his testimony. *Id*. at 2–3. This exculpatory evidence had not been disclosed even though it was concededly responsive to Petitioner's discovery requests and was in DHS's central file on Mr. Ramsundar. ECF No. 225 at 23–24.

Such carelessness by DHS and the FBI is shocking. This Court observed that "Respondent's counsel had the A-file readily available and could have examined it at any time." And yet, "despite the fact that the determination that Petitioner should be detained pursuant to 8 U.S.C. § 1226a(a) and 8 C.F.R. § 241.14(d) was based in significant part on allegations by Ramsundar, it was not until Petitioner's counsel independently obtained a copy of Ramsundar's A-file that Respondent's counsel conducted a meaningful investigation into Ramsundar's credibility." ECF No. 225 at 24. As this Court noted, the evidence in Mr. Ramsundar's A-File "was sufficiently damning that Respondent . . . determined not to call Ramsundar as a witness,

acknowledging that there are 'concerns about [Ramsundar's] credibility and ability to truthfully testify.'" *Id.* (citing ECF No. 180 at 2).

The Court found that "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." *Id.* 24–25. The Court determined that "[i]t may well be that sanctions and/or further relief are in order as a result of this conduct" and determined that "further inquiry and/or discovery may be warranted." *Id*. at 27.

Despite the fact that a "cursory investigation" would have revealed Mr. Ramsundar's fabrications, the government had such blind confidence in his allegations that it filed a motion for sanctions based centrally on his uncorroborated claim that Mr. Hassoun had threatened his life during an attorney visit. ECF No. 190 at 4. The government went so far as to argue that Mr. Hassoun's habeas petition should be *dismissed*—or in the alternative, that Mr. Ramsundar's allegations should be accepted by the Court as true *by default*—on the strength of an affidavit signed by Mr. Ramsundar. ECF No. 225 at 18–19. The government waited weeks to investigate Mr. Ramsundar's allegation of a threat, even after presenting it to the Court. ECF No. 190 at 4. And even its preliminary investigation found that a key detail of Mr. Ramsundar's allegation—the date on which it supposedly occurred—was false. ECF No. 225 at 25. The government failed to preserve exculpatory evidence of that falsehood. ECF No. 190 at 13. It also failed to withdraw the false allegation, and indeed, continued to press it in subsequent filings with this Court even after it knew the allegation could not have been true as stated. ECF No. 225 at 25. The Court described Respondent's conduct in this regard as "at the very least sloppy, and possibly intentionally misleading." *Id.*

Mr. Ramsundar's false accusations, however, are not the only egregious errors that have infected the government's decision to detain Mr. Hassoun. In response to discovery requests, the government represented that no informant had sought or received a benefit for providing information on Mr. Hassoun. *See* ECF No. 190-3 at 4. Yet subsequent disclosures revealed that multiple informants, including Mr. Ramsundar, Mr. Rivas, and Mr. Raza had either explicitly appealed to the government for immigration relief or had been offered such relief by the government. *See* Email from Christopher Lemmo of Dec. 3, 2018 (Exh. 4) ("We asked REVIS [sic] Merino if he would be willing to work as a source if his case were to be dismissed and he were to be released to the streets"); ICE Record of Personal Interview with Abbas Raza (Exh. 5) (listing as "basis for release" that "I provided information to Homeland Security pertaining case.").

III. After the FBI's first letter was abandoned because it parroted conceded lies, a new FBI letter continues to present a false narrative, based on statements of jailhouse informants, that omits contradictory facts, misrepresents underlying sources, and reflects no investigation of their reliability.

The government attempted to resuscitate its case by commissioning a new FBI letter. This letter, dated, June 5, 2020, is nothing more than a recommendation by the FBI to the DHS Secretary in advance of the latter's upcoming biannual deadline to recertify Mr. Hassoun for detention.[1] ECF No. 207-2 ("Second FBI Letter"). Like the original FBI letter, this latest letter is unsworn, does not identify a single source by name, omits any underlying evidence, and simply makes assertions and assessments with no means for the reader to assess their reliability. As in

[1] For now, Mr. Hassoun's detention continues to be based on the DHS Secretary's recertification decision of February 22, 2020, which was made on the strength of the original, now-discredited FBI letter.

the original FBI letter, the allegations in the new FBI letter are false and Petitioner denies them under penalty of perjury. Decl. of Adham Hassoun ("Hassoun Decl.") ¶¶ 14–29 (Exh. 1).

Petitioner has all of the underlying source documents on which the new FBI letter appears to have been based. It has them only because those documents were disclosed in discovery in this case. Petitioner has thus been able to reverse-engineer the letter to identify the source of each of its allegations. What emerges from that analysis is that the letter is a shockingly deceitful and plainly unreliable document. The letter is based entirely on interview reports with detainees; it reflects no independent investigation beyond those interview reports. Moreover, as detailed below, the letter recites allegations that the FBI has itself already investigated and found to be baseless. It willfully misrepresents the underlying witness statements on which it is based. And it completely ignores that the government's *own proposed trial witnesses* have contradicted its core claims.

The most serious allegations in the new FBI letter is that Mr. Hassoun "was overheard by [an] individual telling a fellow detainee how to make explosives and plan attacks." Second FBI Letter at 3. Government documents show that a detainee named Hector Rivas Merino made the accusation. *See* FD-302 Report of Interview of Hector Rivas Merino (Exh. 6). But the government's own documents show that less than three weeks after Rivas Merino made the report, ICE released the detainee with whom Mr. Hassoun was supposedly speaking. *See* Order of Supervision (Exh. 7). Even more damning, an FBI report states that the agency investigated the released detainee about this specific allegation and closed the file. *See* FBI FD-302 Report at 3 (Exh. 8). Both of these facts cast enormous doubt on the allegation. Yet the FBI letter simply

asserts it is true without providing any inkling that these exculpatory facts are in the FBI's possession.[2]

Other parts of the new FBI letter reflect a similarly brazen disregard for contrary evidence. For instance, a central claim in the new FBI letter—that Petitioner supports ISIS and is recruiting for ISIS—is *explicitly contradicted* by two of the witnesses that were on the government's witness list as recently as May 29 and which the FBI letter relies on for other spurious allegations. *See* FD-302 Report of Interview of Mohammed Al-Abed at 2 (Exh. 9) ("AL ABED did not know of any attempt to radicalize or recruit other detainees by HASSOUN." "HASSOUN never discussed any extremist group."); FD-302 Report of Interview of Ahmed Abdelraouf at 2–3 (Exh. 10) ("ABDELRAOUF stated that he did not believe that HASSOUN was trying to recruit him, he did not try at all. ABDELRAOUF further stated that he did not know if HASSOUN was trying to recruit others." "ABDELRAOUF stated that he did not know of HASSOUN talking about specific terrorist talks. ABDELRAOUF further stated that HASSOUN did not talk to him about being a following of any religious group or leader."). The FBI letter ignores this contrary evidence, deceiving the reader by failing to disclose that its sources contradict each other.

The FBI letter also misrepresents the underlying witness statements, summarizing them in ways that flatly misreport the underlying interview reports. For example, the FBI letter states that "from in and about November 2017 to February 2020, three detainees confined with Hassoun separately reported to FBI Buffalo via officials at BFDF that Hassoun was attempting to recruit fellow detainees in support of ISIS." Second FBI Letter at 3. But of the three detainees

[2] In addition, as the Court noted, there is evidence that Mr. Rivas Merino was not fluent in the language in which the supposed conversation occurred. *See* ECF No. 225 at 29–30.

that fit the dates provided, two of them did not actually make this allegation and the third was plainly lying. Petitioner's careful review of all of the government's trial exhibits and other disclosures reveal the allegation that Mr. Hassoun is recruiting for ISIS is based on statements from Mohammed Hirsi, Sean Orlando Smith, and Ahmed Hamed. But the interview report of Mr. Hirsi, makes clear that it is the *interviewer*—a BFDF contract detention officer named Richley—who infers that Mr. Hirsi is "referring to ISIS/terrorist groups" and does not say that Mr. Hirsi himself ever named ISIS. *See* BFDF Intelligence Report at 2 (Exh. 11). A later sworn declaration by Mr. Hirsi makes no such allegation about ISIS. *See* Decl. of Muhamed Hirsi (Exh. 12). Similarly, an interview report with Sean Orlando Smith is the only plausible source for the allegation that Petitioner supposedly was recruiting for ISIS in February 2020. But the FBI report of his interview *never mentions ISIS* and only contains rambling and non-specific accusations that Smith "feels HASSOUN is trying to recruit." FD-302 Report of Interview of Sean Orlando Smith at 2 (Exh. 13). The government did not even move to introduce Smith's interview report as reliable hearsay, in direct violation of this Court's order. *See* ECF No. 225 at 39 ("[W]ith respect to Orlando Smith's hearsay statements, Respondent has not even attempted to satisfy the standard set by the Court for admissibility.").[3]

[3] Mr. Hamed is the only person who claims to connect Mr. Hassoun to ISIS. Though "ISIS" is not mentioned in the FBI report of the interview of Mr. Hamed, Mr. Hamed reportedly said that Mr. Hassoun "identified himself as a follower of al-Baghdadi" during an argument at BFDF. *See* HSI Report of Interview of Ahmed Hamed at 2 (Exh. 14). Mr. Hassoun has provided his own account of the argument in question under penalty of perjury. Hassoun Decl. ¶¶ 24–27. But even on its face, Mr. Hamed's statement fails to meet basic indicia of reliability. First of all, and most obviously, Mr. Hamed does not say anywhere that Mr. Hassoun was "recruiting." Moreover, Ahmed Abdelraouf, who was in the same conversation as Mr. Hamed and who was actually slated to testify at the evidentiary hearing, denied that Mr. Hassoun had said anything about being "a follower of any religious group or leader." Exh. 10 at 3. The FBI ignored all of this evidence, as well as the fact that Mr. Hamed had serious credibility issues that might call into question the veracity of his statement. Exh. 15; *see also* ECF No. 199 at 4. Petitioner would have

The new FBI letter is also literally incredible on its face. In what is surely the letter's most fantastical allegation, the FBI claims that Mr. Hassoun "attaches himself to involvement with the September 11, 2001 terrorist attacks." Second FBI Letter at 3. Mr. Hassoun of course denies the allegation. *See* Hassoun Decl. ¶ 21. The source for this allegation is Mr. Abdelraouf who told investigators that "HASSOUN told a lot of people that he was involved with 9/11." Exh. 10 at 2. That is not true. Hassoun Decl. ¶¶ 21–22.

