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

REPLY MEMORANDUM IN SUPPORT OF PETITIONER'S VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The government continues to assert the breathtaking authority to detain Mr. Hassoun indefinitely, without any semblance of fair process, on the basis of nothing more than a unilateral prediction of future dangerousness. The regulation that purports to authorize this detention is ultra vires, in direct violation of the Supreme Court's authoritative interpretation of the statute under which it was promulgated. The regulation also violates the bedrock substantive due process protections against arbitrary detention by purporting to authorize imprisonment based on dangerousness alone, without any showing of an innate or volitional impairment that creates the danger. Still worse, the government seeks to impose this detention based on a mere preponderance of the evidence without even letting Mr. Hassoun see the underlying evidence against him, without any meaningful opportunity to contest that evidence, and without an impartial judge or neutral decisionmaker. The government, in short, seeks to impose an indefinite life sentence in flagrant violation of the Constitution.

The government has no adequate response to these and the other constitutional flaws in its detention of Mr. Hassoun. In fact, its effort to incarcerate Mr. Hassoun on this basis is particularly troubling because his detention is plainly unjustified. The district judge who sentenced Mr. Hassoun following a four-month trial found that he posed no danger and imposed a lenient sentence as a result. The newfound allegations in the FBI letter are not only false but also inconsistent with his positive record during his 17 years in custody. Whatever risk the government perceives can be addressed by appropriate conditions of supervised release. Indeed, Mr. Hassoun is willing to consent to any reasonable condition, including monitoring of his communications, financial transactions, and movements, and limits on his contacts and curfews. The government's continued imprisonment of Mr. Hassoun is not only unconstitutional and unlawful, it is clearly unnecessary. This Court should order his release immediately.

I. THE GOVERNMENT'S DETENTION OF PETITIONER IS ULTRA VIRES.

Petitioner has explained that 8 C.F.R. § 241.14(d) exceeds the statutory authority in 8 U.S.C. § 1231(a)(6) because it purports to allow indefinite detention, which the Supreme Court has interpreted the statute not to do. *See* Petitioner's Brief. 9–16 ("Pet. Br."). The government maintains that the regulation is a lawful exercise of statutory authority, despite these binding interpretations, because it claims one line of dicta in *Zadvydas v. Davis*, 533 U.S. 678 (2001), creates an exception for certain non-citizens captured in the regulation. Respondent's Opposition 8–13 ("Opp."). But the government's argument misconstrues *Zadvydas*, ignores *Clark v. Martinez*, 543 U.S. 371 (2005), and departs from three circuit court decisions, *see Tran v. Mukasey*, 515 F.3d 478, 482 (5th Cir. 2008); *Tuan Thai v. Ashcroft*, 366 F.3d 790, 796-97 (9th Cir. 2004); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245-56 (10th Cir. 2008). This Court should reject that argument and invalidate 8 C.F.R. § 241.14(d) as ultra vires. But even if the Court accepts the government's characterizations of *Zadvydas* and *Clark*, it should still find § 241.14(d) ultra vires under the constitutional avoidance canon.

First, the government misconstrues *Zadvydas* by suggesting indefinite detention under the regulation is "in accord with" the Court's construction of § 1231(a)(6). Opp. 12. But *Zadvydas* rejected any interpretation of the statute that allows for indefinite detention, holding § 1231(a)(6) gives the government authority to detain non-citizens only while their removal is reasonably foreseeable. *See Zadvydas*, 533 U.S. at 701. As here, *see* Opp. 39, the government in *Zadvydas* relied on § 1231(a)(6)'s use of the word "may" in claiming the text on its face sets no limit on the agency's discretion to detain indefinitely, but applying the canon of constitutional avoidance, the Court rejected that argument. 533 U.S. at 697. As the Court explained, "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." *Id.*; *see also id.* at 699 ("We have found nothing in the history of these statutes

that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention.").

Second, the government virtually ignores the Court's subsequent decision in *Clark*, which reaffirmed that § 1231(a)(6) does not provide discretion to detain *any* individual indefinitely, regardless of the circumstances. *Clark* held that § 1231(a)(6) "applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one." 543 U.S. at 378; *see id.* at 380 ("*same* detention provision" in § 1231(a)(6) cannot be given "different meaning" based on particular constitutional or other considerations present in a particular case).

Third, the government points to dicta in *Zadvydas* to argue that the Court found potential constitutional problems only in "how § 1231(a)(6) was applied," and that it contemplated that the government could apply the statute differently if that application did not raise constitutional problems. Opp. 13. But *Clark* expressly forecloses that argument. 543 U.S. at 380. The government also argues that this line of dicta—which concerned "terrorism or other special circumstances," *Zadvydas*, 533 U.S. at 696—means that the Court left open the possibility that the same statute could authorize indefinite detention via a more "narrow regulation" targeted at a different class of non-citizens. Opp. 13. 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. *See* Pet. Br. 15 n.4.

Clark makes this clear. There, the Court stated that *Zadvydas* required Congress to address the dicta's concerns through new legislation. 543 U.S. at 386 n.8; *id.* at 379 n.4 (rejecting that this line of dicta "evince[s]" an exception to the *Zadvydas* Court's interpretation of

1231(a)(6)); *see also id.* at 386 ("[If t]he government fears that 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 certain non-citizens who cannot be removed from the country. 543 U.S. at 386 n.8; *see* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 117 Stat. 272 ("USA PATRIOT Act") (codified at 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").[1]

Fourth (and relatedly), the Fifth and Ninth Circuits both rejected the government's argument that *Zadvydas* construed § 1231(a)(6) to authorize indefinite detention even in "narrower" circumstances. *See Tran*, 515 F.3d at 484 ("The Supreme Court has twice held that § 1231(a)(6) does not authorize indefinite detention for any class of aliens covered by the statute. We are bound by the statutory construction put forward in *Zadvydas* and *Clark*."); *Tuan Thai*, 366 F.3d at 795; Pet. Br. 13–14. The government ignores these cases, citing only a dissent from the denial of rehearing en banc in *Tuan Thai*. Opp. Br. 12 (citing *Tuan Thai*, 389 F.3d at 970 (Kozinski, J., dissenting from denial of rehearing en banc)). But no court has adopted former

[1] In its opposition brief, the government—for the first time—states that "[t]he ICE Director asked the [DHS] Secretary to authorize Petitioner's continued detention pursuant to 8 U.S.C. § 1226a, as well as pursuant to 8 C.F.R. § 241.14(d))." Opp. 8 n.7. The government further states that the Secretary "has not . . . acted on that request" and that Respondent "will notify the Court" if the Secretary does so. *Id.* The government may be suggesting that it is merely holding this alternative authority in reserve in case it loses this habeas case (just as it lost the last one), but its speculation about how its evolving rationales for Petitioner's detention may apply in the future are entirely irrelevant to the issues before the Court here.

Judge Kozinski's interpretation of *Zadvydas*, which in any event pre-dates the Supreme Court's express ruling in *Clark* that § 1231(a)(6) cannot possibly be given "different meaning" based on particular constitutional or other considerations. *See* 543 U.S. at 380; *see also Tran*, 515 F.3d at 483–84.

