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

SUPPLEMENTAL MEMORANDUM CONCERNING PETITIONER'S DETENTION UNDER 8 U.S.C. § 1226a, IN FURTHER SUPPORT OF PETITIONER'S VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

The government has belatedly invoked yet another authority to continue to detain Petitioner indefinitely, but just like the other authorities on which it has relied, this one too is unlawful, unconstitutional, and does not authorize Petitioner's detention. The government should not be permitted to prolong Mr. Hassoun's detention by stringing along Petitioner and the Court in this manner. Petitioner has been in immigration custody for 22 months; eight months ago Chief Judge Geraci held that his removal was not foreseeable and that he must be released unless the government identified some alternative detention authority; six months ago the government identified such an authority—a DHS regulation purporting to authorize indefinite national security detention, 8 C.F.R. § 241.14(d). Petitioner brought this petition to challenge his detention under that regulation, but it was not until the very day that briefing was to be completed that the government determined it would certify Petitioner under yet another authority, Section 412 of the PATRIOT Act, 8 U.S.C. § 1226a, for substantially the same reasons it did so under the DHS regulation six months ago.

The government's latest effort to find some authority to continue to detain Petitioner fails because 8 U.S.C. § 1226a does not apply to Petitioner and, in any case, is fatally and fundamentally unconstitutional. The statute does not cover Petitioner because, by its own terms, it only applies to individuals who were initially apprehended based on certification by the Secretary of Homeland Security, which Petitioner was not. But even if the statute did apply to Petitioner, it is unconstitutional for much the same reasons as the regulation: it violates substantive due process, procedural due process, and equal protection. In fact, § 1226a is even more clearly unconstitutional than the regulation in several respects. First, it purports to authorize indefinite detention of an even more broadly defined class of people, and without *any* requirement for the government to show that detention is actually necessary to mitigate the threat

it claims Mr. Hassoun poses. Second, the statute contains even fewer procedural safeguards than the regulation, which itself lacks all the essential safeguards required for indefinite civil detention. Indeed, the statute fails to prescribe any procedures the government must follow before determining that a person qualifies for indefinite detention under this law. As explained below, the statute is unconstitutional on its face and as applied, and must be invalidated.

Ultimately, the government's efforts to prolong this case have served to allow it to hold Mr. Hassoun for the better part of a year based on nothing more than anonymous allegations recounted in an unsworn FBI letter that, on their face, are based on patently unreliable hearsay statements of jailhouse informants. At every stage, the government has refused to produce whatever actual evidence, if any, the government may have to support those allegations. In addition, the government has thus far refused to demonstrate to a neutral decisionmaker that there are no conditions of release and supervision that would address whatever threat it perceives—even though Petitioner has clearly and repeatedly communicated that he would consent to the most stringent conditions.

Mr. Hassoun firmly denies the uncorroborated allegations in the FBI letter. They are utterly inconsistent with his 17 years of good behavior in federal custody. They are also inconsistent with his crime of conviction, which the sentencing judge determined involved no activities directed against the United States or its interests. Indeed, after presiding over 4 months of trial and 4 years of proceedings, the sentencing judge concluded that Mr. Hassoun posed no danger to the community. For this reason, the sentencing judge rejected the government's request for a life sentence and instead imposed a sentence that was almost 50% lower than the minimum sentence under the guidelines, a sentence the government itself did not appeal. The government cannot now impose an indefinite sentence of life imprisonment on grounds of supposed

dangerousness by levelling threadbare, unsworn accusations in a unilateral executive process. Petitioner's detention is both unconstitutional and unjustified; this Court should order his immediate release under supervision. In the alternative, if the Court does not strike down the statute on its face or order immediate release on the administrative record, the Court should hold an evidentiary habeas corpus hearing that affords Petitioner a fair opportunity to challenge the government's allegations and to win his freedom.

STATUTORY BACKGROUND

On October 26, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107–56, 117 Stat. 272 (2001) ("PATRIOT Act"). Section 412 of the Act, codified at 8 U.S.C. § 1226a, is the provision at issue here. Section 1226a governs the mandatory detention of aliens initially apprehended on national security grounds based on a certification by the Secretary of Homeland Security.[1]

Section 1226a(a)(3) authorizes the Secretary of Homeland Security to certify a non-citizen if the Secretary "has reasonable grounds to believe" that the non-citizen either is described in one of several listed sections of the Immigration and Nationality Act, 8 U.S.C. § 1226a(a)(3)(A), or "is engaged in any other activity that endangers the national security of the United States," *id.* § 1226a(a)(3)(B). Once the Secretary certifies a non-citizen under paragraph

[1] The regulation refers to the Attorney General as the decisionmaker. 8 U.S.C. § 1226a(a)(1). However, the Homeland Security Act of 2002 abolished the Immigration and Naturalization Service, which was under the control of the Attorney General, and transferred its "detention and removal program" to DHS. Homeland Security Act of 2002, Pub. L. 107–296, § 441, 116 Stat. 2135, 2192 (Nov. 25, 2002 (codified as amended at 6 U.S.C. § 251)). Following this change, powers previously assigned to the Attorney General were reassigned to the Secretary of Homeland Security. 6 U.S.C. §§ 251, 557. Acting Homeland Security Secretary Kevin McAleenan signed Mr. Hassoun's certification order dated August 9, 2019. *See* Respondent's Notice of Secretarial Certification, ECF No. 26, Ex. B.