What is true is that when Mr. Hassoun tells other detainees why he is in detention, he frequently explains that he was one of the thousands of Muslims who was swept up and arrested after the attacks of September 11, 2001. *See id*. Indeed, Mr. Hassoun alleged as much in his Amended Petition for Habeas Corpus. ECF No. 13 ¶ 26. The fact that thousands of immigrant Muslims were detained after 9/11 has been documented extensively by the Department of Justice itself. *See* DOJ Office of Inspector Gen., *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003), https://oig.justice.gov/special/0306/full.pdf. The notion that Mr. Hassoun was somehow *involved* in those attacks is fantastical and utterly uncorroborated by more than two decades of government surveillance. That the FBI letter would repeat this allegation illustrates perfectly that it is not concerned with making credible allegations, but only with repeating useful falsehoods.

The FBI letter's misrepresentation even goes so far as to mischaracterize Mr. Hassoun's criminal conviction, alleging that "Hassoun was one of the primary radicalizing influences in south Florida" from 1994 to 2001. Second FBI Letter at 1. In fact, the District Judge who presided over Mr. Hassoun's four-month criminal trial made factual findings at sentencing that

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proven Mr. Hamed's hearsay allegation false at an evidentiary hearing.

rejected many of the characterizations that the government seeks to revive now, more than a decade later. Tr. of Sentencing, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla Jan. 22, 2008) (Exh. 16).

At sentencing, 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 Mr. Hassoun was motivated by "the plight of Muslims throughout the world [which] pained and moved him" 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." *Id*. at 7:14, 18.

With respect to the criminal conduct itself, Judge Cooke explained 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. Judge Cooke squarely rejected the government's contention that Mr. Hassoun was so dangerous that he should be locked up for life. In a passage that appears almost to anticipate the government's argument for continuing to detain Mr. Hassoun now, Judge Cooke wrote:

> [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. at 8:8–16. The government sought a life sentence. Judge Cooke rejected it. In fact, she imposed a sentence that was almost 15 years lower than the *minimum* recommendation under the sentencing guidelines.

The FBI's willingness to ignore contrary evidence and repeat patently false and easily debunked allegations is as plain as it is shocking. Despite Petitioner's exposure of the prior FBI letter, the revised letter continues to cherry pick and misrepresent allegations from interviews with jailhouse informants, without apparently doing any independent investigation, in order to bolster a predetermined and false narrative. The government has proven over and over in this case that the allegations compiled by the FBI in its letters should be viewed with immense skepticism—not, as the government urges, afforded a deference bordering on credulity.

Mr. Hassoun denies the allegations against him under penalty of perjury. *See* Hassoun Decl. ¶¶ 14–29. He was fully prepared to testify under oath at the evidentiary hearing to elaborate on these denials. *Id.* ¶ 2. The government officials who have decided to keep Mr. Hassoun locked up simply have him wrong. A former fellow detainee who was incarcerated with him in federal prison has written movingly about how Mr. Hassoun was generous, peaceful, and principled, with a keen eye for injustice. *See* Declaration of Andy Stepanian (Exh. 3). But evidently those in the executive branch who control this process have decided he must not be released and no evidence or lack thereof will persuade them otherwise.

IV. The government's misconduct in concealing exculpatory evidence has continued even after this Court ordered the government to produce all such information and threatened to impose sanctions.

The government's pattern of disregarding and concealing exculpatory evidence has continued even through this week. Petitioner learned *after* the Court cancelled the evidentiary hearing that the government had failed to disclose yet another witness's explicit request for a quid pro quo in exchange for testimony. Specifically, on Monday June 22, at 9:38 pm, Respondent's counsel disclosed emails and memos documenting that as early March 24, 2020, Mr. Al Abed—one of Respondent's proposed trial witnesses, *see* ECF No. 173—had told Respondent's counsel explicitly that "[p]rior to giving a full account of what he knows, Al Abed

would like an offer from ICE/DHS." *See* Memo from Attorney John Inkeles to File at DEF21656 (Exh. 17). The documents show that again on April 15, "Al Abed . . . has indicated that he will not assist unless the government will take action regarding his removal." Email of Attorney Anthony Bianco to Numerous Recipients at DEF21658 (Exh. 17); Email from Attorney Steven Platt Transmitting These Disclosures to Petitioner (Exh. 18).

Respondent's counsel knew and failed to disclose this explicit demand for a quid pro quo when it submitted a declaration from Mr. Al Abed to the Court on April 30 in support of its motion for sanctions, arguing that Mr. Hassoun should be prohibited from ever learning the testimony of Mr. Al Abed and other government witnesses. *See* ECF No. 154, Exh. I. It knew of this quid pro quo on May 22 when it listed him as a potential trial witness. *See* ECF No. 173. And it knew that Mr. Al Abed was conditioning his testimony on immigration relief even on June 12, when Respondent's counsel purported to explain to the Court at some length that Mr. Al Abed was reluctant to testify because he was supposedly scared to do so. June 12 Tr. at 8:15–17, 9:25–10:21, ECF No. 218.

During the hearing on June 12, this Court notified Respondent's counsel that it was under Court order to disclose such documents and the Court notified counsel that it was facing potential sanctions for its failure to disclose evidence previously. June 12 Tr. at 31:4–12, ECF No. 218. The Court also ruled that Respondent would not be permitted to examine witnesses outside the presence of Petitioner. June 12 Tr. at 13:7–8, ECF No. 218. Four days later, on June 16, Respondent's counsel wrote an email reporting that Mr. Al Abed remained willing to testify but only in exchange for a quid pro quo: "[H]e would still testify if the government can provide a letter documenting his cooperation in this case." *See* Exh. 17 at DEF21644.

The late disclosure explicitly contradicts Respondent's counsel's statement on the record at the same June 12 hearing when—in response to direct questions from the Court—counsel represented that the government had produced "any additional documents that show Mr. Ramsundar or any other witness who sought benefits in exchange for testimony or has ever received such benefits at any time." June 12 Tr. at 15:12–15, ECF No. 218. That assertion to the Court was false, even though the undisclosed information was contained in emails and other documents written by Respondent's counsel, *see* Exh. 17, and counsel had been discussing Mr. Al Abed just minutes earlier, June 12 Tr. at 6:22–10:21, ECF No. 218.

The government did not disclose any of this until after it moved to cancel the evidentiary hearing and the Court granted that request. The government has offered no explanation for its failure to disclose this exculpatory evidence until after it could have been useful to Petitioner to challenge the government's case.

Not only is this conduct plainly sanctionable,[4] but more to the present point, it speaks directly to the government's *continuing* pattern of disregard for contrary evidence and the utter unreliability of its investigation and allegations. The government has continued to conceal inconvenient facts even *after* Mr. Ramsundar's lies were exposed and it was under threat of sanction. The government's effort to reset this case by issuing a new FBI letter has plainly not been accompanied by a new commitment to careful investigation or the truth itself.

In the face of this misconduct, the fact that the government has asked this Court, and apparently intends to ask one, if not two, appellate courts for a stay of Mr. Hassoun's release based fundamentally on the notion that the courts must defer to its mere allegations reflects

[4] Petitioner expects to raise this as an additional ground for sanctions during the upcoming proceedings this Court has permitted. *See* ECF No. 225 at 27; June 22 Tr. at 26:10–20, ECF No. 244.

inexcusable arrogance and misconduct. Like the government's misconduct, it also bears directly on several of the stay factors. The government should not be allowed to continue to treat the courts with such contempt.

V. Following this Court's evenhanded evidentiary and case management rulings, the government conceded that it cannot prove Petitioner's detainability even by a preponderance of the evidence.

The government has sought this stay as a gambit to prolong Mr. Hassoun's detention even though it lacks any evidence that could justify his detention. This Court ruled in December 2019 that there would be an evidentiary hearing in this case. At argument on January 17, the Court made it clear to the government that to meet its burden it was likely to have to provide the testimony of witnesses with personal knowledge. Jan. 12 Tr. at 5:17–6:7, ECF No. 218. The Court reiterated that observation in its Decision and Order of January 24. ECF No. 75 at 19. ("[T]he Court is highly skeptical that anonymous hearsay from what are essentially 'jailhouse snitches' could meet the clear and convincing evidence standard imposed on Respondent."). The government reserved its objections to the Court's procedural rulings, but never sought an interlocutory appeal.

In the months that followed, the government failed to build its case. It did not, for example, properly seek to take depositions of detainees whose testimony might not be available for trial. *See* ECF No. 225 at 33. It did not take sworn statements from most of its witnesses, including those it knew, or should have known, were removable from the United States. *Id.* It failed to conduct even a rudimentary investigation into the testimony of its star witness, Mr. Ramsundar. *Id.* at 24–25.

