UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

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

Respondent.

Case No. 1:19-cv-00370-EAW

PETITIONER'S SUPPLEMENTAL REPLY MEMORANDUM CONCERNING PETITIONER'S DETENTION UNDER 8 U.S.C. § 1226a

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INTRODUCTION

The government's supplementary briefing reveals the truly astonishing degree to which it claims extraordinary power to imprison, while simultaneously asking this Court to serve as little more than a rubber stamp. The government does not just defend the unprecedented notion of indefinite detention based on dangerousness alone, it argues that it can apply this detention power based on mere "reasonable grounds to believe"—akin to a mere probable cause determination—that Petitioner poses a threat, and that it can do so in a unilateral executive process devoid of any protections at all. The government then argues that this Court has no authority to review that determination, and must simply bless the government's factual allegations. The Constitution does not allow indefinite civil detention under these circumstances.

Petitioner's prolonged detention under 8 U.S.C. § 1226a, is unlawful for several reasons. First, § 1226a does not apply to petitioner, as Mr. Hassoun was not taken into custody pursuant to the Secretary's certification; in arguing otherwise, the government advances a contorted—and implausible—reading of the statute's planning language.

Second, the statute violates Mr. Hassoun's rights to substantive due process, as § 1226a permits indefinite detention based on "dangerousness" alone; in arguing otherwise, the government essentially falls back on its appeal to national security concerns, which cannot cure the statute's deficiencies.

Third, the statute lacks essential procedural safeguards for indefinite civil detention, and fails to hold the government to a rigorous standard of proof; in arguing otherwise, the government confuses "standard of proof" with "facts that must be proved" and minimizes the importance of a neutral decisionmaker in determinations involving fundamental rights.

Fourth, because § 1226a discriminates on the basis of citizenship and purports to authorize the deprivation of Mr. Hassoun's fundamental right to liberty, it violates the right to

equal protection and is subject to heightened scrutiny; in arguing otherwise, the government misconstrues the fundamental question: why allegedly dangerous non-citizens whose removal is not likely in the reasonably foreseeable future should be treated differently than similarly dangerous citizens.

Fifth, if § 1226a were valid, this Court should order Mr. Hassoun's release because the government has failed to sustain its burden to justify his detention under the statute or, alternatively, the Court should conduct an evidentiary hearing to determine whether Mr. Hassoun is properly detained. In arguing otherwise, the government advances a cramped view of this Court's powers at odds with the federal habeas statute, the Constitution, and the historic role of the judiciary in reviewing the legality of executive detention.

The government has not proven that Mr. Hassoun is dangerous or a national security risk. Mr. Hassoun has served his criminal sentence for conduct that even the sentencing judge held posed no danger to the United States. He faces indefinite, potentially permanent imprisonment on the flimsiest allegations. It is this Court's responsibility to enforce the Constitution's limits, to inquire into the facts, and to order immediate release from unlawful executive detention. The government simply may not use national security as a talisman against this Court's scrutiny.

ARGUMENT

I. SECTION 1226a DOES NOT APPLY TO MR. HASSOUN.

Section 1226a provides no authority for Mr. Hassoun's continued detention because he was not "take[n] into custody" pursuant to the Secretary's certification. § 1226a(a)(1). *See* Pet. Supp. 5–10 (Dkt. No. 28). In an effort to avoid this clear text, the government invents a complex construction of § 1226a under which it can be applied to those *already* in custody on other grounds, but that construction suffers from two fatal problems. First, it rests on a convoluted and implausible reading of the statute's plain language. Second, it would enlarge the Secretary's

authority to indefinitely detain non-citizens while simultaneously shrinking the statute's already-thin procedural protections, a consequence incompatible with the government's own theory of congressional intent.