(3), "[the Secretary] shall take [that alien] into custody." *Id.* § 1226a(a)(1). The Secretary may detain the certified non-citizen for up to seven days without initiating criminal or removal proceedings. If after seven days the Secretary has not placed the non-citizen in removal proceedings or charged him or her with a criminal offense, the non-citizen must be released. *Id.* § 1226a(a)(5). If, however, the certified non-citizen is placed in proceedings within seven days, the Secretary of Homeland Security must maintain custody over him or her until the non-citizen's removal from the United States unless he or she is found not to be removable, *id.* § 1226a(a)(2), or the Secretary finds the non-citizen no longer meets the criteria under § 1226a(a)(3) based on the Secretary's required six-month review of the initial certification, §§ 1226a(a)(2), (7).

Section 1226a(a)(6), the provision the government invokes here, states that a non-citizen "detained solely under" § 1226a(a)(1) who is found removable, but whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months "only if [the alien's] release will threaten the national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6).

Section 1226a states that decisions to detain a non-citizen under this section are subject to judicial review by habeas corpus. *Id.* § 1226a(b)(1). This includes review of any certification of a non-citizen under § 1226a(a)(3) or to continue detention of such a non-citizen when removal is not reasonably foreseeable under § 1226a(a)(6). *See id.* § 1226a(b)(1). Such habeas actions may be brought in "any district court otherwise having jurisdiction to entertain it," *id.* § 1226a(b)(2)(A)(iv), but all appeals are to be heard by the U.S. Court of Appeals for the D.C. Circuit, and the law of that Circuit (and of the Supreme Court) are designated as the "rule of

decision" by the statute, irrespective of the jurisdiction in which the petition is initially filed, *id.* § 1226a(b)(3)–(4).

On November 14, 2001, a few weeks after Congress had enacted the PATRIOT Act, the Immigration and Naturalization Service (now the Department of Homeland Security) promulgated 8 C.F.R. § 241.14. That regulation, discussed extensively in prior briefs, specifically addresses the continued detention of non-citizens whose removal is unlikely in the reasonably foreseeable future, based on "special circumstances." *Id.* § 241.14(a). Section 241.14(d) specifies the grounds and procedures governing continued detention of aliens based on national security or terrorism concerns. The agency promulgated the regulation solely pursuant to 8 U.S.C. § 1231(a)(6), the statute at issue in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and not the PATRIOT Act. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967, 56972 (Nov. 13, 2001) ("The Department is issuing § 241.14 to provide procedures for determining whether particular removable aliens may be continued in detention even if their removal is not significantly likely in the reasonably foreseeable future, in light of the Supreme Court's decision in *Zadvydas*."); *id.* at 56967–68, 56972, 56976 (identifying 8 U.S.C. § 1231(a)(6) as the statute at issue in *Zadvydas* and the statutory authority for § 241.14). The PATRIOT Act is not mentioned at all in the notice in the Federal Register promulgating the regulation.

ARGUMENT

I. 8 U.S.C. § 1226a DOES NOT APPLY TO PETITIONER.

The government's attempt to justify Mr. Hassoun's indefinite detention by belatedly invoking 8 U.S.C. § 1226a fails because the statute does not apply to him. Section 1226a instead applies to a distinct group: non-citizens *initially* apprehended and *solely* detained based on the Secretary of Homeland Security's certification that they pose a threat to national security. Thus it

cannot apply to individuals, like Mr. Hassoun, who were not initially apprehended under this authority and are being detained based on another ground (here, 8 C.F.R. § 241.14(d)). While statutory text, purpose, and structure alone place Mr. Hassoun outside § 1226a, the Court should reach this conclusion for the additional reason that the government's construction would raise grave constitutional problems the Court must avoid where another construction is fairly possible, as it is here.

Section 1226a serves two primary and interrelated purposes that underscore the statute's limited application. First, the statute empowers the Secretary of Homeland Security to seize non-citizens on national security grounds and detain them for up to seven days without commencing proceedings. *See id.* §§ 1226a(a)(1), (5). The low, mere "reasonable grounds to believe" standard required for a certification by the Secretary of Homeland Security under § 1226a(a)(3)—roughly akin to the traditional "probable cause" standard for arrests, *see Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977) (contrasting traditional probable cause with a "lesser showing" of "reasonable grounds to believe")—reinforces that the certification was intended to apply only to non-citizens not yet in custody. So does § 1226a's language directing that the Secretary "shall release" individuals not put in proceedings within seven days, § 1226a(a)(5), which resembles that of statutes limiting how long state authorities can hold individuals before they must charge them with a crime. *See, e.g.*, N.Y. Crim. Proc. Law § 180.80 (McKinney 2018) (criminal court "must release" an individual from preventative detention if he is not charged with a crime within a certain time after initial arrest unless he fits an enumerated exception). Thus, from its face, it is clear that the statute's primary purpose is to extend the time that covered persons—*i.e.*, non-citizens initially apprehended based on a §1226a(a)(3) certification—may be detained without

judicial proceedings, from 48 hours to seven days. *See, e.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).[2]

Second, and relatedly, the statute mandates that the Secretary of Homeland Security maintain custody over non-citizens apprehended based on a §1226a(a)(3) certification (and charged within the required seven days), unless the non-citizen is either finally determined not to be removable, *see* § 1226a(a)(2), or the Secretary determines the § 1226a(a)(3) certification should be revoked based on his or her required six-month review, *see* §1226a(a)(7).