While the Tenth Circuit parted ways analytically with the Fifth and Ninth Circuits, it, too, declined to adopt the government's view that the Supreme Court construed § 1231(a)(6) to permit indefinite detention of certain non-citizens. *See Hernandez-Carrera,* 547 F.3d at 1244 (10th Cir. 2008) (acknowledging "the Supreme Court's contrary construction of the statute in *Zadvydas* and [*Clark v.*] *Martinez*"). The Tenth Circuit instead held that although the agency's interpretation was contrary to *Zadvydas* and *Clark*, it was nevertheless owed deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), thus displacing the Supreme Court's authoritative construction of § 1231(a)(6). *See Hernandez-Carrera*, 547 F.3d at 1251. But the government nowhere even hints that it agrees with the Tenth Circuit's analysis, Opp. 12–13, which is erroneous and contrary to binding precedent.[2]

Finally, even if this Court were to find that *Zadvydas* and *Clark* do not render Petitioner's detention ultra vires, it should similarly construe § 1231(a)(6) to allow detention only insofar as

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[2] Specifically, *Chevron* deference is unwarranted when, as here and in *Hernandez-Carrera*, 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 Texas*, 918 F.3d 440, 447 (5th Cir. 2019) ("[A] judicial interpretation should prevail over a later 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.'" (internal citation omitted)); *see also* Pet. Br. 14 & n.3 citing to *United States v. Home Concrete & Supply*, 566 U.S. 478, 487 (2012) (plurality op.). Courts "do not defer to an agency's interpretation of a statute that raise[s] serious constitutional doubts." *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 226 (3d Cir. 2018).

removal is reasonably foreseeable because indefinite detention under the regulation would raise serious constitutional problems. *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 problems); *Edward J. DeBartolo v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575–78 (1988) (same); Pet. Br. 15–16. Not only does indefinite detention raise the gravest of constitutional questions, but in the few instances in which it has been permitted, it has necessarily been accompanied by the most rigorous procedural safeguards, including the presence of a clear burden and adequate standard of proof; the ability to meaningfully examine and refute the government's evidence and to present evidence; and a hearing before a neutral decisionmaker. *See, e.g.*, *Zadvydas*, 533 U.S. at 690–91. As explained previously, *see* Pet. Br. 26–32, and as detailed below, *see infra* at 11–16, the procedures under 8 C.F.R. § 241.14(d) do not remotely provide the safeguards against wrongful detention the Supreme Court has required. This Court should accordingly interpret § 1231(a)(6) not to allow for indefinite detention to avoid confronting the grave constitutional questions presented by the agency's construction of the statute, just as the Supreme Court did in *Zadvydas*.

II. THE GOVERNMENT'S INDEFINITE CIVIL DETENTION OF PETITIONER BASED ON A RISK OF "TERRORISM" VIOLATES SUBSTANTIVE DUE PROCESS.

Petitioner's ongoing indefinite civil detention under 8 C.F.R. § 241.14(d) violates constitutional guarantees of substantive due process. *See* Pet. Br. 16–24. As Petitioner explained, the Supreme Court requires a "dangerousness-plus" rule for civil detention, *Zadvydas*, 533 U.S. at 691, as well as a durational limitation on such detention, *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992). The regulation fails to meet both conditions because it authorizes detention based on perceived dangerousness alone and fails to impose any actual time limit on the detention. The

resulting indefinite civil detention scheme violates the Fifth Amendment's guarantee of substantive due process. The government's arguments to the contrary all fail.

First, the Supreme Court in *Zadvydas* specifically rejected the government's argument that Mr. Hassoun enjoys lesser due process rights because he "has been ordered removed and consequently enjoys no lawful right to be in the United States." Opp. 20. As the Court explained at length, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Such persons necessarily retain the substantive due process right to be free from unlawful detention, even if they have no right to remain in the country. *Zadvydas*, 533 U.S. at 695–96.

Second, the government argues that 8 C.F.R. § 241.14(d) meets the Supreme Court's "dangerousness-plus" rule for indefinite civil detention because it applies only to non-citizens who have been found to "present a *significant* threat to national security or a *significant* risk of terrorism." Opp. 15. But the magnitude of the alleged risk alone is not sufficient. As Petitioner explained, due process requires some innate, volitional factor that could "help[] to create the danger" that might justify indefinite detention. *Zadvydas*, 533 U.S. at 691; *see* Pet. Br. 19–20. The government chooses to ignore that argument, but its failure to confront the clear rule derived from the Supreme Court's substantive due process cases is telling. The government insinuates that the fact that the regulation at issue applies to "a 'small segment of . . . individuals,'" Opp. 16 (alteration in original) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997)), might make up for the fact that "terrorism" is not the kind of "special circumstance" the Supreme Court has in the past found to justify indefinite civil detention. But *Hendricks* is a curious choice as support

for that proposition, for it is a prime example of the rule that "dangerousness-plus" requires the subject population to "suffer from a volitional impairment rendering them dangerous *beyond their control*." *Hendricks*, 521 U.S. at 358 (emphasis added). Bare predictions about future terrorism risk do not meet that constitutional standard.

Third, the government stumbles by attempting to recast the regulation's supposed "enhanced" procedural protections as counterweights for its substantive deficiencies. *See* Opp. 16. But apart from being wrong about the quality of such "protections," *see* Pet. Br. 24-32; *infra* 11–16, this argument ignores that a substantive due process claim is one that alleges that the Constitution "bars certain arbitrary, wrongful government actions *regardless of the fairness of the procedures used to implement them*," *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis added) (quotation marks omitted); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 144-45 (2d Cir. 1994) (same). Substantive due process and procedural due process are "distinct." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Each strand of due process has its own purpose; in particular, substantive due process "serves to prevent governmental power from being 'used for purposes of oppression.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Murray's Les v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856)). As a result, even if the regulation did have all of the procedural protections Petitioner identified as required under the Due Process Clause (which it does not), it would *still* fail as a matter of *substantive* due process.

Finally, the government fails in its attempt to escape the Supreme Court's "dangerousness-plus" rule by casting the regulation as authorizing something less than *indefinite* detention. *See* Opp. 16–17. The government takes the position in this litigation that 8 C.F.R. § 241.14(d) does not in any way affect or alter its obligation under 8 U.S.C. § 1231(a)(1)(A) to

continue working to effectuate the removal order. *See* Opp. 16–17 (addressing Pet. Br. 21 n.8). But even if the government has such an obligation, the very nature of indefinite detention is that its duration is uncertain and could last forever.[3] In this case, as in *Zadvydas*, the government's ongoing duty to identify a country willing to accept Mr. Hassoun, such as it is, does nothing to cure the regulation's absence of a durational limit. Indeed, every indefinite detention scheme the Supreme Court has considered has contemplated that the detention might end as some point, whether through treatment of the mental illness or abnormality following civil commitment, *Hendricks*, 521 U.S. at 353; *Foucha*, 504 U.S. at 77–78, or removal from the United States following immigration detention, *see Zadvydas*, 533 U.S. at 682. Thus, just as in *Zadvydas*, periodic review by the Secretary (or his or her Deputy) also does not remove the regulation from the constitutionally dubious realm of "indefinite detention," *Id*. at 685, and the cases the government cites involving periodic review "satisfie[d] substantive due process" not because of such review but rather because the dangerousness-plus rule had already been met. *See United States v. Comstock*, 560 U.S. 126, 130-31 (2010) (mental illness); *Hendricks*, 521 U.S. 346 (mental "abnormality").

"If the Constitution is not a suicide pact, it is not an instrument of crime either." *Doe v. Boland,* 630 F.3d 491, 496 (6th Cir. 2011) (quotation marks and citation omitted). It is precisely due to the importance of matters of national security that the government must not sacrifice established norms of substantive due process when addressing them. Here, such norms are

[3] The government in this litigation claims that 8 U.S.C. § 1231(a)(1) imposes an obligation to continue to seek removal, but the plain text of the regulation contains no such obligation and, more to the point, the regulation under which Petitioner is detained applies *without regard* to whether any removal efforts remain ongoing. 8 C.F.R. § 241.14(d)(1).

clearly being violated under the guise of protecting them. Mr. Hassoun's ongoing detention lacks the rationales and limitations which due process requires, and is therefore unconstitutional.