First, unlike the government's construction of § 1226a, Mr. Hassoun's construction is straightforward and consistent with the statute's plain language and structure. Subsection (a)(1) requires the Secretary to "take into custody" a non-citizen whom she has "certif[ied]." § 1226a(a)(1). This subsection, as the government agrees, authorizes the Secretary to detain certified non-citizens who "are not yet already in immigration custody." Opp. Supp. 4 (Dkt No. 30). The remaining subsections flesh out how Congress intended subsection (a)(1) to be effectuated. That is, subsections (a)(2) through (a)(7) instruct the Secretary *which* non-citizens may be certified and taken into custody under subsection (a)(1) and *how* those non-citizens are to be processed once the command of subsection (a)(1) is satisfied.[1]

This reading of the statute's text and structure also accords with its legislative history and purpose. Passed in the immediate aftermath of September 11, 2001, Congress designed § 1226a to enable the Secretary to rapidly arrest non-citizens who might pose a national security risk and then, "not later than 7 days after the commencement of such detention," (1) initiate "removal proceedings" against those with no right to remain in the country, (2) "charge . . . a criminal offense" against those alleged to have broken the law, and (3) "release" all others. § 1226a(a)(5); Pet. Supp. 5–6 (discussing § 1226a(a)(5)). As the House of Representatives stated in its section-by-section analysis of the bill, § 1226a "[e]xpands the ability of the [Secretary] to mandatorily

[1] Moreover, the title and structure of the statute are consistent with Mr. Hassoun's understanding, not the government's. The title—"Mandatory detention of suspected terrorists"—makes clear that the provision is centered on subsection (a)(1), which is the *only* subsection granting detention authority at all. The government's reading wrongly puts subsections (a)(2) and (a)(3) at the heart of the statute.

detain those aliens that he certifies may pose a threat to national security, *pending the outcome of criminal or removal proceedings*." 147 Cong. Rec. H7198 (Oct. 23, 2001) (emphasis supplied). Similarly, the Kennedy-Brownback memorandum published in the Senate record states that "[a]ll persons certified under these new provisions *shall be placed in custody* and detained until removed or decertified." 147 Cong. Rec. S11047 (Oct. 25, 2001) (emphasis supplied).

The government's alternative construction requires verbal gymnastics and contradicts this clear congressional intent. The government concedes that subsection (a)(1) gives it the authority to detain only those non-citizens who were not already in custody when certified under subsection (a)(3). Opp. Supp. 6. Nevertheless, according to the government, when Congress wrote "the [Secretary] shall maintain custody of *such an alien*" in subsection (a)(2), Congress was not referring to non-citizens taken into custody under the immediately preceding subsection. Instead, the government asserts that Congress used "such an alien" to refer to any non-citizen whom the Secretary had certified under subsection (a)(3), *regardless* of whether that person was initially detained under subsection (a)(1), detained under some other statutory authority, or not even detained at all. But that reading of the statute is, at best, unnatural. It assumes that, in an attempt to simply and directly refer to the non-citizens identified in subsection (a)(3), Congress took a scenic route through subsection (a)(1). *See* Opp. Supp. 5. But if, in subsection (a)(2), Congress had meant to refer to *any* non-citizen certified under subsection (a)(3), as the government insists, then instead of writing "such an alien," Congress would have made a direct reference to "paragraph (3)." Indeed, Congress did exactly that in five other places throughout § 1226a, including the second sentence of *the same* subsection. *See* §§ 1226a(a)(1), (a)(2), (a)(4), (a)(7), (b)(1). That Congress used an entirely different phrase in the first sentence of subsection (a)(2)—the sentence at the crux of the government's argument—is flatly incompatible with how

the government asks the Court to read the statute. *See, e.g.*, *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) ("[W]here, as here, Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").[2]

The government turns to *Nielsen v. Preap*, 139 S. Ct. 954 (2019), to paper over the implausibility of its reading. Yet *Preap*, which dealt with a different statute, does nothing to help the government's interpretation. It is true that in *Preap*, the Court interpreted the word "describe" to "refer[] back to" a subset of aliens defined by characteristics "not including any limit based on when the[ir] detention occurred." Opp. Supp. 5. But that idea cannot, as the government insists, be blindly transferred to the interpretation of "such" in § 1226a(a)(2)—so as to write out subsection (a)(1)'s application to only non-citizens who were formerly free—for two central reasons. First, the *Preap* Court made clear that it might have arrived at a different conclusion had its reading "contradict[ed] legislative intent or purpose." 139 S. Ct. at 965 (quotation marks omitted). Whereas in *Preap*, a narrow grammatical and semantic analysis produced a conclusion the Court found to be consistent with statutory purpose, here (as explained above), it does not. Second, in *Preap*, the Court explained that its reading of the statute at issue was compelled by the fact that "[o]n any other reading," the power described in the statute "would be downright