Because Mr. Hassoun was not apprehended based on a certification by the Secretary of Homeland Security, he is not subject to § 1226a or its provisions. Instead, Mr. Hassoun's detention in immigration custody pending removal has been controlled exclusively by other statutory provisions—initially by 8 U.S.C. § 1226, which governs the detention of non-citizens pending completion of removal proceedings (including mandating detention in some circumstances, *see id.* § 1226(c)); and subsequently, by 8 U.S.C. § 1231(a), which governs the detention of non-citizens with final orders of removal.

The government relies on § 1226a(a)(6), which provides for continued detention where a certified non-citizen has not been removed and where removal is not reasonably foreseeable, to justify the detention of Mr. Hassoun. But, by its own terms, this detention authority applies only to the limited class of non-citizens covered by the statute—*i.e.*, those apprehended based on a certification by the Secretary of Homeland Security under § 1226a(a)(1). The text itself expressly limits this detention authority to "[a]n alien detained solely under paragraph (1)," *id.*—that is, to

[2] This extension of the period in which an individual may be detained without charge and judicial process raises significant constitutional problems, but the Court need not address them since Mr. Hassoun was not apprehended based on a § 1226a certification.

an alien apprehended and initially detained based on a § 1226a(a)(3) certification by the Secretary of Homeland Security.

8 C.F.R. 241.14(d), on which the government had exclusively relied until Mr. Hassoun filed his reply brief, further underscores why 8 U.S.C. § 1226a cannot authorize Mr. Hassoun's continued detention. That regulation was promulgated nearly one month *after* Congress enacted the PATRIOT Act. It addresses the continued detention of certain aliens held under § 1231(a) who have been ordered removed from the United States but whose removal is not foreseeable, including non-citizens detained for national security or terrorism-related reasons. *See* 8 C.F.R. §§ 241.14(a), (d). The regulation thus addresses the specific category discussed in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Section 1226a, by its own terms, addresses a distinct and narrow group—those initially apprehended and detained based on a national security certification by the Secretary of Homeland Security. And Section 1226a(a)(6) addresses the continued detention of members of this distinct group who would otherwise be released under *Zadvydas* if they could not be removed. In the wake of the terrorist attacks in 2001, Congress and the Administration enacted these two separate detention authorities. Congress's statute filled a small hole in the government's initial detention authority, while the regulation purported to enact a broader post-final order detention authority. Neither provides lawful authority to detain Mr. Hassoun.[3]

[3] As set forth previously, the regulation is *ultra vires* and should be invalidated on that basis alone. *See* Pet. Br. 9–16; Pet. Reply 2–6. If Congress had wished to authorize broad indefinite detention authority over all individuals, like Mr. Hassoun, who have been ordered removed but whose removal is not reasonably foreseeable (*i.e.* the category addressed in *Zadvydas*), it needed to enact a new *statute* expressly providing for that detention power. The government could not simply issue a regulation under a statute, 8 U.S.C. § 1231(a)(6), that had already been authoritatively construed *not* to permit indefinite detention for constitutional reasons. Pet. Reply 2–6. Congress has not enacted any such statute.

Section 1226a, in short, does not authorize the indefinite detention of individuals such as Mr. Hassoun who were initially apprehended and are currently held under detention authority distinct from § 1226a. The government's eleventh-hour certification of Mr. Hassoun under the PATRIOT Act—more than 17 years after Mr. Hassoun's apprehension and commencement of removal proceedings and more than seven months after the district court ordered Mr. Hassoun's release under *Zadvydas* because his removal was no longer foreseeable—underscores the obvious: that the government is attempting to contort a law never intended to apply to Mr. Hassoun to further prolong his unlawful imprisonment.

This Court, moreover, must construe § 1226a not to apply to Petitioner because of the grave constitutional problems it would raise in his case, including as a matter of substantive and procedural due process. *See infra* at 10–21. Whenever a statute raises a serious constitutional problem, courts must avoid that construction when another construction is "fairly possible." *See, e.g.*, *Zadvydas* 533 U.S. at 689 (quotation omitted); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should avoid unnecessarily deciding constitutional issue). Here, these problems can—and therefore must—be avoided because it is certainly "fairly possible" to construe § 1226a not to apply to Petitioner, who was not apprehended based on a national security certification by the Secretary of Homeland Security and is not being detained solely under § 1226a, thus avoiding the constitutional questions Petitioner has raised.[4]

[4] Petitioner does not mean to suggest that the statute would avoid *all* or even most constitutional difficulties if construed to apply only to a narrow class of people initially detained under § 1226a(a)(3). The statute would still lack basic procedural safeguards and infringe on substantive due process protections, among others. But the narrow interpretation of the statute's coverage—which is not simply "fairly possible' but in fact the best interpretation—would permit the Court to avoid reaching those difficult constitutional questions in this case.

II. 8 U.S.C. § 1226a VIOLATES SUBSTANTIVE DUE PROCESS.

Section 1226a violates substantive due process under the Fifth Amendment for similar reasons as the regulation, 8 C.F.R. § 241.14(d), and in fact constitutes an even clearer violation because it does not even require the government to demonstrate that incarceration (as opposed to supervised release under conditions) is necessary to mitigate whatever danger it perceives. There are four reasons why the statute violates substantive due process. First (like 8 C.F.R. § 241.14(d)), the statute authorizes indefinite detention based on dangerousness alone, without any additional circumstance that helps create the danger. Second (like 8 C.F.R. § 241.14(d)), § 1226a lacks any durational limitations. Third (like 8 C.F.R. § 241.14(d)), the statute allows the government to unconstitutionally substitute indefinite civil detention for criminal prosecution. Fourth (unlike 8 C.F.R. § 241.14(d)), § 1226a does not obligate the government to consider and implement other, less restrictive means than physical imprisonment to address the alleged danger.