III. THE GOVERNMENT FAILS TO COMPLY WITH FUNDMENTAL PROCEDURAL SAFEGUARDS REQUIRED BY DUE PROCESS.

Mr. Hassoun faces indefinite detention that could last the rest of his life. Yet the regulation under which he is detained lacks the most basic procedural protections: the right to see and to challenge the evidence and witnesses against him meaningfully; a neutral decision maker; and an obligation to satisfy at least a clear-and-convincing evidence standard. Pet. Br. 26. The government attempts to defend the inadequate procedures of § 241.14(d), Opp. 23–25, but the Constitution and binding case law do not allow the government to detain Petitioner indefinitely without a robust, fair process that could—and, in this case, would—reveal the errors and prejudice that fatally infect the government's case. In an effort to avoid constitutional review of its flimsy process, the government claims, astonishingly, that Petitioner is not "prejudiced" by these procedures and faults Petitioner for declining to submit to a sworn "interview" by an ICE investigator without first being allowed to see the underlying evidence against him. In fact, Mr. Hassoun's prospects of release are obviously prejudiced by the government's unfair and self-serving process, which denies him a fair opportunity to challenge the FBI's (false) allegations and leaves it to a political official to decide whether any conditions of supervision would mitigate the perceived threat, or whether he even poses a significant risk at all.

A. Petitioner's detention is unconstitutional because the regulation lacks basic procedural protections to guard against an erroneous and arbitrary deprivation of liberty.

As Petitioner has explained, the process under the regulation fails *Mathews v. Eldridge*: the private interest is too high, the risk of erroneous deprivation too great, and the additional burden on the government too minimal to justify depriving Mr. Hassoun of an impartial judge,

the opportunity to see and confront the evidence against him, and a determination of his liberty based on a constitutionally adequate standard of proof (at minimum, clear and convincing evidence). *See* Pet. Br. 26–30; *see generally, Mathews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court has repeatedly held that these safeguards are necessary to test the government's allegations when it subjects a person to indefinite civil detention; the government's arguments to the contrary fail.

1. The liberty interest at stake is enormous.

No deprivation of liberty is more serious than indefinite detention in a prison-like facility. The government seeks to minimize the severity of this infringement on two grounds: that Petitioner has a diminished liberty interest because he has been ordered removed; and that he would not be truly at liberty if he were released under stringent conditions of supervision. Opp. 19–21. These arguments are wrong. The Supreme Court in *Zadvydas* specifically rejected the notion that individuals subject to removal enjoy lesser due process rights. *See supra* 7. Likewise, the government cannot seriously contend—and cites not a single case holding—that indefinite detention is less burdensome because Petitioner would be subject to "strict conditions of supervision" if released. Opp. 21. The government tried essentially the same argument in *Zadvydas* and the Court dismissed it. *See* 533 U.S. at 696. There is a vast and obvious difference between being locked up in a federal detention facility and sleeping in one's own bed and living with family at home—however strict the conditions of release.

2. The process under 8 C.F.R. § 241.14(d) creates a grave risk of error.

The process under 8 C.F.R. § 241.14(d) lacks essential safeguards against erroneous and arbitrary detention: an opportunity to see and challenge the evidence, an impartial judge, and a clear-and-convincing standard of proof. The government says its process is "sufficiently robust

to minimize the risk of erroneous deprivation," Opp. 21, but the circumstances of this case vividly illustrate how these procedures produce erroneous and arbitrary decisions.

During the administrative process and in this Court, Petitioner has demanded an opportunity to see any actual evidence the government has against him that post-dates his crimes of conviction, which occurred more than 17 years ago. Pet. Br. 7; Opp. Ex. A-1-J. But even now the government refuses to provide anything more than an unsworn FBI letter, which levels accusations that are based on one-sided and plainly incomplete characterizations of supposed statements from unidentified jailhouse informants. The government refuses, for example, to provide a single piece of the evidence underlying the FBI's allegations or to identify a single witness, yet it claims Mr. Hassoun has received a sufficient "description of the factual basis" for his continued detention. Opp. 21–22.

This process, which the government shamefully describes as "robust," Opp. 21, invites wrongful imprisonment by preventing Petitioner from testing the evidence before an impartial judge. Pet. Br. 30–31. If limited to the current record, the Secretary—and this Court—will never know whether the FBI letter mischaracterizes the statements of the unidentified jailhouse informants, or overlooks evidence showing that the anonymous informants colluded to fabricate a story, or ignores other exculpatory evidence. It is also impossible to tell whether the government meaningfully probed the false accusations levelled by those detainees. At the same time, it seems entirely possible that some component of the U.S. government has evidence—such as telephone logs or recordings—that would directly contradict specific assertions in the FBI letter. Under the current process any such errors will necessarily go undetected. Moreover, because the FBI letter is unsworn, its authors and signatory are not legally accountable for any errors, omissions, mischaracterizations, or other defects it contains.

Petitioner firmly denies the new, eleventh-hour allegations in the FBI letter, Pet. Br. 7; Opp. Ex. A-1-J, but as it stands there is no way for him to know which of these theories explains the FBI's false accusations, and so he cannot mount a factual defense. This alone violates due process. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) ("Any process in which the Executive's factual assertions . . . are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."). Likewise, the Secretary has no way to assess the reliability of the FBI's new allegations even though they are, evidently, the central factual basis for continuing to detain Mr. Hassoun after more than 17 years of otherwise unremarkable imprisonment in federal custody.

The government's arguments in defense of its flawed process are misplaced and contradict binding precedent. First, the government argues that it has provided procedures "more generous" than those upheld in two Second Circuit cases. Opp. 22–23 (discussing *Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967), and *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997)). But neither case supports its argument. *Kordic* was not about detention at all, let alone indefinite detention, and instead concerned the adequacy of procedures for reviewing asylum claims. *See* 386 F.2d at 232–34. *Guzman* addressed the due process rights of a Cuban parolee who had never been admitted into the country, and the court held that for purposes of the Fifth Amendment the petitioner had no right to more process than what Congress had given him. *See* 130 F.3d at 66. In contrast, *Zadvydas* makes clear that non-citizens in Mr. Hassoun's position have robust Fifth Amendment protections against unlawful detention. *See Zadvydas*, 533 U.S. at 693–94; *supra* 7.

Second, the government argues that the regulation's procedures are sufficient because the Secretary retains discretion to order "further procedures" if he sees fit, saying in effect that there could have been more process, if only Petitioner had asked for it—and the Secretary had agreed.

Opp. 22. But Mr. Hassoun repeatedly and forcefully asserted his right to see the witness statements against him, to confront those witnesses, and to see any other evidence in order to rebut it, Opp. Ex. A-1-J, and the Secretary refused without explanation. In any case, the bedrock due process right to see and meaningfully challenge the government's evidence cannot be a matter of government discretion.