The evidentiary hearing was originally scheduled for April 28. On April 10, the Court granted in part Respondent's Motion to delay the hearing due to the coronavirus pandemic. ECF

No. 150. On April 30, Respondent filed a motion seeking dismissal of the petition or other sanctions on the basis of Mr. Ramsundar's false allegation that Mr. Hassoun had threatened him. ECF Nos. 154, 160.

At a status conference on May 1, the Court rescheduled the evidentiary hearing for June 24, and established pre-hearing deadlines. ECF No. 158. The final deadline to submit all witness and exhibit lists was set for May 22. *Id.* The Court set the same deadline for the submission of pre-hearing memoranda, including any arguments in support of admission of hearsay under the framework applicable to Guantanamo Bay habeas cases, as previously adopted by the Court. *Id*. Concerned that the government's key witness, Shane Ramsundar, had recently been issued a final order of removal and might not be available to testify, Petitioner asked the Court for an order providing one week's advance notice of his deportation, which the Court granted. *Id.*

On May 7, Petitioner notified Respondent that he had discovered evidence exposing Mr. Ramsundar as a fraud. ECF Nos. 190-11 (redacted), 196-11 (sealed). Petitioner moved for sanctions and to compel disclosure on May 15. *See* ECF No. 164. On May 22, while the parties' sanctions motions were pending, the parties filed their witness lists, exhibits lists, and pre-hearing legal memoranda. ECF Nos. 169–171, 173. Respondent sought to introduce the hearsay statements of several witnesses, including Hector Rivas Merino, Ahmed Hamed, Abbas Raza, and Dujon Manley. Resp.'s Pre-Hearing Memorandum, ECF No. 169. Respondent also asked the Court to hold the hearing in-person on June 24, or else to delay the hearing for one month. *Id.* Petitioner, in turn, submitted his witness and exhibit lists, did not seek the introduction of any hearsay not otherwise admissible under the federal rules, and asked the Court to hold the hearing on June 24 by video conference if necessary. *See* ECF No. 171. On May 29, the parties filed

supplemental exhibit lists, ECF Nos. 179, 181, and simultaneous responses to one another's pre-hearing briefs. ECF Nos. 183, 199.

On June 11, the day before the final pretrial conference, the government filed a notice attaching the new FBI letter. *See* ECF No. 207. On the day of the final pretrial conference, the government filed a motion to add two additional witnesses, despite the fact that the deadline had passed on May 22, despite the fact that it had not previously identified those witnesses to Petitioner, and even though it had been in possession of those witnesses' statements as far back as February. ECF No. 209. Respondent sought to introduce one of those witness's statements only via hearsay, but made no motion to admit that hearsay pursuant to this Court's rulings. *Id.*

At the pretrial conference on June 12, the Court ruled from the bench that Respondent had not established the reliability of two of its proposed hearsay witnesses, Abbas Raza, and Hector Rivas Merino. June 12 Tr. at 38:12–13, ECF No. 218. Three days later, on June 15, the Court issued a text order finding that it would allow the government to use the proposed hearsay statements of Ahmed Hamed. ECF No. 216. At the same time, the Court denied Respondent's late motion to add two witnesses. *Id*.[5]

On June 18, the Court issued its Decision and Order explaining its rulings on outstanding pretrial issues. The Court rejected Petitioner's argument that he enjoyed a Fifth Amendment right to opt not to testify; granted Petitioner's motion to have Petitioner testify last, after Respondent's other witnesses; rejected Petitioner's request to be permitted to conduct a direct examination of

[5] Respondent's brief incorrectly states that these orders were issued on June 18. ECF No. 242-1 at 5. In fact, the Court issued the orders nearly a week earlier, specifically "[t]o aid the parties in preparing for the evidentiary hearing," ECF No. 216; June 12 Tr. at 38:17–18, 39:9–10, ECF No. 218. The Court's decision on June 18 merely set forth the reasons for its prior holdings. ECF Nos. 216, 225.

Petitioner before Respondent's cross; explained its reasons for rejecting the proposed hearsay of Abbas Raza and Hector Rivas Merino while granting that of Ahmed Hamed; and explained why it had refused to permit the addition of Respondent's late witnesses, Vasiliy Ranchinskiy and Sean Orlando Smith. *See* Decision and Order, ECF No. 225.

The same day, without warning or advance notice, Respondent moved to cancel the evidentiary hearing, which was scheduled to begin six days later. In its motion, Respondent conceded that it could not meet its burden on the clear and convincing evidence standard.[6] Respondent's counsel confirmed the concession at an emergency telephone conference the following day. June 19 Tr. at 6:6–7, ECF No. 241. At a telephonic conference on Monday, June 22, Respondent's counsel further conceded that the government could not have met its burden at an evidentiary hearing even under a preponderance-of-the-evidence standard. June 22 Tr. at 9:19–21, ECF No. 244. During the June 22 conference, in light of Respondent's concession that it lacked the authority to detain Petitioner under the Court's rulings, Petitioner's counsel confirmed that an evidentiary hearing was unnecessary, but indicated to the Court that Petitioner would seek to submit documentary evidence in opposition to any motion to stay the Court's anticipated order of release, particularly with respect to the government's likely unfounded and false assertions about Petitioner's supposed dangerousness, relevant to the irreparable harm factor of the government's anticipated motion for a stay. June 22 Tr. at 17:18–21, ECF No. 244.

[6] Respondent contends that this Court's evidentiary and case management rulings are to blame for its failure to carry its burden. But if Respondent had believed that witnesses like Ranchinskiy and Smith were truly essential to its case, it would have noticed them months earlier, when it conducted their interviews. Indeed, the government has not indicated an intent to appeal the Court's exclusion of either Ranchinskiy or Smith.

The following day, pursuant to Court order, the parties submitted agreed upon conditions of release. *See* Joint Status Report, ECF No. 240. Petitioner agreed to every one of Respondent's proposed conditions, accepting conditions even more stringent than those Respondent had described to the Court during the prior day's hearing. *Compare* June 22 Tr. at 11:15–22, ECF No. 244 (Respondent's counsel indicating that Mr. Hassoun would be able to walk without permission outside his sister's home with certain restrictions), *with* ECF No. 240 (providing no radius whatsoever within which Mr. Hassoun can walk without permission). Mr. Hassoun's sister is ready and waiting to welcome him back home, where she lives with her son, daughter-in-law, and grandson. *See* Declaration of Bothaina Hassoun ¶ 11 (Exh. 2).

Nevertheless, the government now seeks a stay of any order of release on the chilling theory that it may detain a person indefinitely even though it admits that it does not have reliable evidence to prove that he poses a danger under any plausible standard of review.

ARGUMENT

The government cannot come close to meeting the high standard required to subvert the ordinary judicial process and impose a stay of Petitioner's immediate release pending appeal. It comes to this Court invoking the Court's "extraordinary injunctive powers," and it therefore faces a very high burden. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). An application for stay pending appeal is evaluated on a multi-factor test akin (though not identical) to a motion for preliminary injunction. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.* (*WMATC*), 559 F.2d 841 (D.C. Cir. 1977); *Comm. on Judiciary v. McGahn*, 407 F. Supp. 3d 35, 38 (D.D.C. 2019). As the Supreme Court has explained, a stay is an "intrusion into the ordinary processes of administration and judicial

review[.]" *Nken*, 556 U.S. at 427 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)). A court's decision to grant a stay pending appeal requires more than a speedy evaluation of the merits of an appellant's legal claim, but is based in equity, and "the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* at 433 (quotation marks omitted).[7]

There are four "traditional" factors that govern a request for a stay: "(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 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see Maldonado-Padilla*, 651 F.3d at 328; *Cuomo*, 772 F.2d at 974; *McGahn*, 407 F. Supp. 3d at 38. Both the Second and D.C. Circuits use the so-called "sliding-scale," or balancing, approach to applications for stays pending appeal (and preliminary injunctions). *See, e.g.*, *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006); *Steele v. United States*, 287 F. Supp. 3d 1, 3 (D.D.C. 2017); *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 16-CV-8507 (AJN), 2020 WL 359907, at *1 (S.D.N.Y. Jan. 21, 2020); *Strougo v. Barclays PLC*, 194 F. Supp. 3d 230, 233 (S.D.N.Y. 2016); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring, joined by Henderson, J.) (preliminary injunction). Under this approach, a somewhat more relaxed version of the first factor applies where a party can show that *all three* of the other factors "tip[] *decidedly* in their favor." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir.) (emphasis

[7] The government has indicated that may take not one but two appeals from this Court's order of release—and, of course, thereby attempt to take two bites at a stay pending appeal of that order. *See* ECF No. 242 at 1.

added), *cert. granted on other grounds*, 140 S. Ct. 660 (2019); *see WMATC*, 559 F.2d at 843–44 ("[A] court, when confronted with a case in which the other three factors *strongly* favor interim relief[,] may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." (emphasis added)).

Under any approach, to obtain a stay pending appeal, the government faces a very high bar. *See Nken*, 556 U.S. at 437 (Kennedy, J., concurring, joined by Scalia, J.) ("It seems appropriate to underscore that in most cases the debate about which standard should apply will have little practical effect provided the court considering the stay application adheres to the demanding standard set forth."). And in a habeas case, there is a "preference for release" of a victorious petitioner pending appeal. *Hilton*, 481 U.S. at 777–78; *accord* Fed. R. App. P. 23(c).

The government is not likely to succeed on the merits of its claims on appeal. First, as the Court twice held in careful and reasoned opinions, due process demands that the executive justify Petitioner's indefinite detention by, at a minimum, clear and convincing evidence. *See infra* § I.A. Second, the Court did not abuse its discretion in excluding certain hearsay statements from government informants as unreliable—and even if it had, any error was harmless given the government's abandonment of its case. *See infra* § I.B. And third, the Court correctly held that 8 C.F.R. § 241.14(d) was invalid. *See infra* § I.C.