First, as Mr. Hassoun has previously explained in detail, indefinite detention based on alleged dangerousness alone, without any additional circumstances that help create the danger, such as mental illness, violates substantive due process. *See* Pet. Br. 15–20; Pet. Reply 6–8; *see also, e.g.*, *Zadvydas*, 533 U.S. at 691; *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992); *Kansas v. Crane*, 534 U.S. 407, 412 (2002). Section 1226a thus suffers from the same fatal flaw as 8 C.F.R. § 241.14(d), the government's previously asserted justification for indefinitely detaining Mr. Hassoun. Like that regulation, § 1226a provides for indefinite detention based on dangerousness alone, without "proof of some additional factor . . . that makes it impossible for the person to control his behavior." *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). The government has not even tried to explain why invocations to "terrorism" threats or "national security" constitute this kind of additional factor indicating an innate and irremediable condition.

Second, § 1226a contains no durational limit, and could thus result in Petitioner's permanent imprisonment. As Mr. Hassoun has explained, the Supreme Court has found that dangerousness justifies civil detention *only* in the context of pretrial detention, where there are meaningful durational limitations. *See* Pet. Br. 20; *see also Schall v. Martin*, 467 U.S. 253 (1984); *United States v. Salerno*, 481 U.S. 739 (1987). And the Court has invalidated indefinite-detention schemes (or fashioned durational limits itself) by specifically pointing to those very cases. *See* Pet. Br. 20; *see also Foucha*, 504 U.S. at 82; *Zadvydas*, 593 U.S. at 682, 690–91. Section 1226a contains no durational limitation whatsoever.[5]

Third, § 1226a violates substantive due process because it allows the government to unconstitutionally substitute indefinite civil detention for criminal prosecution. Pet. Br. 21–24. "In our society liberty is the norm, and detention . . . without trial is the carefully limited exception." *Salerno*, 481 U.S. at 747. As noted above, this "carefully limited exception" has *never* been construed to permit indefinite civil detention based on dangerousness alone. But *even if* this exception might be so construed in cases involving suspected terrorists, the detention still cannot be "excessive in relation to the regulatory goal Congress sought to achieve." *Id.*; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 557 (2004) (Scalia, J., dissenting) (government cannot "render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute or asserting that it was incapacitating dangerousness offenders rather than punishing wrongdoing").

The government must, at minimum, therefore demonstrate that it cannot achieve its goal of incapacitation through the ordinary criminal process. *See Foucha*, 504 U.S. at 82 (in addition

[5] For the reasons previously explained, semi-annual "review" of a determination that an individual may be certified for detention, as required by § 1226a(a)(7), is plainly not a durational limitation in and of itself. *See* Pet. Br. 20–21 (discussing *Zadvydas*); Pet. Reply 8–9.

to impermissibly seeking detention based solely on future dangerousness, government failed to "explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction"). The government has leveled serious accusations against Mr. Hassoun—accusations that, if proven, could well constitute a violation of federal criminal law and result in conviction and imprisonment. But the government has failed to provide any legitimate justification for why it has not brought charges against Mr. Hassoun based on its accusations, even as it routinely uses the federal criminal process to incapacitate individuals suspected of supporting terrorism in a range of ways.[6] Mr. Hassoun's detention violates substantive due process for this reason as well.

Finally, § 1226a is also excessive in relation to any legitimate purpose because it fails to obligate the government to identify other, less restrictive means to address the alleged danger and require Mr. Hassoun's conditional release on that basis. Even absent an express intent to punish, detention may fall on the punitive side of the "punitive/regulatory" line if it is not tied to a rational, non-punitive purpose, or if it appears to be "excessive in relation to [such a] purpose." *Salerno*, 481 U.S. at 747. Accordingly, the government can under no circumstances indefinitely detain a person without establishing that lesser conditions of release would fail to address the asserted risk. *See id.* at 750 ("[T]he government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any other person."). Indeed, in this respect, § 1226a differs even from the regulation on which the government alternatively relies, which despite its myriad of

[6] *See, e.g.*, U.S. Dep't of Justice, Counterterrorism White Paper 3 (June 22, 2006), (describing material support statutes as "[o]ne of the cornerstones" of federal counterterrorism efforts), https://perma.cc/KH8Y-ZDD3; Center on Law and National Security, Terrorist Trial Report Card: Sept. 11, 2001–Sept. 11, 2011 (2011) (describing "increasingly aggressive use of material support statutes" and "high conviction rate"), https://perma.cc/5H4E-ZNHD.

constitutional shortcomings, at least requires the agency to find that "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism." 8 C.F.R. § 241.14(d)(1)(iii). Section 1226a lacks any such requirement and instead provides for indefinite detention based solely on a determination that the alien poses a threat to national security (or to the safety of the community or any person), without consideration of any possible alternatives to imprisonment, such as electronic monitoring, curfews, house arrest, orders restricting communications, or other conditions. 8 U.S.C. § 1226a(a)(6). This failure to mandate release where conditions short of incarceration could address the alleged threat violates the least restrictive means requirement of Substantive Due Process.[7]

III. 8 U.S.C. § 1226a VIOLATES PROCEDURAL DUE PROCESS.

Even if the statute applies to Petitioner, § 1226a lacks any of the basic procedural protections required by the Constitution to safeguard against error. First, neither the statute nor any government regulation or other guidance spells out *any* procedures that the Secretary must observe before deciding to hold a person indefinitely under the statute. Second, the statute does not provide any standard of proof to justify indefinite detention under § 1226a(a)(6), let alone a constitutionally permissible standard.[8] Third, it fails to provide any notice of the procedures to which a prospective detainee is subject and, in this case, Petitioner was not put on notice that he

[7] The government's recently issued certification under § 1226a, which parrots the language of the statute, contains no indication that the government, in fact, considered any less restrictive alternatives for Mr. Hassoun when it decided to detain him under § 1226a. *See* ECF No. 26, Ex. B. In any event, the government must establish that no such alternatives exist.