Third, the government argues that the Constitution allows the Secretary—rather than an impartial judge—to decide Petitioner's fate because "due process is a 'flexible' concept." Opp. 23. But no court has ever stretched due process so far as to allow an Executive branch official to sanction indefinite detention, including in the immigration context for those individuals held under 8 U.S.C. § 1231(a)(6), the very statute at issue here. *See, e.g.*, Pet. Br. 24–32; *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) ("[A] hearing before an immigration judge is a basic safeguard for aliens facing prolonged detention under § 1231(a)(6)."); *Guerrero-Sanchez* 905 F.3d at 222–23 (same); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (requiring "individualized determination of the necessity of detention before a neutral decision maker" to avoid "serious constitutional concerns" in case of "prolonged detention"); *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421, at *9 (W.D.N.Y. Nov. 2, 2018) (Vilardo, J.) (prolonged immigration detention unconstitutional "unless the government demonstrates by clear and convincing evidence before a neutral decisionmaker that it is necessary"). Indeed, the failure to provide a neutral decisionmaker is so elemental that it violates due process even for alleged enemy combatants seized on the battlefield during wartime. *Hamdi*, 542 U.S. at 537 ("An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.").

Fourth, Respondent appears to suggest that the availability of judicial review on habeas somehow cures the regulation's failure to provide a neutral decisionmaker. Opp. 23–24. But if the backstop of habeas review were sufficient to cure any procedurally deficient custody review scheme, no court would ever have had occasion to strike one down. *See Sopo v. U.S. Atty. Gen.*, 825 F.3d 1199, 1217 n.8 (11th Cir. 2016) (*vacated on other grounds by* 825 F.3d 1199 (11th Cir. 2016)) (government is required to comply with due process whether or not a habeas petition has been filed). On the other hand, if the government means to suggest that this Court should serve as the neutral decisionmaker and preside over discovery and an evidentiary hearing to determine whether Mr. Hassoun's detention is factually justified, Petitioner would welcome that proposal. *See* Opp. Ex. A-1-J (demanding an evidentiary hearing before the Article III court).

Finally, the government asserts that the "default" preponderance-of-the-evidence standard for civil proceedings should apply in this context, Opp. 24–25, even in the face of a raft of Supreme Court cases holding that indefinite detention must be justified by at least clear and convincing evidence, *see* Pet. Br. 28–30; *United States v. Salerno,* 481 U.S. 739, 741 (1987); *Hendricks,* 521 U.S. at 364; *Addington v. Texas,* 441 U.S. 418, 424 (1979); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966); *Chaunt v. United States*, 364 U.S. 350, 353 (1960).[4] But even where the government subjects a non-citizen

[4] The government cites *Zadvydas* for the proposition that a preponderance standard applies, noting that under *Zadvydas*, detention is lawful only if the government can rebut the detainee's initial showing that removal is not reasonably foreseeable. Opp. 24. But this burden-shifting framework is not aimed at determining whether *indefinite* detention is justified; it is aimed at determining whether detention has become unreasonably prolonged in the first place. Once that determination has been made, as it has been here, *Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 7894 (W.D.N.Y. Jan. 2, 2019), every single indefinite detention case the *Zadvydas* Court cites with approval demands the government justify continued detention under, at minimum, a clear and convincing evidence standard. 533 U.S. at 691.

to prolonged detention while immigration proceedings remain pending—as opposed to the present circumstance where detention is potentially without end—"the vast majority of the district courts—and all the district courts in this Circuit" have "required the Government to meet its burden by clear and convincing evidence." *Arrellano v. Sessions*, No. 18-cv-6625, 2019 WL 3387210, at *12 (W.D.N.Y. July 26, 2019) (Telesca, J.) (collecting cases); *see also, e.g.*, *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018) ("[T]he overwhelming majority of courts to have decided the issue" utilized the "clear and convincing" standard); *accord Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011).[5]

3. No government interest justifies depriving Petitioner of fundamental procedural safeguards.

The government cannot justify the absence of fundamental procedural safeguards by invoking "the importance of protecting national security and preventing terrorism." Opp. 25. Those are, of course, weighty responsibilities. But to argue that they are a talisman excusing the government from abiding by the Constitution is an error. Courts have repeatedly held that the government may not dispense with the Constitution's fundamental guarantees of due process, even in the name of national security. That is especially true here, where the government cites no logistical, evidentiary, security, or other "fiscal and administrative burdens" that would make it difficult to provide additional process. *Mathews*, 424 U.S. at 335.

[5] Petitioner previously noted that the regulation actually imposes no burden of proof on the government at all, in addition to failing to specify any standard of proof. Pet. Br. 28. Respondent now "concedes here that § 241.14(d) places the burden on the government to prove the various facts necessary to justify detention," but cites nothing in the regulation's text to this effect. Opp. 24. While this concession may bind the government in this case, the need for the concession—which still fails to provide at least a clear-and-convincing evidence standard—underscores the regulation's abject failure to spell out a fair process.

In *Hamdi*, the Supreme Court weighed the *Mathews* factors in the more extreme context of a person accused of waging war against the United States on the battlefield in Afghanistan in the months immediately after 9/11. 542 U.S. at 512–14, 531–32. Even there, the Court vindicated the fundamental requirements of due process: "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Id.* at 530

Accordingly—and despite the challenges of grafting legal procedures upon battlefield detentions—the Court insisted that the Constitution required "a meaningful opportunity to contest the factual basis for . . . detention before a neutral decisionmaker." *Id.* at 509. *Hamdi* involved a U.S. citizen, but the decision was based on the Due Process Clause, which applies to non-citizens such as Mr. Hassoun. Moreover, as the Fourth Circuit subsequently held, alleged enemy combatants arrested in the United States (whether citizens or not) are entitled to even more robust protections under the Due Process Clause than the Court mandated in *Hamdi*. *See al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam) (reversing lower court decision for failure to provide alleged enemy combatant a meaningful opportunity to challenge the government's allegations in his habeas proceeding), *vacated as moot sub nom. al-Marri v. Spagone*, 555 U.S. 1220 (2009). Notably, Judge Traxler's controlling opinion in *al-Marri* found the habeas proceeding before the lower court violated procedural due process because the court accepted the government's hearsay affidavit as the most reliable available evidence without any inquiry into whether the provision of nonhearsay evidence or access to any discovery would

unduly burden the government. *Id.* at 268 (Traxler, J., concurring).[6] Even alleged enemy combatants at Guantanamo Bay are afforded more rigorous protections than Mr. Hassoun. Since the Supreme Court decided *Boumediene v. Bush* in 2008, federal courts have been conducting hearings to scrutinize the legal and factual basis for detention there and have established procedures that include providing access to evidence—even classified information—in the government's possession. *See Boumediene v. Bush*, 553 U.S. 723, 783, 786 (2008); *Qassim v. Trump*, 927 F.3d 522, 531 (D.C. Cir. 2019) (describing discovery procedures in Guantanamo habeas cases, which include "a mechanism for the exchange of classified information" prior to the merits hearing in federal court). It is stunning that the government claims it can provide a person subject to indefinite *civil* detention—which is almost never permitted and which, when allowed, is subject to the most rigorous procedural safeguards—even *less* protection than the courts have mandated for "enemy combatants" held in military detention under the laws of war, where indefinite detention is the norm and the procedures far more permissive.

The government tries the same arguments in a different form when it claims that the procedures here are permissible because the Executive Branch is owed "substantial deference" in immigration and national security matters. Opp. 25. But whatever "deference" the government may get in judicial review of a full and fair agency decision-making process does not excuse the government of its obligation to submit to fair procedures in the first place.

Tellingly, the government fails to identify a single logistical, evidentiary, or other burden that it would incur by providing additional process. Opp. 25–26. That is because, despite the

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[6] Judge Traxler further stated that the petitioner was "placed at a substantial disadvantage" when he was denied any meaningful opportunity to contest the allegations—*even in* a habeas proceeding before a federal judge. *Al-Marri*, 534 F.3d at 274.

government's national security concerns, no such obstacles exist. The evidence relating to Petitioner's criminal conviction was aired in open court, all of the new allegations against him arise from a brief window of time following his transfer to immigration custody, and he remains in federal custody, ready and willing to participate in a fair process. This case presents no special administrative difficulties relating to national security or otherwise.