Even if the government cannot show a likelihood of success, but has shown that one or another of these issues constitutes a serious or substantial legal question, it cannot demonstrate that *any* of the other prongs of the relevant inquiry—irreparable harm, harm to Petitioner, and the public interest—tip in its favor, let alone *decisively* in its favor. Not only, but particularly, given the severe conditions of supervised release (including near-total surveillance, location tracking, and home confinement) to which Petitioner has agreed, Petitioner's release will cause no

irreparable harm to the government, and the government has chosen not to present any evidence to the contrary. Indeed, Petitioner has accepted every single one of the conditions of release that the government proposed. Petitioner's liberty interest is more than substantial as a matter of law, particularly so in the context of this case. And, finally, the public interest lies in the effectiveness of the habeas remedy in extraordinary circumstances like these.

I. The government is not likely to succeed on the merits of its appeal.

The government is unable to meet the high bar of showing that it is likely to succeed on the merits of its appeal of the Court's grant of Petitioner's habeas petition. Here, the government raises three arguments that the Court legally erred.[8] It is not likely to succeed on any of them on appeal—both because of the merits of those arguments, and because the collapse of its case has exposed that any error would not have made any difference to the outcome.

The government represents that, under likelihood of success, it need not demonstrate it will probably win the issue on appeal. *See* ECF No. 242-1 at 6–7. Instead, it says, all it must show on that factor is that it has a "substantial case on the merits." *Id.* (quoting *Hilton*, 481 U.S. at 778). What the government omits, however, is what is set out above: that the "substantial case" (or "serious issue") standard applies only where a party can show it "decidedly" prevails on the other three factors. *Trump*, 943 F.3d at 637; *see WMATC*, 559 F.2d at 843.[9] In any event,

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[8] The government sets out four arguments, though two—that the Court "erred in ordering an evidentiary hearing at all," ECF No. 242-1 at 16, and that the Court "erred in its rulings on the placement of the burden of proof and the standard of proof," *id.* at 18—are one and the same.

[9] This type of omission has been something of a pattern in this litigation. *See* ECF No. 55 at 10–11 ("Some quick research by Respondent's counsel would have revealed that there are cases . . . [that] do not support Respondent's position. . . . To say the least, it is disappointing that Respondent's counsel, after consulting with other counsel including 'prosecutors and appellate attorneys' in this District's United States Attorney's Office, submitted a legal memorandum to the Court that failed to acknowledge contrary case law that did not support its position."); ECF No. 225 at 26 ("Unfortunately, this is not the first time Respondent has failed to maintain

the government cannot satisfy this factor by showing a "mere possibility" that it will prevail on appeal, for that is "too lenient" a standard. *Nken*, 556 U.S. at 434–35 (cleaned up) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2009)).

Beyond ignoring that critical element of the sliding-scale test for a stay, the government cites *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002), to suggest that "likelihood of success" "means . . . 'something less than fifty percent'" in its own press for a stay. ECF No. 242-1 at 7. But *Mohammed* permitted such a low bar on the first stay factor because of the severity of the injury the *Petitioner* would have suffered—removal from the country—had a stay not been granted: "In the context of a stay of removal of an alien pending appeal of an adverse habeas decision, the gravity of the injury to the alien if a stay is denied, compared to the lesser 'injury' to the Government if one alien is permitted to remain while an appeal is decided, suggests that the degree of likelihood of success on appeal need not be set too high." 309 F.3d at 102. In other words, that case applied a sliding-scale approach, and weighed a non-citizen's interest in avoiding irreparable injury of removal while his appeal was still pending—in the event a higher court later deemed it unlawful—as so important that such a person could win a stay even with a fair (rather than serious) chance at winning their legal issue. To use such a case in the government's own favor, when the government is asking the courts to deprive Petitioner of his liberty even after conceding its case, is a dark irony. More likely, it is just another mistake.

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accuracy in their representations to the Court. Again, it is not clear whether this is the result of carelessness or intentional misconduct—but either way, it reflects poorly on counsel for Respondent.").

That the government can be so careless with a legal standard that will determine a human being's freedom *after he has already won his release* in this Court sheds light on its failures to attend to so much else in the prosecution of his case.

And relying on *Hilton*, the government suggests that a different calculus applies to "habeas release[s]." ECF No. 242-1 at 6. But *Hilton*, cited repeatedly in *Nken*, recited the familiar and "'traditional'" four-part test. *Nken*, 556 U.S. at 433 (quoting *Hilton*, 481 U.S. at 777)). And besides, *Hilton* involved a very different kind of habeas release than the one in this case. The "successful habeas petitioner" in *Hilton* was not someone like Petitioner, detained merely on executive say-so and seeking release because there is no factual predicate for his detention in the first place. *Hilton*, 481 U.S. at 778. He was, instead, a "state habeas petitioner [who] ha[d] been adjudged guilty beyond a reasonable doubt by a judge or jury, and [whose] adjudication of guilt ha[d] been upheld by the appellate courts of the State." *Id.* at 779. The Court explicitly contrasted that scenario from someone, for example, in pretrial detention, whose guilt had never been passed upon. *Id.* (discussing *United States v. Salerno*, 481 U.S. 739 (1987)). Petitioner, of course, should be in an even better position than the pretrial detainee in *Salerno*, because rather than facing the prospect of criminal process, Petitioner has now won his release when the government conceded.

A. The Court correctly held that the government bears the burden of proving Petitioner's "dangerousness to national security" by, at a minimum, "clear and convincing evidence."

As it did more than a full year ago, the government argues that the government has the power to consign Mr. Hassoun to detention for the rest of his life without any decision by a neutral decisionmaker and without meeting any standard of proof. *See* ECF No. 242-1 at 16–21.

The Court was right to reject this argument before, and it should reject it again now. Indeed, the spectacular collapse of the government's case after it was forced to expose its weakness to Petitioner through discovery demonstrates exactly why the government's argument is so dangerous. Without a fair process, Petitioner today would remain imprisoned on evidence

the government has since withdrawn, evidence so flimsy that the government did not even dare present it to this Court at all, and evidence so untrue that the government admittedly would never have permitted Petitioner to test it at an evidentiary hearing. The Constitution, and the habeas statute, do not permit that kind of abuse of executive authority, and the Court's rulings ensured that such was prevented in this case.

First, it is essential (and should be uncontroversial) that, in this habeas proceeding, the government bears the burden of proof. Indeed, in every instance in which the government has sought to confine an individual in civil detention, 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); *Salerno*, 481 U.S. at 750; *Addington v. Texas*, 441 U.S. 418, 431 (1979). Quite simply, when the government seeks to detain an individual indefinitely on the basis of an executive finding of "dangerousness," the heavy weight of the liberty interest at stake requires that the government bear the burden of proving the facts justifying the detention. *See, e.g.*, *Foucha*, 504 U.S. at 86.

Breathtakingly, after all that has happened in this case, the government continues to argue that the Court erred by not accepting the first FBI letter—the one the government withdrew after Petitioner's independent investigation (rather than Court-ordered discovery) yielded a document that fatally undermined it, and forced its retraction—as "conclusive[] justifi[cation of] Petitioner' detention" in December 2019. ECF No. 242-1 at 16. This must be among the most extreme and unapologetic arguments for unreviewable executive power the government has ever put to paper. But as the Court correctly held, "in enacting § 1226a, Congress affirmatively chose to provide for judicial review of the merits of determinations made under § 1226a(a)(6)." ECF No. 75 at 13 (citing 8 U.S.C. § 1226a(b)(l)). Good thing, too, as it turned out. And despite the government's

renewed efforts to dub this case one involving an "administrative immigration decision" governed by a lower standard, ECF No. 242-1 at 16, the Court's prior rejection of that attempt (as well as the notion that the talisman of "national security" undermines the Court's ability to second-guess the executive) was precisely on point. *See* ECF No. 75 at 13. Indeed, just yesterday, the Supreme Court effectively rejected the government's effort here to collapse core habeas challenges seeking release from executive detention, like this case, and review of immigration removal decisions. *See Thuraissigiam v. DHS*, No. 19-161, 2020 WL 3454809, at *7 (U.S. June 25, 2020).

Second, the government must prove that a detainee satisfies the requirements of the statute by, at a minimum, clear and convincing evidence. ECF No. 75 at 5–13.[10] Seven months ago, the Court concluded—based on the time-tested framework articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and its application in *Addington*, 441 U.S. at 431—that "the failure to impose a clear and convincing evidence standard in 8 C.F.R. § 241.14(d) violates the requirements of procedural due process," ECF No. 55 at 24; *see infra* § I.C, and a month later the Court extended that logic to 8 U.S.C. § 1226a as well. *See* ECF No. 75 at 10–11. As the Court noted, *Addington* was based on a consideration of "the difficulty inherent in proving dangerousness" as well as the fact that "the preponderance standard . . . increases the risk of inappropriate commitment and fails to impress upon the factfinder the importance of the decision to deprive an individual of his or her liberty." ECF No. 55 at 24 (citing *Addington*, 441 U.S. at 426–27, 429); *see* ECF No. 75 at 10–11.[11]

[10] Petitioner reserves his argument that the most appropriate standard of proof in the context of indefinite detention based on an individual's "danger to national security" is the reasonable-doubt standard. *See* ECF No. 60 at 8–11.