[8] As noted above, *see supra* 3–4, 6, the "reasonable grounds to believe" standard under § 1226a(a)(3) applies only to certification for apprehension and initial detention. *See* §§ 1226a(a)(1), (3); *see also id.* § 1226a(b)(1) (noting distinct certifications made under paragraphs (a)(3) and (a)(6)). But even if the statute could be construed to prescribe a "reasonable grounds to believe" standard for certification under § 1226a(a)(6), that standard is woefully deficient to authorize indefinite, and potentially permanent, imprisonment.

was even being *considered* for detention under the statute until after the administrative record was closed and all procedures were complete. The statute violates the basic principle that people must have reasonable notice of a potential deprivation of liberty and must know the procedures to which they are subject. Each of these three flaws is constitutionally fatal. And even if the government seeks somehow to retroactively repurpose the procedures it used under 8 C.F.R. § 241.14(d) to detain Petitioner under this entirely different statute—which it cannot lawfully do and did without any timely notice—those procedures are likewise unconstitutional, as Petitioner has already argued at length. Pet. Br. 24–32; Pet. Reply 10–19. The statute, in short, suffers from irremediable procedural defects and this Court should strike it down as unconstitutional.

First, the government has established no procedural safeguards before the decision is made to detain a person indefinitely under 1226a(a)(6). The statute provides no independent decisionmaker, no opportunity for a detainee to see the evidence or even the allegations on which the government is acting, and no opportunity for the detainee to be heard or to call witnesses, or otherwise to challenge the government's allegations. Indeed, the statute does not even require the Secretary to *explain the government's reasons* for detention after making the decision. The statute simply vests the Secretary with the procedurally unfettered authority to "certify an alien" under paragraph (a)(3) and then to authorize indefinite detention under paragraph (a)(6). 8 U.S.C. § 1226a(a)(3), (6). In this respect, it is even worse than the regulation the government has previously invoked to detain Mr. Hassoun, 8 C.F.R. § 241.14(d), which at least did spell out certain procedures, even if they were utterly inadequate. *See* 8 C.F.R. § 241.14(d)(2); Pet. Br. 26–31; Pet. Reply 11–16.

The government may argue that it satisfied the requirements of procedural due process with respect to the PATRIOT Act by observing the procedures of the separate detention power it

has invoked under the regulation. But the government cannot retroactively graft the procedures established under a completely separate statutory authority onto this statute. When promulgating a regulation, the Administrative Procedure Act ("APA") requires the government to publish a notice that includes "reference to the legal authority under which the rule is proposed," 5 U.S.C. § 553(b)(2), and a "concise general statement of [the rule's] basis and purpose," 5 U.S.C. § 553(c). This requirement is essential in order to put the public on notice of what the government is actually doing and to allow the public to provide meaningful comment on a new regulation. Indeed, the courts and the Department of Justice itself recognize that "[t]he reference [to legal authority] must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule.'" *Glob. Van Lines, Inc. v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1298 (5th Cir. 1983) (alterations in original) (quoting U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 29 (1947)). The APA "at the very least requires that the legal grounds upon which the agency thought it was proceeding appear somewhere in the administrative record." *Id.*; *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978) (invalidating regulation that did not provide reference to the legal authority under which it was proposed).

In this case, the procedures under the regulation, 8 C.F.R. § 241.14(d), were enacted under the ordinary post-removal detention statute that was at issue in *Zadvydas*, 8 U.S.C. § 1231(a)(6), *not* the PATRIOT Act, 8 U.S.C. §1226a. *See* 66 Fed. Reg. 56976 (listing the sources of authority for the regulation); *see also supra* 5 (pointing out that the Federal Register notice for the regulation does not even mention the PATRIOT Act). The APA does not allow the

government to attempt, belatedly, to cure 8 U.S.C. § 1226a's utter lack of due process by retroactively invoking regulations promulgated under another statute.[9]

Even if the government could somehow transplant the procedures under the regulation into the PATRIOT Act, those procedures are themselves unconstitutional. As Petitioner has already argued extensively, the regulation is unconstitutional because it does not provide a neutral decisionmaker, an opportunity to see the actual evidence, or any opportunity to confront witnesses, to obtain exculpatory evidence from the government, or otherwise to show that government's allegations against Petitioner are false and that detention is unnecessary. *See* Pet. Br. 24–32; Pet. Reply 10–19.

In fact, the procedural due process violation here is more egregious because there are even fewer substantive constraints on detention under the PATRIOT Act than under the regulation. As explained above, 8 U.S.C. § 1226a does not require a determination that incarceration is necessary to address whatever danger the government perceives. *See supra* at 12–13. The need for a "fullblown adversary hearing," *Salerno*, 481 U.S. at 750, is even clearer where the detention standard has so few limits, thereby elevating the risk that the Secretary's unilateral determination will be erroneous, prejudiced, ignorant of important facts, or otherwise unjust.