There is, in short, no reason to deny Petitioner a fair process. The regulation plainly violates the Constitution's requirements of a neutral decisionmaker, opportunity to see and meaningfully contest the evidence, and a heightened standard of proof. This Court should invalidate the regulation and direct Petitioner's release under appropriate conditions of supervision.

B. Petitioner is prejudiced by the government's inadequate procedures and has standing to challenge them.

The government seeks to evade judicial review of its procedures by claiming Mr. Hassoun has suffered no "prejudice," because he has supposedly "declined to take advantage of those procedures" by opting not to sit for an "interview" under oath with an ICE investigator tasked with building the case against him without first seeing the government's evidence. Opp. 18–19. The government's argument rests on a basic misapprehension of the cases. Courts do not require individuals to submit to unconstitutional procedures in order to challenge them. *See al-Marri*, 534 F.3d at 275 (Traxler, J., concurring) ("I am aware of no case in which a person detained in this country has been stripped of the opportunity to contest his detention for refusing to participate in an unconstitutional process."). Rather, courts will sometimes decide not to adjudicate procedural due process violations when it is clear that additional procedures *would not have made a difference*. Put differently, "due process violations in immigration proceedings [are subject] to harmless error review." *Singh*, 638 F.3d at 1209. In all the cases the government cites,

courts declined to consider procedural due process challenges *not* because the petitioners refused to submit to the challenged procedures, but because the additional procedures would not have affected the outcome.[7]

Moreover, "prejudice" is not a prerequisite for courts to consider whether procedures violate due process. Courts in this circuit and elsewhere frequently adjudicate whether procedures are constitutional *before* determining whether violations may have affected the outcome on the facts of a particular case. *See, e.g.*, *Singh*, 638 F.3d at 1204, 1209 (holding procedural due process required a heightened standard of proof and a contemporaneous record of proceedings, but petitioner was only prejudiced by the first error); *Arrellano*, 2019 WL 3387210, at *12–13 (holding the IJ incorrectly allocated burden of proof and then finding prejudice because, based on evidence before the reviewing court, the IJ might have ruled differently); *Brevil v. Jones*, No. 17-cv-1529, 2018 WL 5993731, at *5 (S.D.N.Y Nov. 14, 2018) (same).

Accordingly, the fact that Petitioner declined to submit to the ICE investigator's interview before seeing the evidence against him has no bearing on whether he has suffered the kind of "prejudice" necessary for this court to review and correct the government's flawed

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[7] In *Garcia-Villeda v. Mukasey*, the petitioner had "admitted before ICE and [the Court] all of the facts necessary to warrant" an adverse outcome and "[n]one of the additional procedural protections he demands would have changed this." 531 F.3d 141, 149 (2d Cir. 2008). In *Miller v. Mukasey*, the petitioner did not contest the predicate facts justifying adverse action "either before the agency or in his petition to [the] Court." 539 F.3d 139, 165 (2d Cir. 2008). In *Van Harken v. Chicago*, the court declined to consider a due process challenge to a city parking-violations ordinance when the challengers had conceded guilt by paying their tickets without registering objections to or contesting them. 906 F. Supp. 1182, 1187 (N.D. Ill. 1995). And in *Escalante-Calmo v. Clark*, the petitioner claimed falsely that he had been deprived of the very procedural protections that were in fact offered to him. No. 06-cv-1575, 2007 WL 1577868, at *5 (W.D. Wash. May 30, 2007). The government also cites *Lewis v. Casey*, 518 U.S. 343 (1996), but that case concerns the distinct question of the type of injury sufficient to challenge prison library policies; it does not involve a procedural due process claim or any "prejudice" requirement, and is thus irrelevant here.

process. Opp. 18–19. Petitioner declined to participate in that hostile and facially inadequate examination *precisely because* the government refused to provide evidence that would have allowed him a meaningful opportunity to answer and rebut the government's allegations. Opp. Ex. A-1-J (asking, before the interview, to see the evidence against him); Email Declining Interview (detailing principled objections and explaining that "to do so would be fundamentally unfair because Mr. Hassoun is unable to directly contest . . . allegations that are anonymous, unsourced, and unsupported by any evidence."); *supra* 12–13 (explaining various ways in which Petitioner might attack the government's evidence if permitted to see it). The government now seeks to penalize Petitioner for insisting on this fundamental principle of fairness, contending that "the source of [Petitioner's] injury was his own pre-judgment of the procedures, as opposed to the procedures themselves." Opp. 19. In fact, the source of Petitioner's injury is the government's refusal to provide a fair process, not his insistence on obtaining it.

In any event, Petitioner's decision not to participate in the interview does not somehow render "harmless" all of the constitutional defects that infect the government's process. The failure to provide a neutral decisionmaker, access to evidence, and the correct standard of proof will affect the outcome of the detention process. The government misrepresents the record when it states that Petitioner "has not submitted any evidence or statements to rebut the facts in the FBI Director's letter." Opp. 19. To the contrary, Petitioner submitted extensive documentary evidence showing he poses no danger and could readily be released under supervision. Opp. Ex. A-1-J; *infra* 32–36. This included the detailed findings of the federal district court judge; numerous letters attesting to his peaceful character; and a seven-page letter from counsel. *Id*. The letter from counsel, moreover, contained Mr. Hassoun's specific denial of all of the new, anonymous allegations and explained why the FBI letter was unreliable on its face. *Id*. It also

explained in detail why the record evidence shows Mr. Hassoun could easily be released under conditions of supervision that would mitigate whatever threat the government perceives and that he would consent to any reasonable condition of release.

The government's failure to provide basic procedural safeguards is not "harmless" error. These deprivations are fundamental: they are preventing an impartial decision about whether Mr. Hassoun can safely be released under appropriate conditions of supervision and whether he poses a "significant" risk in the first place. They are preventing any inquiry into the false allegations of the FBI letter. They are, in short, leading directly to the erroneous and arbitrary decision to detain Petitioner long after he has completed serving his sentence and potentially for the rest of his life. This Court is empowered to adjudicate and correct these constitutional violations.

IV. THE REGULATION THE GOVERNMENT USES TO JUSTIFY FURTHER DETENTION OF PETITIONER IS UNCONSTITUTIONALLY VAGUE.

As Petitioner has explained, the terms "national security" and "terrorism" as used in 8 C.F.R. § 241.14(d)(1)(ii) are unconstitutionally vague. Pet. Br. at 33–35. As an initial matter, the government claims the Petitioner relies only on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), to support his vagueness argument without articulating the Second Circuit standard for a facial vagueness challenge set out in *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018), and has thus failed to meet his burden under that standard, Opp. 27 n.11. But the Petitioner relied on *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006), *see* Pet. Br. 33, which sets out a substantially similar standard. Moreover, Petitioner saw no need to argue from first principles because § 241.14(d) suffers from the same infirmities that the Supreme Court found rendered similar statutes unconstitutionally vague in *Dimaya* and *Johnson v. United States*, 135 S. Ct. 2551, 2557–60 (2015). Regardless, Petitioner can meet the *Copeland* standard.