[11] The Court was also correct to reject the government's argument that *Jones v. United States*,

Addington is consistent with the Supreme Court's repeated 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); *see also Woodby v. INS*, 385 U.S. 276, 285–86 (1966); *Chaunt v. United States*, 364 U.S. 350, 353 (1960). 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 (citation omitted). 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; *see* ECF No. 75 at 12 ("Here, as in the pretrial detention context, the purported rationale for the detention is not punitive but preventative, and so it is appropriate to impose a high standard of proof on Respondent to justify continuing to hold Petitioner.").[12]

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463 U.S. 354 (1983), is more apposite to this case than *Addington* and counsels the imposition of a preponderance standard. *See* ECF No. 75 at 11 (explaining Petitioner's detention as a "danger to national security" is unlike detention after a criminal acquittal based on an affirmative defense of insanity, as in *Jones*, because absent any "affirmative action on the part of the detainee, . . . there is no diminishment of the risk of erroneous deprivation" under *Mathews*).

[12] Similarly, in immigration cases, when the government seeks to hold noncitizens for extended periods during removal proceedings, due process requires that the government meet a clear and convincing evidence standard to prove that prolonged detention is necessary, as district courts in

The government argues that because Petitioner is a non-citizen of the United States, the Court should have applied the "burden-shifting framework" from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), under which the government need only put forth credible evidence to shift the burden back to the detainee. *See* ECF No. 242-1 at 19. But as this Court previously explained, that status does not "impact[] the *Mathews* calculus sufficiently to warrant a lesser level of process than that afforded to Hamdi." ECF No. 75 at 8–9. "In particular, Petitioner's non-citizen status does not change the significance of his liberty interest, the risk of erroneous deprivation, or the burden to the government of providing additional process." *Id.* at 9.

Under the government's absurd position, Petitioner—a longtime resident of the United States who is protected by the Due Process Clause—would have significantly fewer rights to challenge his indefinite detention than wartime detainees at Guantánamo who are captured on a foreign battlefield and who have not previously been found to be protected by due process. *See, e.g.*, *Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010) (government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful). The D.C.

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this Circuit have consistently recognized. *See, e.g.*, *Singh v. Whitaker*, 362 F. Supp. 3d 93, 105 (W.D.N.Y. 2019) ("[T]he government may not continue to detain Singh unless no later than fourteen days from the date of this decision, it demonstrates by clear and convincing evidence before a neutral decision maker that he is a danger to the safety of other persons or of property or is not likely to appear for his removal."); *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421, at *9 (W.D.N.Y. Nov. 2, 2018) (holding that immigration detention statute was unconstitutional as applied to petitioner on Procedural Due Process grounds in part because it did "not require the government to demonstrate by clear and convincing evidence that his detention necessarily serves a compelling regulatory purpose," and collecting cases); *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794, at *15 (S.D.N.Y. Dec. 27, 2018) (explaining that "the overwhelming consensus of judges in this District . . . is that once an alien's immigration detention has become unreasonably prolonged, he or she is entitled to a bond hearing at which the government bears the burden to demonstrate dangerousness or risk of flight by clear and convincing evidence" (quotation marks omitted)).

Circuit has applied these protections in literally hundreds of Guantánamo habeas cases, including many that, unlike this case, involve classified information and evidence obtained in a foreign war zone. They are the very least that should apply here, where the government does not face the same obstacles to obtaining, preserving, and presenting evidence. *See* ECF No. 75 at 10.

In any event, the government has conceded that it could not satisfy *either* the clear and convincing evidence standard in this case *or* the preponderance standard. *See* June 22 Tr. at 9:4–21 (government counsel stating that he would "definitely agree" that the government could not meet a preponderance standard in this case). Even under the *Hamdi* framework, the government produced no evidence to rebut. And Petitioner submits that even with the burden, and as the above account shows, *see supra* Procedural History & Facts, he would have prevailed had the government went forward with the evidentiary hearing. The notion that this issue likely merits reversal is unsound at best.

B. The Court did not abuse its discretion in excluding hearsay as unreliable—and even if it did, any error was harmless.

If the government appeals the Court's exclusion of hearsay evidence statements made by Hector Rivas Merino and Abbas Raza, *see* ECF No. 242-1 at 20–21, it will fail. The Court has wide latitude to admit or exclude evidence; indeed, with rare exceptions, a district court's evidentiary rulings are reviewed for abuse of discretion. *See Kapche v. Holder*, 677 F.3d 454, 468 (D.C. Cir. 2012); *Al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010); *Atl. Specialty Ins. Co. v. Coastal Envtl. Grp. Inc.*, 945 F.3d 53, 63 n.12 (2d Cir. 2019). The abuse-of-discretion bar is high. For instance, the D.C. Circuit has held that a party challenging a district court's evidentiary decision must show that the decision was "clearly unreasonable, arbitrary, or fanciful." *Kapche*, 677 F.3d at 468 (quotation marks omitted); *see also United States v. Litvak*,

889 F.3d 56, 67 (2d Cir. 2018) (appellate court "will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous").[13]

There is not the slightest chance of the government demonstrating an abuse of discretion here—and in its brief, it doesn't even try. The government does not, for instance, address the Court's extensive analysis of the admissibility of Rivas Merino's and Raza's proffered hearsay. *See* ECF No. 225 at 28–33. Much less does it identify where, precisely, it believes the Court's analyses of each declarant's hearsay went awry. Instead, the government raises two general complaints: first, that the Court did not "account adequately" for the government's efforts to obtain Rivas Merino's and Raza's live testimony; second, that the Court did not "soundly account for the high degree to which former detainees were personally familiar with Petitioner[.]" ECF No. 242-1 at 21.

These gripes are meritless. As an initial matter, it is the government's fault—not the Court's—that it failed to take even a sworn statement, let alone a deposition, of these witnesses before it chose to release them from Respondent's custody. That decision was entirely in the

[13] A district court may also abuse its discretion when it rules based on "an erroneous view of the law." *Atl. Specialty Ins. Co.*, 945 F.3d at 63 n.12; *Oceana, Inc. v. Ross*, 920 F.3d 855, 864 (D.C. Cir. 2019). The government does not argue that the Court based its challenged evidentiary rulings on an erroneous view of the law. ECF No. 242-1 at 21. Nor can it. As the government urged, ECF No. 61 at 9, the Court permitted the parties to seek the introduction of hearsay evidence that would have been inadmissible under the Federal Rules. *See* ECF No. 225 at 27; *see also* ECF No. 75 at 17. In evaluating the admissibility of such evidence, the Court relied generally on D.C. Circuit cases involving habeas challenges brought by enemy combatants subject to military detention in Guantánamo Bay. *See* ECF No. 225 at 27 (citing *Al-Bihani*, 590 F.3d at 879, and *Barhoumi*, 609 F.3d at 422); *see also* ECF No. 75 at 16–17 (discussing *Bostan v. Obama*, 662 F. Supp. 2d 1, 3 (D.D.C. 2009)). The standards applicable in that context are, at minimum, the standards appropriate here. In other words, Mr. Hassoun is entitled to at least those evidentiary protections afforded to enemy combatants captured on the battlefield and detained by the military outside the sovereign United States and under the laws of war. No appellate court will hold otherwise.

government's control, and the witnesses were released well after the government knew that it would be relying on their statements to keep Petitioner detained in the face of his habeas corpus petition. The government has only itself to blame for failing to preserve testimony of witnesses who were once in its physical custody. *See* 28 U.S.C. § 2246 (permitting evidence to "be taken orally or by deposition, or, in the discretion of the judge, by affidavit" in habeas cases).

Moreover, even a cursory review of this Court's rulings on Rivas Merino's and Raza's proffered hearsay, ECF No. 225 at 28–33, makes it obvious that the Court carefully considered the indicia of reliability associated with each declarant's statements—including evidence that raised serious concerns as to each declarant's credibility—before concluding that the statements were inadmissible. *See id.* at 30, 32. The Court noted that:

- Rivas Merino's statements lacked corroborating evidence. ECF No. 225 at 29 (citing *Al Harbi v. Obama*, No. CIV.A. 05-02479(HHK), 2010 WL 2398883, at *10 (D.D.C. May 13, 2010)).

- Rivas Merino's statements purportedly conveyed his memory of a conversation he had overheard between two Arab speakers—but the evidence indicated that Rivas Merino was not fluent in Arabic. *Id.* at 29–30 (citing *Sulayman v. Obama*, 729 F. Supp. 2d 26, 38 (D.D.C. 2010)).

- Rivas Merino was offered a benefit in exchange for his testimony in December 2018, "calling into to question whether his statements in January 2019 were influenced by his desire for immigration relief." *Id.* at 30.

- Raza's statements were memorialized only in a detention officer's informal email summary, rather than an investigative report, and the statements thus memorialized raised significant doubts as to whether the officer had accurately taken Raza's meaning. *Id.* at 32; *id.* at 32 n.4.

- Raza's statement lacked corroborating evidence. *Id.* at 32.

- The evidence indicated that Raza had a "history of serial misrepresentations to governmental authorities." *Id.* at 32.

- Based on the government's own email correspondence, the government appeared to have "understood that Raza was seeking some kind of benefit in return for providing statements against Petitioner." *Id.* at 33.

- At minimum, the government could have, and should have, obtained sworn statements from both declarants if it intended to rely on them to prove Petitioner's dangerousness. *Id.* at 30, 33.

The government appears to disagree with how the Court weighed these indicia. ECF No. 242-1 at 21. That is, of course, the government's prerogative. But to prevail on appeal, it must do more than disagree: it must identify errors in the Court's analysis so egregious as to constitute an abuse of the Court's discretion. *See United States v. Fonseca*, 435 F.3d 369, 377 (D.C. Cir. 2006) ("Where, as here, two different evidentiary rulings would be reasonable, the standard leaves the choice to the discretion of the trial judge."). It cannot.