Section 1226a is unconstitutional for a second reason, too—it authorizes indefinite detention without a constitutionally adequate standard of proof. As Petitioner has explained, the

[9] To Petitioner's knowledge, the government has never subsequently provided any official notice that the procedures under the regulation would apply under the PATRIOT Act. Neither did Petitioner receive timely notice of the procedures in this instance. *See infra* 18–19 & n.11 (explaining that Petitioner did not receive notice of these procedures until after the administrative process was complete and the record closed); *cf.* 5 U.S.C. § 553(b) (rules must be published in the Federal Register "unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law").

Supreme Court and the lower courts have consistently held that indefinite civil detention may be imposed only if the government is able to prove its case by at least clear and convincing evidence. *See* Pet. Br. 28–30; Pet. Reply 15–16; *Foucha*, 504 U.S. at 72; *Salerno*, 481 U.S. at 741; *Hendricks*, 521 U.S. at 364; *Addington v. Texas*, 441 U.S. 418, 433 (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). Section 1226a(a)(6) sets out no standard of proof for indefinite detention. Even if § 1226a(a)(3)'s "reasonable grounds to believe" standard could be applied to a certification under § 1226a(a)(6), it would fall well below any standard any court has ever upheld for indefinite civil detention. *See* Pet. Br. 28–30; Pet. Reply 15–16. A "reasonable grounds to believe" standard falls below not only the required "clear and convincing" standard, but also the "preponderance of the evidence" standard that the government previously defended. Opp. 24. The statute, on its face, fails to meet the constitutional baseline and is therefore invalid. *Cf.* Pet. Br. 28–30; Pet Reply 15–16 (arguing that the regulation, which also did not specify a standard of proof, is unconstitutional for failing to impose a standard of at least clear and convincing evidence).

Third, the statute violates due process because it fails to provide even minimal notice to a detainee—particularly a detainee that was never initially certified under paragraph (a)(3)—that he is being considered for indefinite detention under paragraph (a)(6), nor does it provide notice of the procedures that will be used to make that determination. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent.*

Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). The statute—on its face and as applied by the government in this case—utterly fails to provide such notice.

As noted already, the statute contains no description whatsoever of the procedures the Secretary must follow in order to make the determination under paragraph (a)(6) that a person will be continued in detention indefinitely, or of the procedures for the prior, initial certification under paragraph (a)(3). The government has enacted no regulations spelling out any such procedures, nor has it even published informal guidance on the subject. The government is simply making up procedures as it goes along, without telling the person who is subject to them. This is a flagrant violation of the most elementary principles of procedural justice. *See, e.g.*, *Mullane*, 339 U.S. at 314; *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970)

The statute's failure to guarantee basic notice requirements is illustrated by the manner in which the government proceeded in this case. The government did not provide Mr. Hassoun with notice that he was even being considered for detention under the statute—let alone the process it would use under this statute—until the government filed its Response to the Amended Petition on August 9, 2019. *See* Opp. 8 n.7. In that filing, the government notified Petitioner for the first time that it was considering invoking the PATRIOT Act to detain him. This came seven months after Judge Geraci ordered the government to release Mr. Hassoun unless it had some other basis to hold him, and six months after the government first notified Petitioner that it was considering him for detention under 8 C.F.R. § 241.14(d).[10] Until its response brief, the government never suggested that its "process" to detain Petitioner under the regulation might also be used under the

[10] The government did not appeal Judge Geraci's determination that Mr. Hassoun's removal is not foreseeable.

statute. By the time Mr. Hassoun was notified that the government might invoke the statute, that process under the regulation was complete and the administrative record final. As a result, Petitioner had no opportunity to be heard on the question of his detention under the PATRIOT Act before the decision was made.[11]

The government may argue that it need not observe constitutionally adequate procedures *before* subjecting Petitioner to indefinite detention under the paragraph (a)(6) of the statute because the statute provides for judicial review of decisions *afterwards* through habeas corpus. *See* 8 U.S.C. § 1226a(b)(1). But the Constitution does not allow this type of lawless action; it insists that the government must bear the burden of initiating fair proceedings *before* either depriving a person of their liberty or indefinitely continuing that deprivation, unless there is some exigency justifies dispensing with this requirement.

The Courts have consistently required officials to submit to a full, fair process *before* making the determination to continue a person's incarceration indefinitely under civil detention laws. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (where state wishes to place criminal defendant in indefinite civil detention due to lack of mental capacity, state must promptly "either institute the customary civil commitment proceeding . . . or release the defendant"); *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966) (where state seeks to continue to detain a criminal convict on grounds of mental illness after the end of his sentence, prisoner is entitled to full civil commitment procedures before placement in civil commitment); *Foucha*,

[11] The government's Notice of Decision to Certify Detention under Section 236A asserts that Petitioner was "provided a reasonable opportunity to review the evidence against you," citing to the process that was used to compile the "administrative record" under the regulation, 8 C.F.R. § 241.14(d). *See* ECF No. 26, Ex. B. But at the time that record was compiled, Mr. Hassoun had no idea he was being considered for detention under the PATRIOT Act, nor that the record compiled under the regulation would be used to detain him under the PATRIOT Act.