[2] Moreover, if 8 U.S.C. § 1226a swept as broadly as the government suggests, there would have been no need for the government to promulgate 8 C.F.R. § 241.14(d). *See* Pet. Supp. 8. Section 241.14(d) was promulgated a month after Congress enacted § 1226a because § 1226a does not cover non-citizens like Mr. Hassoun who were apprehended in the normal course of removal proceedings. Of course, as Mr. Hassoun has argued throughout this litigation, § 241.14(d) also is not a lawful basis for his detention. *See, e.g.*, Pet. Supp. 8 n.3; Pet. Br. 1–2 (Dkt No. 14).

incoherent," "nonsense," and "ridiculous." *Id.* But here, far from being "ridiculous," Mr. Hassoun's reading of the statute is the only one that can coherently and consistently tie together all of the statute's provisions along with its legislative purpose and history.

Second, the government's construction of § 1226a produces an anomaly that is flatly inconsistent with its own view of the statute's purpose. The government contends that subsection (a)(2) is its actual authority to detain Mr. Hassoun, and that subsection (a)(6) is properly read as a "limitation" on that authority because it requires an additional certification that is more demanding than the one required under subsection (a)(3). *See* Opp. Supp. 4. But by its own terms, subsection (a)(6) applies only to non-citizens "detained solely under" subsection (a)(1). And as Mr. Hassoun and the government agree, subsection (a)(1) "is properly understood simply as a grant of authority . . . to the Secretary to detain aliens who are certified, *if they are not already in immigration custody*." Opp. Supp. 4 (emphasis supplied). Thus, the government's reading renders the supposedly constitutionality-saving limitation in (a)(6) as being *entirely inapplicable* to non-citizens (like Mr. Hassoun) who are not "take[n] into custody" pursuant to (a)(1).[3]

Put simply, if the government is correct about the statute's plain language, then someone who is initially detained under (a)(1) pursuant to certification under (a)(3) can be held indefinitely only if the limitations in (a)(6) are satisfied—but the same is not true for someone, like Mr. Hassoun, who was not initially detained pursuant to the (a)(3) certification but whose custody is merely "maintain[ed]" under (a)(2) pursuant to that certification. § 1226a(a)(2). The

[3] Additionally, even if subsection (a)(6) were a separate grant of authority, and not merely a limitation on the authority granted in (a)(1), Mr. Hassoun would not be subject to it because he was not detained "solely" under subsection (a)(1), as he was previously being held in immigration custody under 8 C.F.R. § 241.14(d). Pet. Supp. 7–8.

necessary consequence of the government's reading is that as long as Mr. Hassoun remains certified, the Secretary must maintain custody of him, but because he was not detained under (a)(1) he is not entitled to the limitation in (a)(6).[4]

As Mr. Hassoun has explained, the (a)(6) limitation is itself constitutionally inadequate, Pet. Supp. 10–21; *see infra.* 7-11, but the fact that the government's statutory construction would make it unavailable to detainees like Mr. Hassoun makes the government's reading of the statute all the more dubious. For this reason as well, the government's construction produces an absurd result that Congress, under the government's own theory, cannot have intended.[5] *See, e.g.*, *United States v. Venturella*, 391 F.3d 120, 126 (2d Cir. 2004) ("A statute should be interpreted in a way that avoids absurd results.").

II. SECTION 1226a VIOLATES MR. HASSOUN'S RIGHT TO SUBSTANTIVE DUE PROCESS.

As Mr. Hassoun has maintained throughout this litigation, indefinite detention violates the right to substantive due process when based on alleged dangerousness alone, without some additional circumstance that helps give rise to the alleged danger. *See* Pet. Supp. 10; Pet. Br. 15–

[4] The government takes contradictory positions about whether the (a)(6) limitation applies to Petitioner's situation. It specifically disclaims (a)(6) when it interprets the statutory text, writing that the limits of "subsection (a)(6) only apply when § 1226a is the *sole* basis for detention," which, as the government points out, is not the case here. Opp. Supp. 7 & n.4. It also pointedly omits any mention of (a)(6) when laying out its standard for making the decision to detain, instead focusing exclusively on the (a)(3) certification and periodic review thereof under (a)(7). *Id.* at 18–19. Elsewhere, the government appears to invoke the (a)(6) limitation in addition to the (a)(3) certification. *See id.* at 14, 17 n.11. The government cannot have it both ways. Its incoherent position stems from its effort to contort the statute to provide detention authority in a circumstance that the text does not contemplate.