First, the government has failed to show how the text of § 241.14(d) meaningfully differs from the residual clauses the Supreme Court found unconstitutionally vague in *Dimaya* and *Johnson*. *Dimaya*, 138 S. Ct. 1214-15; *Johnson*, 135 S. Ct, 2557-60. Opp. 28–29, 30–31. As Petitioner argued, Pet. Br. 34, the regulation shares the same double-indeterminacy that the Supreme Court found causes "grave uncertainty," *Johnson*, 135 S. Ct. at 2557: it lacks any standard either for (1) measuring the "threat to national security" or "significant risk of terrorism" that an individual would pose if released, or (2) determining how much of a "threat" or "risk" one must pose to satisfy the criteria, 8 C.F.R. §§ 241.14(d)(i), (ii).

The government also claims the terms "national security" and "terrorism" are sufficiently clear, but its arguments in support all fail. Opp. 28–31. It is undisputed that the regulation itself lacks any definition of either term. As the FBI itself has noted, "[t]here is no single, universally accepted, definition of terrorism." U.S. Dept. of Justice, Terrorism: 2002-2005, iv (2006), https://www.fbi.gov/stats-services/publications/terrorism-2002-2005. Although the government—contrary to its own statement above—contends that "[s]ince at least September 11, 2001, ordinary Americans have had a reasonable grasp of the meaning of 'terrorism,'" Opp. 29, the vagueness of the terms is evident in the government's own efforts to argue to the contrary. In its brief, the government defines terrorism as "the systematic use of violence to intimidate, especially for political ends." Opp. 29. But that effort to give substance to the term conflicts with another part of the regulation 8 C.F.R. § 241.14(d)(1)(i) which incorporates the definition of "terrorist activity" from a section of the Immigration and Nationality Act. *See* 8 U.S.C. § 1182(a)(3)(B). That section, in turn, defines "terrorist activity" to mean a series of specific acts, such as hijacking and assassination and contains no mention of a political motive. *Id*. Under the government's reading of the regulation, therefore, "terrorism" has two very different

meanings in the two subsections of the regulation. This type of discrepancy is at odds with the idea that "ordinary people have fair notice of the conduct a statute proscribes." *Dimaya*, 138 S. Ct. at 1212.

"National security" is a similarly broad term capable of radically divergent meanings. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("The word 'security' is a broad, vague generality . . . ."); *Paton v. La Prade*, 469 F. Supp. 773, 782 (D.N.J. 1979) ("National security is too ambiguous and broad a term. The memory of the lawlessness that masqueraded as 'national security' searches is too close to the memory of this court."); *Am. Sec. Council Educ. Found. v. FCC*, 607 F.2d 438, 454 (D.C. Cir. 1979) (Wright, J., concurring) ("That 'national security' means different things to different people is incontestable . . . ."). The government cites *United States v. Wilson* for the proposition that "national security" is not vague. 571 F.Supp. 1422, 1426–27 (S.D.N.Y. 1983), *aff'd* 750 F.2d 7 (2d Cir. 2014); Opp. 30. In that case, however, the term "national security" was expressly defined in the statute in question, the Classified Information Procedures Act, and the court concluded that the statutory definition was not vague. Here, there is no such definition.

Moreover, the definition of "national security" in the Classified Information Procedures Act is exceedingly broad, encompassing "the national defense and foreign relations of the United States." Such a definition, if it were found to be applicable to 8 C.F.R. § 241.14(d), would allow the government to detain an individual even if there was no risk of violence at all, as long as the government could show that the individual's conduct affected the interests of the United States. That definition would raise a severe substantive due process concern. *See supra* 7–8 (Due Process Clause requires a "dangerousness-plus" analysis). The government does not make this argument but instead further muddies the waters by arguing that "the meaning of 'national

security' in § 241.14(d)(1)(ii) could not conceivably be broader than it is in the Classified Information Procedures Act." Opp. 30. But the fact that there may be an outer limit to the meaning of the term does not render it specific enough to avoid a vagueness problem.

Similarly, the government cites another extremely broad definition of national security, the one found in the Immigration and Nationality Act. Opp. 38. That law defines "national security" to mean "national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(d)(2). But, again, the government does not adopt this definition, as it would allow the government to detain individuals who posed no threat of violence whatsoever, which would violate substantive due process. *See supra* 7–8. Instead, the government argues that the existence of this definition—which the regulation does not incorporate—somehow renders the term not vague. Yet in citing multiple definitions of the term "national security," the government exposes that the term has no understood meaning to ordinary individuals and in fact has many meanings that are simply too broad to defend as a basis for detention. *See Bode v. Kenner City*, No. 17-cv-5483, 2017 WL 3189290, at *18 (E.D. La. July 26, 2017) ("The City's identification of five different definitions of the term "political activity" exacerbates rather than remedies the vagueness of the law."); *LeBlanc v. People*, Crim. No. 2011-0027, 2012 WL 1203333, at *3 (V.I. Apr. 4, 2012)("multiple definitions" do not render statute not vague). Elsewhere, Congress has provided a definition to suit the context, but the regulation here contains no definition, and requires people to guess at what it means. This is precisely what the due process clause prohibits.

Even if § 241.14(d) did not resemble the residual clauses in *Johnson* and *Dimaya* so much that it is void for vagueness under those cases alone, it meets the *Copeland* test. For the same reasons, Petitioner argued the terms "national security" and "terrorism" are not clear

enough to remove a layer of indeterminacy in the statute, *see supra* 23–25, they "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Copeland*, 893 F.3d at 110. Alternatively, both "national security" and "terrorism" are so vague and capacious that they could easily encompass speech that is protected by the First Amendment, which supports that they could "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Id.*; *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

The government does not argue that the terms terrorism and national security could not be used to chill protected speech of disfavored groups—a criterion the Second Circuit specifically considered in *Farrell*, 449 F.3d at 485—but merely claims they are not being used that way toward Petitioner. Opp. 27 n.12. Even if that were the standard here, the government's argument misstates the record. The government has cited Petitioner's alleged use of "incendiary rhetoric" as one of the rationales for holding him under the regulation. Opp. Ex. A-1-B. But it provides no further information as to the content of this "rhetoric" or how it has substantiated any harm to national security or terrorism threat—confirming the very risks raised by the use of vague terms in a detention regulation.

The regulation, in short, gives the government carte blanche power to define its terms in whatever way it wants in order to detain whomever it wants for an indefinite—and potentially prolonged—period of time. The Constitution requires more specificity.

V. THE GOVERNMENT DOES NOT ADDRESS PETITIONER'S EQUAL PROTECTION CHALLENGE.

In its opposition, the government misconstrues bedrock equal protection principles and fails to explain why 8 C.F.R. § 241.14(d) survives Mr. Hassoun's equal protection challenge. A statute or regulation triggers heightened scrutiny when it (1) touches on a fundamental right *or* (2) targets a suspect class. *Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012); *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). Mr. Hassoun argues 8 C.F.R. § 241.14 triggers heightened scrutiny because the regulation "encroaches on a fundamental right"—*i.e.* the right to be free from the government's indefinite physical restraint—in a way that fails to meet heightened or even rational scrutiny. Pet. Br. 36 (citing *Foucha*, 504 U.S. at 86).

Rather than address this fundamental rights argument, however, the government appears to respond to a suspect classification argument *not* raised by Mr. Hassoun—*i.e.* a classification based on alienage, which in the immigration context is subject only to rational basis review. Opp. 34–35. In fact, most of the cases cited by the government do not address a fundamental rights analysis at all. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79 (1976) (alienage classification in federal insurance program did not violate equal protection); *United States v. Lue*, 134 F.3d 79, 86 (2d Cir. 1998) (alienage classification in federal criminal law did not violate equal protection); *Romero v. INS*, 399 F.3d 109 (2d Cir. 2005) (nationality classification in federal immigration law did not violate equal protection); *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (federal immigration enforcement on alleged religious, ethnic, gender, and race classifications grounds did not violate equal protection).