It bears emphasis that even if the government could establish that the Court had abused its discretion, its appeal would fail because it cannot establish that the exclusion of Rivas Merino's and Raza's hearsay statements affected its "substantial rights." Fed. R. Civ. P. 61; *Lane v. District of Columbia*, 887 F.3d 480, 485 (D.C. Cir. 2018); *Atl. Specialty Ins. Co.*, 945 F.3d at 63 n.12. The government does not so much as assert that the exclusion of Rivas Merino's and Raza's hearsay affected the outcome of these proceedings. Nor can it reasonably do so, for at least two reasons. First, the problems of reliability affecting both declarants' hearsay statements would have rendered the statements' probative value at the evidentiary hearing marginal at best, even if the Court had not excluded them as a gatekeeping matter. *See* ECF No. 225 at 31 (Raza's "statements are insufficiently reliable to be of any probative value"); *id.* at 29 ("Rivas Merino's statements are insufficiently reliable to be given probative weight in this proceeding").[14]

[14] Though the government appears ready to challenge this Court's ruling to exclude Mr. Raza hearsay statements, Petitioner does not believe that Mr. Raza's statements form the basis of any of the allegations in the new FBI letter based on the dates that various events allegedly occurred and the fact that the FBI itself never conducted an interview of Mr. Raza. The government surely does not intend to argue that this Court erred in giving no weight to hearsay statements that the

Second, and more fundamentally, the government did not attempt to satisfy its burden in the first place. In fact, the government informed the Court that it would not put on evidence even if the Court required the parties to move forward with the hearing. June 22 Tr. at 9, ECF No. 244. Given its repudiation of the Court's factfinding process, the government's intent to appeal the Court's evidentiary rulings is, quite frankly, bizarre. To prevail on appeal, the government would need to demonstrate that the loss of a small number of hearsay statements, which the Court excluded largely on the basis of their dubious reliability, influenced or tainted the outcome of an evidentiary hearing that never happened because the government refused to participate in it—but in which, had the government participated, the Court would have played the role of factfinder. The convolutedness of this position would be comical if the United States had not adopted it to justify a man's imprisonment.[15]

C. The Court was correct to invalidate 8 C.F.R. § 241.14(d).

The government argues that Petitioner's detention is authorized by 8 C.F.R. § 241.14(d), which was promulgated pursuant to 8 U.S.C. § 1231(a)(6). ECF No. 242-1 at 8–16. In December, this Court correctly rejected this argument, and declared § 241.14(d) "a legal nullity that cannot authorize the ongoing, potentially indefinite detention of the Petitioner." ECF No. 55 at 25. The government does not even come close to establishing a likelihood of success on

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FBI itself apparently decided not to rely on.

[15] It is worth noting that the government does not mention this Court's decision declining to allow Respondent to add two new, previously undisclosed witnesses after the deadline. ECF No. 225 at 39–40. It thus appears to concede that those two witnesses were not central to its case and are not relevant to this motion to stay. This only highlights the remarkably unpersuasive notion that the exclusion of patently unreliable hearsay statements of Rivas and Raza were somehow the linchpin of its case. Respondent's decision to concede the case and seek a stay is, very transparently, a gambit to try to keep Petitioner detained on a stay pending appeal without evidence.

appeal. The government's argument fails for two reasons: first, the Supreme Court has authoritatively construed § 1231(a)(6) not to authorize the potentially indefinite detention of any person where removal is not reasonably foreseeable; and second, even if these authoritative constructions of § 1231(a)(6) did not render Petitioner's detention ultra vires, § 241.14(d) cannot be construed to authorize indefinite detention because indefinite detention under the regulation would violate procedural due process or, at minimum, raise serious constitutional problems.[16]

First, as this Court found, Supreme Court precedent forecloses the agency's interpretation of § 1231(a)(6). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court rejected the government's argument that 8 U.S.C. § 1231(a)(6) set no limit on the length of time the government could detain a non-citizen after the individual had been ordered removed from the United States. *Id.* at 689. In construing § 1231(a)(6), the Court applied the cannon 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.* The *Zadvydas* Court found that a statute authorizing indefinite detention of a previously admitted non-citizen would raise a serious constitutional problem, and further found "nothing" in the text of § 1231(a)(6) evincing the requisite "clearly demonstrate[d] congressional intent to authorize indefinite, perhaps permanent, detention." *Id.* at 699. Thus, the Court concluded, "once removal is no longer reasonably foreseeable, detention continued detention is no longer authorized by statute." *Id.*

Less than four years later, in *Clark v. Martinez*, 543 U.S. 371 (2005), "the Supreme Court unequivocally foreclosed any reading of § 1231(a)(6) that differentiated between the classes of

[16] Petitioner maintains that the regulation also violates substantive due process by purporting to authorize indefinite detention based solely on future "dangerousness." ECF No. 14 at 16–24; ECF No. 25 at 6–10.

aliens covered thereby." ECF No. 55 at 17. "In particular, the *Clark* Court rejected the argument that § 1231(a)(6) could be read as having 'a different meaning' when a particular class of aliens was involved." *Id.* (quoting *Clark*, 543 U.S. at 380). As Justice Scalia explained for the *Clark* Court, "to sanction indefinite detention [under § 1231(a)(6)] in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 U.S. at 386. It would, Justice Scalia said, "be to invent a statute rather than interpret one." *Id.* at 378. This Court thus concluded that "[i]n the face of this clear language by the Supreme Court, Respondent's contention that *Zadvydas* and *Clark* can be reconciled with a reading of § 1231(a)(6) that authorizes indefinite detention for any alien that falls within its provisions lacks merit." ECF No. 55 at 17.

As this Court further noted, ECF No. 55 at 14, the Fifth and Ninth Circuits have both rejected the government's argument that it can indefinitely detain even specially dangerous non-citizens under § 241.14. *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*." (emphasis added)); *Tuan Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004) (§ 1231(a)(6) cannot "properly be read to . . . allow[ ] the indefinite detention of dangerous resident aliens"). The Tenth Circuit too declined to adopt the government's view that the Supreme Court construed § 1231(a)(6) to allow for the indefinite detention of certain non-citizens. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (acknowledging "the Supreme Court's contrary construction of the statute in *Zadvydas* and

[*Clark v.*] *Martinez*").[17] The Tenth Circuit held that although the agency's interpretation of § 1231(a)(6) was contrary to *Zadvydas* and *Clark*, it was nevertheless owed deference under *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), thus displacing the Supreme Court's authoritative construction of the statute—an argument the government does not make now and declined to affirmatively assert before, Nov. 22 Tr. at 48–49, ECF No. 56, and, in any event, would not alter the result here because of critical differences in the subsection of the regulation at issue. As this Court held, § 241.14(d) is entirely devoid of the "robust procedural protections" contained in § 241.14(f), and therefore cannot be a permissible construction of § 1231(a)(6), even if § 241.14(f) is. ECF No. 55 at 18–19; *id.* at 25.[18]

The government nevertheless seizes on a line of dicta from *Zadvydas* addressing "terrorism or other special circumstances," *Clark*, 543 U.S. at 696, to argue that the Court left open the possibility that the same statute, § 1231(a)(6), might authorize indefinite detention

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[17] *Tran*, *Tuan Thai*, and *Hernandez-Carrera* each addressed another subsection of § 241.14—namely § 241.14(f), which permits potentially indefinite detention of "aliens determined to be specially dangerous." *See* ECF No. 55 at 13. But, if anything, the argument that § 241.14(d) is *ultra vires* is even stronger, since Congress specially enacted legislation to address non-citizens covered by alleged threats to national security, and the Supreme Court expressly stated that such legislation was necessary in order to indefinitely detain such individuals. *See Clark*, 543 U.S. at 386 n.8.

[18] *Hernandez-Carrera* is also wrong on its own terms because *Chevron* deference is unwarranted when, as here, an agency interpretation conflicts with a previous judicial interpretation reached through constitutional avoidance. *See, e.g.*, *Blake v. Carbone*, 489 F.3d 88, 100 (2d. Cir. 2007) (declining to afford agency interpretation *Chevron* deference because it conflicted with the court's previous interpretation reached through constitutional avoidance): *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 447 (5th Cir. 2019) ("[A] judicial interpretation should prevail over a latter conflicting agency interpretation if the 'court, employing traditional tools of statutory construction, ascertain[ed] that Congress had an intention on the precise question at issue." (citation omitted)); *see also United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) (plurality op.).

through a regulation aimed at "a certain narrower set of persons if the danger their release poses is of a particularly serious nature." ECF No. 242-1 at 10. But that dicta was not a commentary on the *actual authority granted by* § 1231(a)(6); instead, the Court was analyzing whether the statute raised serious constitutional problems concerning *Congress's* power to authorize indefinite detention at all, and what *Congress* might potentially authorize in subsequent legislation.

Clark makes this clear. There, the Court stated that *Zadydas* required Congress to address the dicta's concerns through new legislation. 543 U.S. at 386 n.8; *see also id.* at 386 ("[If t]he government fears the security of our borders will be compromised . . . Congress can attend to it."). And in fact, as *Clark* observed, Congress "react[ed] to *Zadvydas*" by enacting legislation granting the agency authority to do what § 1231(a)(6) does not: to detain indefinitely non-citizens who cannot be removed from the country because they allegedly pose a threat to the national security. *Id.* at 386 n.8 (citing 8 U.S.C. § 1226a(a)). In short, any authority to detain indefinitely cannot derive from § 1231(a)(6). *See Clark*, 543 U.S. at 387 (O'Connor, J., concurring) (government must rely "on other statutory means for detaining aliens whose removal is not foreseeable and whose presence poses security risks"). This authority can derive exclusively, if at all, from the PATRIOT Act, the very statute the government itself has invoked in this litigation as a basis to detain.