[5] The government's citation of the Kennedy-Brownback memorandum, as legislative history, merely emphasizes that Congress saw its (a)(6) limitation on the detention authority it granted in (a)(1) as critical to the statute's constitutionality. *See* 147 Cong Rec. S11047 (Oct. 25, 2001) (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)). It does nothing to support the government's contorted reading of the statute to apply to Mr. Hassoun.

20; Pet. Reply 6–8 (Dkt. No. 25); *see also, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992); *Kansas v. Crane*, 534 U.S. 407, 412 (2002). The government continues to deny that settled proposition, and now it fails even to respond to Petitioner's argument that the statute violates substantive due process because it fails to require a showing that detention is actually necessary to mitigate the purported danger, or that there are no conditions of release that would do so. Pet. Supp. 12–13. Since § 1226a authorizes Mr. Hassoun's indefinite post-removal-order detention based on alleged dangerousness alone—and even worse, does so without regard to the availability of less restrictive alternatives—it violates his right to substantive due process. *See* Pet. Supp. 10.

Rather than address the "dangerousness-plus" requirement for indefinite civil detention, the government asserts that § 1226a comports with substantive due process because it applies only to a narrow subset of non-citizens and requires periodic review of those non-citizens' detention. Opp. Supp. 13–14. But the scope of the statute is not narrow in the one sense essential to satisfying the demands of the Due Process Clause: it is not limited to persons who satisfy the dangerousness-plus requirement. The power to subject a person to indefinite civil detention is extraordinary, and the Supreme Court has authorized it *only* when it is limited to a narrow category of particularly dangerous persons whose dangerousness is accompanied by a special circumstance that itself helps create the danger. *See* Pet. Supp. 10; Pet. Br. 15–20; Pet. Reply 6–8; *see also, e.g.*, *Zadvydas*, 533 U.S. at 691; *Foucha*, 504 U.S. at 83; *Crane*, 534 U.S. at 412. Section 1226a manifestly fails to meet that requirement. Neither subsection (a)(3) nor subsection (a)(6) nor subsection (a)(7) requires the government to demonstrate that Mr. Hassoun's alleged dangerousness is accompanied by this kind of special circumstance. Indeed, subsection (a)(7) requires no showing of dangerousness at all. For that reason alone, the grounds on which § 1226a

authorizes indefinite detention are constitutionally insufficient.

It bears repeating that the government may not invoke "terrorism" as a qualifying "special circumstance" under this line of cases without exceeding the constraints the Supreme Court has imposed in this context. National security or terrorism concerns are not the kind of innate, volitional factors that could "help[] to create the danger" that might justify indefinite civil detention. *Zadvydas*, 533 U.S. at 691. Rather, those concerns *are* the danger—and that is precisely what the Court has repeatedly held to violate substantive due process. As Justice Kennedy pointed out in his *Zadvydas* dissent, the notion that terrorism might qualify as a "special circumstance" under the Court's substantive due process jurisprudence concerning indefinite civil detention is incompatible with the long-standing (and frequently applied) principle, endorsed by the *Zadvydas* majority, that "an assessment of risk" alone is insufficient to justify indefinite detention. *Id*. at 714–15 (Kennedy, J., dissenting).

The government does not simply ignore this fundamental requirement of substantive due process but it mischaracterizes the scope of the statute itself. *First*, the government wrongly contends that (a)(3) defines "narrow categories." *See* Opp. Supp. 14. Section 1226a(a)(3) permits the Secretary to certify a wide range of non-citizens. The Secretary may, for instance, certify a non-citizen based on reasonable grounds to believe that the non-citizen has attempted, at some point, to evade a law prohibiting the export of goods or technology from the United States. *See* §§ 8 U.S.C. 1226a(a)(3)(A); 1227(a)(4)(A)(i). The statute also allows for certification if the government believes that such individual "is engaged in any other activity that endangers the national security of the United States," § 1226a(a)(3)(A), without providing any definition of what national security means. The category of people who qualify for certification is anything but "narrow."