504 U.S. at 72 (1992) (where prior basis for detention no longer applies, detainee "is entitled to constitutionally adequate procedures to establish the grounds for his confinement" on new basis); *see also Vitek v. Jones*, 445 U.S. 480, 494–496 (1980) (prisoner serving criminal sentence entitled to notice and hearing before transfer to mental institution); *see also Hendricks*, 521 U.S. at 352–53 (recounting procedures for transferring individual from criminal custody to indefinite civil commitment, including requirement that the state initiate commitment proceedings before a judge prior to the end of the criminal sentence). In all of these cases, the mere availability of post-hoc review via habeas (or otherwise) did not excuse the government of the obligation to make its case to a neutral decisionmaker in a fair process *in advance* of making the decision to hold the person in indefinite civil detention.

This requirement of pre-determination proceedings is no mere technicality, but an essential safeguard of liberty. If post hoc habeas review were enough, the government could make the unilateral decision to lock anyone up (or continue anyone's detention indefinitely) at any time without observing any process at all. It could simply keep people detained forever without making its case to any judge, unless and until each detainee managed to file and litigate a habeas challenge to judgment. The Constitution's protections forbid exactly this kind of arbitrary action. The government may not shift the burden onto detainees to bring habeas actions—at their own expense, without a right to appointed counsel, and with the delay inherent in such proceedings—in order finally to have an impartial decisionmaker adjudicate whether their liberty could lawfully be taken in the first place.

The statute at issue here utterly discards these rudimentary principles. It affords an individual *no* process before the Secretary makes the determination to hold him indefinitely under § 1226a(a)(6). Moreover, there is no exigency or other extraordinary circumstance that

justifies dispensing with a pre-determination process where (as here) the government already has an individual in custody and is simply making the determination about whether to continue that detention indefinitely. *Cf. County of Riverside*, 500 U.S. at 52 ("States 'must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or *promptly after* arrest.'") (emphasis in original) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)).[12]

Because the statute flagrantly violates the requirements of procedural due process on its face, the Court should strike it down and order Mr. Hassoun's immediate release under appropriate conditions of supervision.[13]

IV. 8 U.S.C. § 1226a VIOLATES EQUAL PROTECTION.

Like 8 C.F.R. § 241.14(d), 8 U.S.C. § 1226a violates the Equal Protection Clause of the Fifth Amendment. Section 1226a(a)(1) applies to *all* non-citizens (removable or not), and can be applied to "*any* alien who is certified under paragraph (3)." 8 U.S.C. § 1226a(a)(1). The statute targets non-citizens like Mr. Hassoun, and unlawfully interferes with their fundamental liberty

[12] In this case, Chief Judge Geraci gave the government 60 days after granting Mr. Hassoun's initial habeas petition in order for it to establish an alternative legal basis for holding Mr. Hassoun. *Hassoun v. Sessions*, No. 18–cv–586, 2019 WL 78984, at *8 (W.D.N.Y. Jan. 2, 2019). Eight months have passed since then. In these circumstances, there is no exigency that could possibly justify dispensing with a fair process before determining that a person will be held indefinitely in civil custody.

[13] It would not be appropriate in this case to order the government to start afresh and provide additional administrative process in order make the initial detention determination. Adequate procedures do not exist in the statute or any regulation. It is impossible to fashion adequate procedures because the statute's plain text explicitly prescribes an unconstitutional standard of proof and explicitly vests a political official—rather than an impartial judge—with the power to determine whether detention is warranted. In any case, establishing new administrative procedures at this juncture would invariably take more time, during which Mr. Hassoun would remain in detention, losing additional precious years of his life without justification or fair process. The appropriate remedy for the procedural due process violation here is to strike down the statute and order Mr. Hassoun's immediate release under supervision.

right to be free from physical restraint without adequate reason for singling them out. As Mr. Hassoun has explained, Pet. Br. 35–36, and the government did not contest, Opp. 34–35, the Equal Protection Clause protects non-citizens facing indefinite civil detention. Because § 1226a thus encroaches on the fundamental right to be free from constraint, it triggers heightened scrutiny, just like 8 C.F.R. § 241.14(d). *See* Pet. Br. 36–37 (explaining freedom from constraint is a fundamental right, and subject to heightened scrutiny) (citing *Foucha*, 504 U.S. at 86).

As with 8 C.F.R. § 241.14(d), the statute's discriminatory treatment of non-citizens fails to serve a government interest sufficiently compelling to survive heighted scrutiny—or even rational basis review. *See* Pet. Br. 37; Pet. Reply 28–29. On its face, the statute identifies "the national security of the United States" and the "safety of the community" as the purported government interests at play. 8 U.S.C. § 1226a(a)(6). However, nothing in the statute justifies why non-citizens pose any more of a threat than other, similarly situated, U.S. citizens, including Mr. Hassoun's co-defendant in his prior case (who is now free). *See* Pet. Br. 37 n.17. Nor does anything in the statute justify denying non-citizens (and non-citizens alone) fair process before they are subject to indefinite detention. The Equal Protection Clause prohibits such discriminatory treatment.

V. IF THE COURT DOES NOT INVALIDATE THE STATUTE, IT SHOULD MAKE AN INDEPENDENT DETERMINATION ABOUT WHETHER DETENTION IS JUSTIFIED, WHICH IT IS NOT.

Section 1226a provides that this Court has habeas jurisdiction to review whether detention is lawful under the statute. The statute explicitly grants the Court power to "review . . . the merits of a determination made under subsection (a)(3) or (a)(6)" to detain a person indefinitely. 8 U.S.C. § 1226a(b)(1). This Court therefore has authority to determine for itself that the government has not shown that Mr. Hassoun meets the requirements of the statute and that his detention is unlawful. Thus, even if the Court does not strike down the statute as facially

unconstitutional and order immediate release on that basis, it should hold an evidentiary hearing to address and resolve the merits of Petitioner's detention.