Reno v. Flores and *Demore v. Kim* are the only fundamental rights cases the government cites, but neither case undermines Petitioner's argument. In *Reno*, the Supreme Court considered whether limits on custody determinations regarding noncitizen minors impinged on a fundamental

right. 507 U.S. 292, 302 (1993). "The 'freedom from physical restraint,'" however, was "not at issue in [that] case." *Id*. Similarly, the fundamental rights analysis in *Demore* concerned immigration detention with "a definite termination point [and] in the majority of cases [of] less than 90 days." 538 U.S. 510, 529 (2003) (distinguishing *Zadvydas*). Mr. Hassoun's detention has long exceeded this 90-day period, and has no definite end point. The government, in short, says nothing on why the fundamental right asserted by Mr. Hassoun does not trigger heightened scrutiny.

Additionally, the government mischaracterizes the class of noncitizens subject to the regulation, and thus fails to provide even a rational basis for its classification. Opp. 35. Even if only rational basis (rather than heightened scrutiny) applied to the challenge here—which it does not—the government must provide a "relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Petitioner identifies the class affected by the regulation as noncitizens ordered removed, but unlikely to be removed, Pet. Br. 36 (citing 8 C.F.R. §§ 241.14(a)(1), (d)), and the government's asserted objective in abridging the fundamental right is security or terrorism concerns.

The government does not provide a rational basis for subjecting only noncitizens ordered removed (but unlikely to be removed) to this abridgment. Instead, it redefines the classification as "aliens who have been ordered removed [. . .] but who cannot be removed in the reasonably foreseeable future, and whose release from detention would pose a significant risk to national security or a significant threat of terrorism that cannot reasonably be avoided by conditions on release." Opp. 36–37. This circular logic is unavailing. "Public safety and national security" might be legitimate government interests, *id*. at 36, but the government has provided no reason why removable noncitizens who are unlikely to be removed pose any *more* of a threat to public safety

or national security than any other removable person or U.S. citizen. *Id*. at 37-38. As Mr. Hassoun has observed, for instance, the government provides no rationale for why one of his co-defendants (a U.S. citizen) convicted of the same crimes and sentenced by the same judge has now served his time and is at liberty, while he faces the prospect of indefinite detention. Pet. Br. 37 n.17. Indeed, individuals convicted of far more serious terrorism crimes are now on the streets and escape detention under § 241.14(d) solely because of their citizenship status. *See* Niraj Chokshi & Carol Rosenberg, *John Walker Lindh, the 'American Taliban,' Was Released. Trump Said He Tried to Stop It*., N.Y. Times, May 23, 2019.

VI. THE GOVERNMENT HAS NOT ESTABLISHED THAT PETITIONER MEETS THE REQUIREMENTS OF 8 C.F.R. § 241.14(d).

The government claims that the Court lacks jurisdiction to hear Mr. Hassoun's argument that he does not meet the requirements of 8 C.F.R. § 241.14(d). Opp. 38. However, Mr. Hassoun is not challenging the discretionary decision of the Secretary to hold him; instead he is challenging the Secretary's legal authority to hold him because the government has not met its burden to satisfy the three legal requirements of 8 C.F.R. § 241.41(d). The Court maintains jurisdiction over such non-discretionary decisions. The government also argues that "even if the Court did have jurisdiction, the evidence supports the [the government's] discretionary determination." Opp. 38. This contention also fails; the government's evidence is insufficient to establish the requirements of § 241.14(d).

A. The Court has jurisdiction to find that Mr. Hassoun's detention is unlawful under § 241.14(d).

Contrary to the government's argument, 8 U.S.C. § 1252(a)(2)(B), which bars judicial review of denials of discretionary relief, does not bar review of Mr. Hassoun's claim that the government did not meet its burden under § 241.14(d). Mr. Hassoun, like the petitioners in *Zadvydas*, "do[es] not seek review of the [Secretary's] exercise of discretion; rather, [he]

challenge[s] the extent of the [Secretary's] authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion." *Zadvydas*, 533 U.S. at 688. Setting aside for the moment Petitioner's arguments that § 241.14(d) is ultra vires and unconstitutional, Petitioner recognizes that if he actually meets the three requirements of the regulation, the government then has discretion to decide whether to detain him, and *that* discretionary decision might not be subject to review. Here, however, Petitioner contends that the government lacks the legal basis to detain him under the regulation because it has failed to show that he meets the three requirements. This is precisely the type of mixed question of law and fact that is not foreclosed by 8 U.S.C. § 1252(a)(2)(B). *See Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005) ("§ 1252(a)(2)(B)(ii) applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines"); *Cho v. Gonzales*, 404 F.3d 96, 102 (1st Cir. 2005) ("[C]ourts, including ours, have not hesitated to review the Attorney General's threshold eligibility determinations" despite § 1252(a)(2)(B).).

The Court in *Zadvydas* explicitly rejected the government's argument that the Court had to defer to the government's own evaluation of whether removal was reasonably foreseeable. *Id*. at 699 ("The Government seems to argue that [we] would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter. In our view, that is not so."). After *Zadvydas*, courts routinely examine the facts underlying the government's decision to continue to detain petitioners pursuant to § 1231(a)(6) and find that removal will not occur in the reasonably foreseeable future, as the district court previously did in this very case. *See Hassoun v. Sessions*, No. 18-cv-586, 2019 WL 78984 (W.D.N.Y. Jan. 2, 2019) (Geraci, C.J.) (examining facts and finding that Petitioner's removal was not reasonably foreseeable); *see also, e.g., Singh v.*

Whitaker, 362 F. Supp. 3d 93, 101 (W.D.N.Y. 2019) (examining facts and finding that government's procurement of travel documents for India was not reasonably foreseeable).

The government's reliance on *Sol v. INS*, 274 F.3d 648 (2d Cir. 2001), and *Contreras-Salinas v. Holder*, 585 F.3d 710 (2d Cir. 2009), is misguided. In both cases, the petitioner asked the Court to review a denial of a discretionary waiver. *See Sol*, 274 F.3d at 651–52 (declining to review a discretionary waiver of deportation under former Immigration and Nationality Act § 212(c) that was committed by statute to discretion of Attorney General); *Contreras-Salinas*, 585 F.3d at 713-14 (The statute establishing the waiver "clearly commit[s] to the Attorney General's 'sole discretion' the determination of 'what evidence is credible and the weight to be given that evidence.'"). Section 241.14(d)(1) contains no similar language committing the decision to detain Mr. Hassoun to the discretion of the government.

In arguing that the Court lacks jurisdiction to hear this claim, the government makes an argument that exposes the sleight of hand in its brief and reveals its true intent—that is, to deny meaningful scrutiny of Mr. Hassoun's indefinite detention. Elsewhere, the government concedes that habeas review of the Secretary's decision is available, even insisting that the availability of such review cures any failures of the regulation to provide a neutral decisionmaker. Opp. 23. But in arguing against jurisdiction, the government contends that the Secretary's decisions made under § 241.14(d) are "untouchable" and unreviewable. *Id.* at 39. Similarly, the government's argument that "[t]he regulation does not bind or limit the Director's discretion in making" findings that the three criteria are satisfied, *id.* at 38, directly contradicts its own assertion that § 241.14(d) contains "substantive regulatory hurdles," *id.* at 41. It is clear from these contradictory sets of arguments that the government is attempting to have its cake and eat it too, arguing that habeas review is available to Mr. Hassoun in order to save the regulation from being invalidated,

while at the same time denying Mr. Hassoun that very same review by claiming that its decisions are discretionary and subject to a jurisdictional bar.