Second, the definition of dangerousness that the statute uses to authorize indefinite detention of individuals like Mr. Hassoun is extremely broad. Even assuming it applies to individuals not initially detained under subsection (a)(1), *see supra* at 2-7, subsection (a)(6) authorizes the indefinite detention of certified non-citizens who "will threaten . . . the safety of . . . any person." § 1226a(a)(6). It is difficult to imagine a more expansive definition of dangerousness. It sweeps in any certified non-citizen purported to be dangerous to someone, somewhere, at some point. The danger does not need to be to the national security of the United States; it does not need to be imminent; it does not need to be significant; and most important, it does not need to be accompanied by "some other special circumstance . . . that helps to create the danger." *Zadvydas*, 533 U.S. at 691. Even sole reliance on an alleged threat to national security (rather than reliance on a vaguer threat to "the safety of . . . any person") would not sufficiently narrow the statute's definition of dangerousness, because a threat to national security does not, on its own, satisfy the dangerousness-plus requirement. *See* Pet. Reply 7. Accordingly, the government is mistaken when it states that § 1226a "comports with the Supreme Court's guidance in *Zadvydas* . . . ." Opp. Supp. 14. It does nothing of the kind.

Third, no amount of procedural rigor could ever make up for the statute's failure to meet the dangerousness-plus bar. *See* Pet. Reply 8; *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (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*." (emphasis supplied) (quotation marks omitted)). Even if it were otherwise, the government's proposed procedures are woefully inadequate. *See infra* 11–16.

Ultimately, as explained above and in Petitioner's previous memoranda, even if § 1226a were as narrow and procedurally rigorous as the government contends, the statute could not

lawfully authorize Mr. Hassoun's indefinite detention.

III. SECTION 1226a LACKS FUNDAMENTAL PROTECTIONS OF PROCEDURAL DUE PROCESS.

The government's opposition reveals the truly breathtaking power it claims to detain people under § 1226a without fair process to protect against erroneous and arbitrary decisions. The government continues to defend the indefensible position that the executive can decide to imprison a person indefinitely, and potentially for life, without any hearing before an impartial decisionmaker, without access to the actual evidence and witnesses against him, and without providing other relevant or even exculpatory evidence in the government's possession. *See* Opp. Supp. 16–20. Not a single case supports this extreme argument. But the government now makes an even more radical claim: that it can detain a person under this process based on nothing more than "reasonable grounds to believe" that the extraordinarily broad standard in § 1226a(a)(3) has been met. Opp. Supp 18–19. A system could hardly be devised to create a higher "risk of an erroneous deprivation" of liberty. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The statute violates the Constitution's guarantee of procedural due process on its face and should be struck down on that basis. Alternatively, the statute is unconstitutional as applied in this case, both for failing to provide minimally adequate procedures and for failing to establish such procedures and provide notice thereof in advance of decision. Either way, this Court should order Mr. Hassoun to be released from custody under appropriate conditions of supervision forthwith, or alternatively, hold an evidentiary hearing that satisfies the demands of the federal habeas statute and the Due Process Clause.

First, the government contends that certifications under § 1226a are subject to a constitutionally adequate standard of proof, but it rests solely on the "reasonable grounds to believe" standard for certification under paragraph (a)(3). *See* Opp. Supp. 18. The government

contends that this is the *only* evidentiary burden in the statute that the government must meet, to justify indefinite, potentially endless, detention. *See id.* at 18–19 (failing to specify any standard of proof under (a)(6), and refusing to indicate whether any standard applies to subsequent (a)(7) redeterminations of the (a)(3) certification). But, as Petitioner has pointed out repeatedly, the Supreme Court has consistently required a standard of at least clear and convincing evidence to justify indefinite civil detention. *See* Pet. Supp. 16–17; Pet. Reply 15–16, Pet. Br. 28–30.

The government does not dispute that its "reasonable grounds to believe" standard is similar to (and perhaps weaker than) the probable cause standard for mere arrests. Pet. Supp. 6. This is a much lower standard than even the inadequate "preponderance of the evidence" standard it previously defended under the regulation. *See id.* at 17. The government does not cite a single case to support the jaw-dropping proposition that indefinite detention can be justified on mere probable cause or less. *Id.* at 18–19.[6] It simply asserts that any higher standards of proof are "inapposite to the situation here," citing to its prior brief defending the higher preponderance standard. *Id.* at 19 (citing Opp. 24–25). Mr. Hassoun has already addressed the prior argument, *see* Pet. Reply 8–9, which boils down to the specious claim that detention under § 1226a (or 8 C.F.R. § 241.14(d)) is not "indefinite" in nature. *See* Opp. 24–25. The correct standard of proof is at least "clear and convincing evidence." *See* Pet. Supp. 16–17.