There are two potential courses for the habeas inquiry. First, the Court can and should determine that the allegations in the administrative record do not suffice to meet the detention requirements of the statute because the record upon which the government made its determination is utterly devoid of actual *evidence* that Mr. Hassoun presently poses a threat to anyone or anything. As detailed in Petitioner's prior briefs and in his counsel's letter responding to the administrative record, the government has not provided any evidence that he poses a current threat, but instead relies solely on an unsworn letter from the FBI that contains nothing more than unsubstantiated conclusions and allegations attributed to anonymous jailhouse informants who supposedly "overheard" or were told about conversations Petitioner supposedly had. *See* Pet. Br 38–40, Pet. Reply 32–36; Gov. Opp. Ex. A-1-J. Allegations are not evidence. And there is no evidence that Mr. Hassoun poses any threat. Moreover, there is ample evidence in the record showing that Mr. Hassoun in fact poses no threat to the national security of the United States or any person here. This evidence includes the explicit findings of the federal judge who presided over his criminal trial and who imposed a sentence far below the minimum guidelines range because she determined that Mr. Hassoun posed no danger to anyone in this country and never directed any actions against the United States. Pet. Br. 39; Pet. Reply 34; Am. Pet. Ex. A. It also bears emphasis that there is nothing in Mr. Hassoun's 17 years of positive behavior in federal custody that is consistent with the false allegations of the jailhouse informants, which date to a single short period of his time in immigration detention.

In the event that the Court is not prepared to make a determination that Mr. Hassoun's detention is unjustified as a matter of law on the present record, the Court should promptly direct

the parties to prepare for an evidentiary hearing in this Court that meets the vital requirements of habeas corpus and due process.

"[T]he writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). When, as here, there is no adequate underlying process to challenge executive detention, habeas courts must conduct a searching review of the basis for imprisonment. *See Frank v. Magnum*, 237 U.S. 309, 331 (1915) (habeas courts must "look beyond forms and inquire into the very substance of the matter"). This includes the power to "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. It also includes the opportunity for discovery and otherwise to obtain evidence by "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" in order to "secur[e] facts where necessary to accomplish the objective of the proceedings." *Harris v. Nelson*, 394 U.S. 286, 299 (1969); *see also Hamdi*, 542 U.S. at 525 ("[Section] 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.") (citing 28 U.S.C. § 2246).

These principles of habeas corpus are supplemented in this case by the demands of procedural due process. Any habeas proceeding in this Court must afford Petitioner, at the very least, the procedural safeguards that the Due Process Clause requires, spelled out at length above an in prior briefing. *See supra* 13–17; Pet. Br. 26–31; Pet. Reply 11–16.

In particular, at a minimum, a *habeas* hearing in this Court would require the government to prove that Mr. Hassoun is properly detained under the statute based on admissible evidence that is clear and convincing. *See supra* 16–17; Pet. Br. 28–30; Pet. Reply 15–16. In advance of such a hearing, Petitioner should also have an opportunity to obtain disclosure of the

government's actual evidence against him and of any evidence in the government's possession that is potentially exculpatory, or which might impeach the government's witnesses, or otherwise help establish that he is not properly detained. *See Harris*, 394 U.S. at 300 ("At any time in the proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held . . . [the Court] may issue such writs and take or authorize such proceedings with respect to development . . . of the facts . . . ."). Petitioner should also have the right to examine witnesses against him (or in his favor), including those who are in government custody. 28 U.S.C. § 2246.

Mr. Hassoun has firmly denied all of the new allegations against him that the FBI has levelled in its unsworn letter. Pet. Reply 32–36. He is entitled to a fair process before an independent and neutral judge, at which the government must try to prove those allegations with evidence and where he has a meaningful opportunity to demonstrate those allegations are false. *See supra* 13–17; Pet. Br. 24–32; Pet Reply 10–19. Without those allegations, all that remains of the government's case is his crime of conviction, which occurred more than 17 years ago, for which he has served his time, and which the sentencing judge determined posed no danger to anyone in the United States and warranted barely half of the minimum sentence under the guidelines. That is plainly insufficient to hold Mr. Hassoun indefinitely on grounds of "dangerousness." Moreover, Mr. Hassoun is willing to agree to stringent conditions of release, which would extinguish whatever threat the government perceives. This Court can and should provide Petitioner with a fair opportunity to test the government's evidence and demonstrate that he should be released—an opportunity that the government has utterly denied him thus far.

CONCLUSION

For the foregoing reasons, the Court should invalidate 8 U.S.C. § 1226a and order Mr. Hassoun to be released immediately under appropriate conditions of supervision. Even if the

statute applied to Mr. Hassoun and was valid, the Court should order Mr. Hassoun's immediate release because, as a matter of law, the administrative record lacks sufficient admissible and probative evidence to justify Petitioner's detention under the statute. Otherwise, the Court should make the determination that Petitioner is not properly detained following an evidentiary hearing that affords Petitioner the essential procedural safeguards that Procedural Due Process and habeas corpus require, including that Petitioner have an opportunity for appropriate discovery and that the government bear the burden of proof by at least clear and convincing evidence. Mr. Hassoun poses no danger to the community and is in any case willing to consent to stringent conditions of release that would fully address the government's concerns. He cannot and should not continue to be detained indefinitely. This Court should order his release immediately or else conduct a hearing consistent with the requirements of the habeas statute and the Constitution.

Respectfully submitted,

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