The government's crabbed version of habeas review is not only incorrect, but also violates the Constitution's Suspension Clause. As the Supreme Court has repeatedly stated, "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in this context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. For habeas review of executive detention to be meaningful, as the Suspension Clause requires, it must include, for example, the power to correct any errors, to assess the sufficiency of the government's evidence, and to admit and consider relevant exculpatory evidence that was not previously considered. *Boumediene*, 553 U.S. at 786.

B. The government does not satisfy the requirements of § 241.14(d), and its decision to detain Mr. Hassoun is unsupported by the "evidence" in the record.

The essential facts used by the government to satisfy the criteria of § 241.14(d) are unsupported by the evidence. First, the record does not support the government's finding that Mr. Hassoun "presents a significant threat to the national security or a significant risk of terrorism." 241.14(d)(1)(ii). The FBI Letter is the *only* document in the government's record that speaks to Mr. Hassoun's conduct after his arrest 17 years ago. Yet it is unsworn and therefore has no evidentiary value; neither the government nor the Court may draw factual conclusions from its contents. The government ignores the deficiencies of the FBI letter, instead arguing that "Petitioner has submitted no new evidence of his own to ICE for consideration in the § 241.14(d) process." Opp. 43. But Petitioner does not have the burden of proof, as the government concedes. Opp. 24. Mr. Hassoun categorically denies all of the allegations in the FBI letter and submitted

extensive documentary evidence showing he poses no danger. *See* Opp. Ex. A-1-J. He cannot do more without access to the actual evidence underlying the FBI letter. *See supra* 11–13.[8]

The government's argument that Mr. Hassoun's prior convictions prove that he is at a high risk of recidivism is also baseless. The government posits that Mr. Hassoun's prior convictions justify its conclusion because "terrorists, even those with no prior criminal behavior, are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." Opp. 46. This assertion, however, has never been proven, and the government's reliance on "unsubstantiated assumptions about recidivism" is severely flawed. *See United States v. Alhaggagi*, 372 F. Supp. 3d 1005, 1013 (N.D. Cal. 2019) (stating that it was "inappropriate to automatically increase a defendant's criminal history based on unsubstantiated assumptions about recidivism" in terrorism cases); Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 Yale L.J. 1520, 1549–50 (2017) ("[T]he very limited data suggests that individuals convicted of terrorism offenses do not recidivate at higher rates than those convicted of other crimes."). One study has shown, for example, that "'[o]f the more than 300 prisoners who have completed their terrorism sentences since 2001," there were only "'a handful of cases in which released inmates had been rearrested, a rate of relapse far below that or most federal inmates.'" *Alhaggagi*, 372 F.Supp.3d at 1015

[8] Similarly, the government's unsupported assertion that Mr. Hassoun's "[b]road, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact" is absurd. The government has not provided the identities of any witnesses, without which Mr. Hassoun has no grounds to attack their credibility. Mr. Hassoun is presently limited to attacking the witnesses' credibility based on the only information made available to him, that they were fellow detainees. Opp. Ex. A-1-B. It is preposterous for the government to argue that Mr. Hassoun would not be able to do more if he were given additional information, including their respective identities.

(quoting Scott Shane, Beyond Guantanamo, a Web of Prisons for Terrorism Inmates, N.Y. Times, Dec. 10, 2011).

The government's inference that Mr. Hassoun's prior conviction means he poses a danger also flies in the face of the authoritative findings of the U.S. District Court Judge who actually presided at his criminal trial and determined at sentencing that Mr. Hassoun posed no danger to the community, had never taken any actions directed against the United States, and was a valued colleague and coworker who had positive, supportive relationships with people from all walks of life. Am. Pet. Ex. A, 6–8. The judge's decision to reject the government's demand for a life sentence and impose a term of imprisonment radically below the minimum guidelines range explicitly reflected her determination that Mr. Hassoun posed no danger. Notably, the government did not appeal the sentence, even while it appealed Mr. Hassoun's co-defendant's sentence for being too lenient, *see United States v. Jayyousi*, 657 F.3d 1085, 1109 (11th Cir. 2011), and it dropped the remaining eight charges against him without taking them to trial, Am. Pet. ¶ 43. The government had its opportunity to challenge the district court's findings but did not take it. It may not now effectively ignore and overrule those findings and conclude that his conviction alone somehow means he continues to pose a danger more than 17 years after his arrest. [9]

Further, but critically, the record likewise does not support the government's summary conclusion that "[n]o conditions of release can reasonably be expected to avoid the threat to the

[9] In addition, the government also cites Mr. Hassoun's alleged refusal "to admit his past criminal activity of which he was convicted, suggesting he could continue such activity in the future" and Mr. Hassoun's alleged unwillingness to "cooperate with law enforcement in their investigation." Dkt. No. 17, Att. 4 at 45-46. Both of these allegations are irrelevant, as they are not probative of Mr. Hassoun's alleged dangerousness or risk of recidivism, nor does the government offer any explanation of how they might be.

national security or the risk of terrorism." § 241.14(d)(1)(iii). Not only has Mr. Hassoun been subject to comprehensive supervision pre-dating his arrest, but he would be subject to similar or even more stringent supervision—including, but not limited to, monitoring his communications, movements, and financial transactions—after his release. *See* 8 U.S.C.§ 1231(a)(3); 8 C.F.R. § 241.13(h).

The government's argument that it lacks the capacity or legal authority to properly surveil Mr. Hassoun after his release is unfounded. First, the government's own regulations provide broad discretion: "The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal." 8 C.F.R. § 241.13(h). The government cannot artificially tie its own hands and limits its own authority to impose conditions of release to justify keeping a man locked up.

Second, as Mr. Hassoun has made clear, even if the government perceives some other unspecified legal obstacles to certain forms of supervision, Mr. Hassoun would be willing to consent to a broad variety of stringent conditions, including monitoring of his communications and locations, restrictions on the people with whom he is allowed to communicate electronically, curfew requirements or even potentially house arrest. After 17 years of imprisonment, Mr. Hassoun, now 57 years-old, is willing to agree to any reasonable conditions in order to regain his freedom from detention while he continues to pursue all possible options for leaving this country. Indeed, releasing Mr. Hassoun under supervision would likely expedite his removal because it would demonstrate to potential recipient countries that he does not pose any grave threat requiring incarceration.

In addition to any conditions imposed by this Court, Mr. Hassoun will be subject to the supervision requirement of his criminal sentence, as well as any conditions deemed necessary by immigration officials. Am. Pet. Ex. A, 19:19–23. If, moreover, Mr. Hassoun were to violate any such conditions of release, or were to engage in any activity that endangers national security, ICE could re-detain him. 8 C.F.R. § 241.13(i). Further, Mr. Hassoun could be prosecuted and sentenced to imprisonment for violating the terms of his immigration release, 8 U.S.C. § 1253(b), or he could be returned to criminal custody for violating the conditions of his criminal supervised release, 18 U.S.C. § 3585(e); Fed. R. Crim. P. Rule 32.1. Petitioner can and should be safely released under supervision.

CONCLUSION

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

Respectfully submitted,

/s/ Jonathan Manes

Jonathan Manes
A. Nicole Hallett
Supervising Attorneys
Erin Barry
Patrick Hoover
Colton Kells
Student Attorneys
507 O'Brian Hall, North Campus
University at Buffalo School of Law
Buffalo, NY 14260
716-645-2167
jmmanes@buffalo.edu
nicole@buffalo.edu

Jonathan Hafetz
Brett Max Kaufman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
jhafetz@aclu.org

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

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

Counsel for Petitioner

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Buffalo, New York