Second, even if *Zadvydas* and *Clark* did not render Petitioner's detention ultra vires, § 241.14(d) cannot be construed to authorize indefinite detention because indefinite detention under the regulation would violate procedural due process or, at minimum, raise serious constitutional problems such that it should be construed not to authorize indefinite detention for any category of non-citizens it covers. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001)

(rejecting agency interpretation of a statute that would raise serious constitutional problem); *Edward J. DiBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–78 (1988) (same). This Court thus correctly concluded that § 241.14(d) is not a permissible interpretation of § 1231(a)(6) due to the serious procedural due process problems it presents, rendering it "a legal nullity that cannot authorize the ongoing, potentially indefinite detention of Petitioner." ECF No. 55 at 25.[19]

As this Court explained, Supreme Court precedent clearly establishes that "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." ECF No. 55 at 20 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). Courts determine the process due by considering: (1) the importance of the individual interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *See Mathews*, 424 U.S. at 335; ECF No. 55 at 20. As this Court found in December—and as the subsequent course of this litigation has made clear as day—§ 241.14(d)

[19] This Court properly rejected the government's argument that Petitioner lacks standing to challenge the regulation's procedures because he declined to participate in the offered interview with his accusers and jailors for two reasons. ECF 55 at 20 n.7. First, a litigant need not exhaust his remedies before mounting a procedural due process challenge. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 70–71 (2009). And second, Petitioner should not be penalized for declining to participate in an interview with the immigration officer "given the lack of procedural protections associated with such interview and the fact that Petitioner did submit a response to ICE's notice that it intended to continue his detention. ECF No. 55 at 20 n.7. Indeed, it is *the government* that has declined to participate in the process, moving to cancel the evidentiary hearing days before it started—a hearing where, notably, the government would have had the opportunity to examine Petitioner under oath and before a judge.

does not provide procedural due process. ECF No. 55 at 20. Indeed, it does not even come close to meeting any semblance of the process due in these circumstances under the three *Mathews* factors.

Notably, "[t]he liberty interest at stake in this case is of the highest order, inasmuch as Petitioner (and any other individual potentially detained under § 241.14(d)) faces the possibility of indefinite civil detention." ECF No. 55 at 20–21; *see also, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of the liberty the [Due Process] Clause protects.").

Moreover, the procedure set forth in § 241.14(d) "is insufficient to protect against an impermissible risk of erroneous deprivation." ECF No. 55 at 21. The Court rightly found it "particularly significant that 8 C.F.R. § 241.14(d) . . . does not provide for any review by a neutral decisionmaker. The *Zadvydas* Court expressly noted that 'the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights.'" *Id.* (quoting *Zadvydas*, 533 U.S. at 692); *see Bailey v. Pataki*, 708 F.3d 391, 403 (2d Cir. 2013) (civil detention even of allegedly dangerous individuals must be "undertaken by a neutral decisonmaker with the benefit of an adversarial hearing"). Indeed, a neutral decisionmaker is an irreducible element of due process *even* for an individual captured on the battlefield during wartime. *Hamdi*, 542 U.S. at 533.

The Court also correctly found § 241.14(d) deficient because it failed to articulate any standard of proof, and that given the magnitude of the liberty interest, and the inherent difficulty in proving dangerousness, § 241.14(d)'s failure to impose a clear and convincing standard on the government "violates the requirements of procedural due process in the framework of this regulation." ECF No. 55 at 24 (citing *Addington*, 441 U.S. at 426–27 (1979)); *see also, e.g.*,

Foucha, 504 U.S. at 72 state must establish dangerousness by clear and convincing evidence in civil commitment cases).[20]

Finally, although "the [g]overnment's interest in protecting the public from terrorism is also very weighty," ECF No. 55 at 21, the government has no interest in improperly detaining individuals it erroneously believes pose a danger to the nation's security or safety of the public. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint."). And providing a far more robust process to avoid such errors, such as the process provided for indefinite detention based on future dangerousness in § 241.14(g)–(h), which includes review by an immigration judge and a requirement the government show a special danger by clear and convincing evidence, would not be unduly burdensome or harm national security. ECF No. 55 at 18–19, 24–25. This is especially true because § 241.14(d) "is rarely invoked by the [g]overnment" and these protections would therefore need to be provided in "such a small number of cases." *Id.* at 25. The government's asserted interest in the agency procedures under the regulation is further diminished because in the PATRIOT Act *Congress* specified exactly what process should be provided to those, like Petitioner, whom the government seeks to detain indefinitely after their removal is no longer reasonably foreseeable:

[20] The Court did not reach the question of whether Petitioner was also denied due process because he was deprived of the opportunity to meaningfully examine the government's evidence and witnesses and to present his own witnesses. ECF No. 55 at 24 n.9. Petitioner maintains that the regulation fails procedural due process for these reasons as well, given the importance of these protections in preventing an erroneous deprivation of liberty. *See* ECF No. 14 at 30–31 (citing cases). If anything, subsequent developments, during which was provided Petitioner the ability to examine the government's allegations and expose key aspects as complete falsehoods, coupled with the government's admission it could not sustain its burden only when finally facing an actual hearing, underscores the fundamental nature of these protections.

court review pursuant to the federal habeas statute, where *Congress* has long empowered courts to examine the facts and law, and order release if warranted. *See* 8 U.S.C. § 1226a(b) (citing 28 U.S.C. § 2241).

The government relies primarily on the same smattering of cases that fail to support its position and that the Court soundly rejected. Some of its arguments are outrageous. ECF No. 242-1 at 12 ("The regulation provides ample process."). Others are just offensive. *Id.* at 14 (downplaying Petitioner's liberty interest in being free from imprisonment potentially for the rest of his life because, if allowed to live at home with family members, he would remain under supervised release pursuant to his criminal sentence). The government, moreover, has the audacity to continue to defend a process in which it retains sole power over a man's freedom even after it became clear that (1) the government's central allegations were based on falsehoods; (2) the government hid this from Petitioner and the Court; and (3) the government refused to present evidence just days before an actual hearing when it would finally have had to expose its case to an impartial judge. If ever a case showed how vital due process is to our system, this is it. Far from a likelihood of success, the government's claim that § 241.14(d) is valid and authorizes Petitioner's indefinite detention is almost certain to fail.[21]

[21] The Court may also consider whether any error regarding the regulation was harmless in this matter in considering the equities of a stay pending appeal. See *infra* § III–IV. In December 2019, the Court held that the lack of a neutral decisionmaker and "the failure to impose a clear and convincing evidence standard in 8 C.F.R. § 241.14(d) violates the requirements of procedural due process." ECF No. 55 at 23–24. The government did not take an interlocutory appeal. A month later, it held that the government must prove its allegations by clear and convincing evidence under the statute, as well. Plainly, even if the Court had not invalidated the regulation—a decision that, at that point, would have been ripe for an interlocutory appeal that, now, could well be over already—the government would have been playing by the same exact rules for the next six months leading up to the evidentiary hearing. For that reason, its complaints about the Court's ruling on the regulation would have collapsed into the *exact same ones* that *are* subject to harmless error review concerning the statute—especially given the government's

II. The government will not be injured in any respect whatsoever—let alone irreparably—if Petitioner is released pending appeal under extreme supervisory conditions of oversight and surveillance.

Given the severe conditions of supervision to which Petitioner agreed—in substance, time and again over the past 17 months—even after winning his habeas case and his freedom from government custody, the government will suffer no harm at all if he is released while the government takes its paltry appeals in his case. Its protestations otherwise are wildly unsound, even frivolous.

The government relies on the most recent FBI letter's assessment that Petitioner is a "danger to national security" in arguing that it will suffer irreparable harm upon Petitioner's release. *See* ECF No. 242-1 at 20–21. Of course, that assessment is based upon the same set of false and patently unreliable allegations the government just decided it could not prove to this Court. It is doubtful that the government may rely upon assertions that it refused to introduce as evidence in its case in chief (through actual witnesses or documents) to justify a finding of irreparable harm to achieve the same result on a motion for a stay pending appeal.[22] So when the

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admission that it could justify Petitioner's detention even by preponderance of the evidence. This strongly suggests that to enter a stay pending appeal on that basis would be plainly unjust in these circumstances. As the D.C. Circuit, invoking Justice Frankfurter's words in another case involving life and death, put it: "[T]here comes a point where courts should not be ignorant as judges of what they know as men and women." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013) (Garland, J.) (cleaned up) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J., announcing judgment and concurring)).

[22] Though the government selects a smattering of quotations from *Hilton*, there is one in particular it strains to omit: "The interest of the habeas petitioner in release pending appeal" is "always substantial." 481 U.S. at 777. And that interest is strengthened (and the government's position "weakest") where conditions of supervision reduce the risk of flight or harm. *See id.* at 778.

In any event, as noted above, *Hilton* explains that post-conviction habeas petitioners are "in a considerably less favorable position than" pretrial habeas petitioners, "such as the

government insists that a man of Petitioner's "background"—"as an individual known to recruit others to engage in terrorist activity," pointing to the FBI letter, ECF No. 242-1 at 25—poses an unmitigable threat upon even with these extraordinarily stringent terms of release, it is crucial to remember that its basis for that assertion is a pile of allegations that it has admitted it cannot prove, and that Petitioner has denied under penalty of perjury, and that do not withstand even cursory scrutiny. *See supra* Procedural History & Facts §§ II–III.[23]

Regardless, even on its own terms, the FBI's assessment does not establish that Petitioner will be a danger to the community in light of the extreme conditions of supervision to which he has agreed to abide upon his release, even though his victory would have entitled him to much more freedom. The FBI letter evaluated Petitioner's dangerous based on the premise that, unless detained indefinitely, he would have the "ability to travel within the United States" and make use of "the wide availability of communications facilities" beyond the "inherent legal and practical limitations of surveillance." Second FBI Letter at 4; *see* ECF No. 242-1 at 25. But upon the

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respondent in *Salerno*[.]" *Id.* at 779. This case obviously rests on the *Salerno* end of the spectrum, for the government's core allegations against Petitioner are just that: allegations, unproven and, as the government now concedes, unprovable. *Salerno* makes it clear that for the government to hold a pretrial detainee on the basis of dangerousness, it must prove the detainee's dangerousness by clear and convincing evidence in a "full-blown adversary hearing" before a neutral decisionmaker. *Salerno*, 481 U.S. at 750. That is exactly what the government conceded it could not do here. Given the government's concession that it cannot prove Petitioner's dangerousness by even a mere preponderance of the evidence, it would be bizarre for any court to hold that Petitioner's dangerousness justifies a stay pending appeal. Yet that is exactly what the government asks this Court to do—and it may ask several more to do the same.

[23] The government's position on the merits is, essentially, that Congress granted it unilateral authority over Petitioner's detention (and that the Constitution has nothing to say about that), and therefore the Court has no business evaluating its justifications for that detention. *See supra* § I.A. Wrong, but fair enough. The government's position on irreparable harm, though, is even more disturbing: it asks this Court to exercise its powers in equity to *go along with that view*, even absent a statute to point to.

release Petitioner just won, Petitioner has agreed to conditions that will make him the most surveilled "free" man in Florida, if not the country. He will wear an ankle monitor. His every communication will be observed. He will not leave his residence without pre-approval, unless attending to a medical emergency. The government will even approve where he goes to pray. The government will also have the power to approve all visitors except for his sister's immediate family members, who the government has already pre-approved. That he is willing to accept such strict conditions in order to facilitate his prompt release speaks directly to his intent to live peacefully and his desire—more than anything—simply to taste some freedom and see his family. His agreement to these conditions constitutes stronger evidence about him than anything the government has to date produced in this Court.

The government's other arguments should be dismissed out of hand. The government cites ominously to the fact that upon release Petitioner will "return[] to the very setting of his prior criminal activity in southern Florida," ECF No. 242-1 at 22, without any discernible point; he would be confined in Florida because his only immediate family in this country has lived there for thirty years. Exh. 2 ¶ 2. It suggests that based on his past criminal conviction (rather than the specific conduct underlying his conviction), he is categorically likely to reoffend. *Id.* And it suggests that because he violated a protective order in this case—for which he took responsibility and apologized to this Court—he will not "conform his conduct to the law." *Id.* at 23. It also speculates, in a sealed declaration, that Petitioner could "potential[ly] . . . use visitors or family members to carry out tasks" on his behalf, Glasheen Decl. ¶ 8—which, to the extent it

includes grocery shopping, is certainly true. These are, frankly, preposterous arguments for irreparable harm, further underscoring that the government will suffer none of it.[24]

To assign Petitioner cartoonish powers to evade intense surveillance and monitoring (after having completed 18 years in detention during which he was likewise subjected to the same)—on the basis of not a single allegation it has proven against him in seventeen months of trying (or at least being forced to try by this Court), well as baseless suggestions of family messengers, his criminal conviction for non-violent conduct, a single protective order violation, and the mere fact that he plans to return to the state of Florida—is maniacal. And to suggest that such could equitably form the basis of a judicial order to prolong Petitioner's detention, the justification for which the government has just conceded it cannot prove under rules of due process bearing any burden at all, is deeply wrong, and an abuse of state authority that should both chill and sadden all Americans.

Because the government has not shown irreparable harm, under either the traditional four-factor test recited in *Nken* or the sliding-scale approach, its bid for a stay must fail. *See Trump*, 943 F.3d at 637; *Sherley*, 644 F.3d at 405.

[24] Astonishingly, the government argues, based on a declaration, that Mr. Hassoun should remain detained because "he will have to arrange his own transportation" and "[m]onitoring Petitioner's travel from New York to Florida is burdensome operationally . . . and a significant expenditure of personnel and financial resources." Meade Decl. ¶ 11. This is fatuous. In fact, Immigration and Customs Enforcement has an entire division—ICE Air Operations—that specifically "provid[es] air transportation services to ERO's 24 field offices, to facilitate the movement of aliens within the United States." *See Fact Sheet: ICE Air Operations*, U.S. Immigr. & Customs Enf., https://www.ice.gov/es/factsheets/ice-air-operations.

III. A stay of Petitioner's release pending appeal in the unconscionable circumstances of this case, including the government's conduct in prosecuting and then forfeiting it, would constitute a manifest injustice and would substantially injure Petitioner.

Petitioner's liberty interest is of the highest order. While that interest is not, after every judicial decision ordering a prevailing petitioner's release in habeas, decisive as to whether a stay pending appeal is justified, in this case it should be.

The story of this matter is as unconscionable as it is unbelievable. Petitioner has remained detained—now, as the government admits, unlawfully under the law of this case—for 17 months. He has been accused of fantastical plots recycled by a patently unreliable witness withdrawn after independent investigation revealed government malfeasance in the conduct of his case. He has been tantalized by a government offer of settlement that vanished without explanation at the eleventh hour. He has been promised his long-awaited day in court, only to see a global pandemic force its delay for two months. And, after everything, on the doorstep of that day, the government has admitted that it has no case to make in this Court—yet it refuses to consent to Petitioner's release, even under extraordinary conditions of supervision, while it takes its appeal. This is appalling.

To prolong Petitioner's detention in these circumstances would cause him severe injury. As Petitioner said, in a March 2 letter to the Court, "no one is going through what I am going through." ECF No. 94 at 2. As he said, in a new sworn declaration in opposition to the government's motion, "I do not understand how this could happen to a person." Hassoun Decl. ¶ 2. And, as he said in the same declaration, "These government officials have gamed the courts to drag out my detention for 16 months already based on lies and now they want to drag it out for many more months in appeals while I stay in detention and no judge ever has a chance to find the

truth or question their allegations. This is not fair. All I want is for someone to recognize the truth and set me free." *Id.* ¶ 10.

This is a human being. Enough.

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.

In *Boumediene*, the Supreme Court 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." 553 U.S. at 765–66. This case, as much as any in memory, challenges these principles, and throws them into question so as to directly undermine the public interest.

The writ of habeas corpus is the "stable bulwark of our liberties." 3 W. Blackstone, Commentaries on the Laws of England 137 (1768). As Justice Holmes wrote more than a century ago, habeas "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). 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), and to serve "as an effective and imperative remedy for detentions contrary to fundamental law," *Fay v. Noia*, 372 U.S. 391, 438 (1963). Release through habeas corpus is the time-tested remedy whose importance the Supreme Court has just yesterday—while refusing to, in its view, "broaden" it—

reaffirmed as one of the Constitution's historical cores. *Thuraissigiam*, 2020 WL 3454809, at *8–9; *id.* at *35 (Sotomayor, J., dissenting, joined by Kagan, J.).

To issue a stay of Petitioner's release would require a degree of willful blindness so antithetical to justice that it would profoundly compromise public faith in not only the habeas remedy, but in the judiciary's truth-seeking function. Here, that function—which the government's tactics have short-circuited—have not produced a formal record, but it did produce facts and judicial findings along the way. *See supra* Procedural History & Facts §§ II–IV. Those facts make clear—crystal clear—what has happened here, and what the government is doing now. Were the public to see the habeas remedy manipulated and undermined in the manner the government's motion for a stay proposes, the Judiciary would suffer a serious blow, and an essential promise of the Constitution would be outed as inert and illusory—at least for some.

The government's impoverished view of "the public interest" is wrong, and, against the above considerations, it cannot tip the balance in its favor. 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. ECF No. 242-1 at 24–26. But the argument "that potentially wasted and diverted staff resources constitute an irreparable harm" is "meritless," *Shays v. FEC*, 340 F. Supp. 2d 39, 48 (D.D.C. 2004) (quotation marks omitted), and even if the same should not strictly apply to a consideration of the public interest, it is without a doubt weak tea. *Cf. Nat. Res. Def. Council, Inc. v. FDA*, 884 F. Supp. 2d 108, 122, 124 (S.D.N.Y. 2012) (explaining that accepting that argument "would almost always result in a finding of irreparable harm whenever an agency was required to comply with a court order," and "stays pending appeal would become routine, conflicting with the rule that such relief should be extraordinary" (quotation marks omitted)

(citing *Shays*, 340 F. Supp. 2d at 41; *Graphic Commc'ns Union, Chi. Paper Handlers' & Electrotypers' Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985)).

The government also argues that the public interest in this case lies in the "the institutional interests that all three branches of government have expressed in favor of detention authorities like the regulation and statute." ECF No. 242-1 at 24; *see id.* at 26–27. To whatever extent this is true, it ignores entirely those branches' far more weighty expression in the importance of liberty, habeas corpus, and judicial review. The habeas statute the Court relied upon in this case to conduct these proceedings, 28 U.S.C. § 2241, was passed by the First United States Congress, was signed by President George Washington, and has been enforced by thousands of judges over its 231 years of age. *See Chatman-Bey*, 864 F.2d at 806 (citing the "venerable Judiciary Act of 1789").

The government's national-security interests are real, and the public plainly benefits from their judicious exercise. In a case like this, though, where such exercise is not only unapparent, but demonstrably false, those interests must give way in a balance against habeas, against liberty, and against the interest in accountability of the state that the Founders so wisely established so long ago.

CONCLUSION

The Court should deny the motion for a stay. Petitioner seeks his immediate release from custody, but respectfully urges the Court—which is closest to this case and its participants—to issue a written decision on this motion before, orally or otherwise, deciding it, so as to allow any future court (or courts) considering the same considerations, in the posture of an emergency application, to benefit from its opinion.

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Respectfully submitted,

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