Second, the government argues that regardless of the prevailing standard of proof required for indefinite detention, the government has satisfied that standard by making a determination under the separate regulation (which requires what it calls a "higher threshold") that Mr. Hassoun poses a "significant" risk. *See* Opp. Supp. 19. But here the government

[6] It appears that on this "reasonable grounds" standard, the government could imprison a person indefinitely even if, on the government's own record, it was more likely than not that Petitioner posed no danger at all.

confuses the substantive criteria that must be met under the regulation ("significant risk of terrorism") with a standard of proof (which describes the required quantum of evidence for the factfinder). *See* Pet. Reply 7; *see also Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (Petitioner "confuse[d] the standard of proof with the meaning of the element that must be proved."); *Crocock v. Holder*, 670 F.3d 400, 403 (2d Cir. 2012) (Petitioner "appears to confuse the substantive standard for establishing admissibility with the evidentiary burden required to demonstrate that he has satisfied the applicable substantive criteria."). The government cannot dispute that neither § 1226a nor the regulation imposes anything approaching the clear-and-convincing standard of proof required under the Constitution. *See* Pet. Reply 16 n.5; Pet. Supp. 16–17.

Third, the government argues that Mr. Hassoun cannot invoke "facial deficiencies" in § 1226a's procedures to the extent he is arguing "that it may conceivably be applied unconstitutionally to others." Opp. Supp. 16. But the D.C. Circuit has recently cast doubt on the applicability of the "in all applications" standard for a facial challenges. *See, e.g.*, *U.S. Telecomm. Ass'n v. Fed. Commc'ns Comm.*, 825 F.3d 674, 735–36 (D.C. Cir. 2016) (discussing the Supreme Court's recent "skepticism about that longstanding framework"). In any case, Petitioner is not arguing that the statute may be applied unconstitutionally in other unspecified circumstances; he is arguing that it is unconstitutional when applied to *everyone*, including him. The plain text of the statute, as construed by the government itself, prescribes an unconstitutionally low standard of proof. "No set of circumstances exists under which the Act would be valid," because this unconstitutional "reasonable grounds" provision is visible on the face of the statute. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (upholding pre-trial detention statute against facial challenge because, among other things, it required showing of

clear-and-convincing evidence in every case); *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (invalidating law "not because [an official] applied this discretion wisely or poorly in a particular case, but rather because [the official] enjoys too much discretion in *every* case") (emphasis in original).

Fourth, the government continues to contend that it may simply graft 8 C.F.R. § 241.14(d)'s procedures onto § 1226a, at least in this case. *See* Opp. Supp. 17 n.12. But as Petitioner has argued, the government violates basic procedural due process principles when it fails to establish procedures (and, usually, to provide notice thereof) in advance of deciding whether to deprive a person of liberty. Pet. Supp. 14–15, 17–18 (citing *Mullane, v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970)). The government cannot make up procedures as it goes along and expect them to be ratified after the decision has been made. The Supreme Court has rejected such an *ad hoc* approach to due process, even with respect to much less severe deprivations of liberty. For instance, in a case concerning the right of a government contractor to confront witnesses in an administrative proceeding to revoke his security clearance, the Court held that the process afforded must be made clear explicitly "because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene v. McElroy*, 360 U.S. 474, 507 (1959). There, as here, "[w]ithout explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id*.

The government does not engage with this argument. Instead, it contends that Mr. Hassoun was not prejudiced in this particular case because, in the government's view, it would

have made no difference if Petitioner had been told that the procedures under the separate regulation were going to be used retroactively to detain him under the statute. Opp. Supp. 19-20.[7] But the government's "no harm no foul" argument misses the point: even if Petitioner's decisions at the administrative stage would have been no different, the government still violates due process by certifying him for detention under the statute without establishing procedures in advance or providing notice of them. The procedural requirements of the Due Process Clause are, among other things, a structural protection against arbitrary government decision making. *See Greene*, 360 U.S. at 507; *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (recognizing that the "touchstone of due process is protection of the individual against arbitrary action of government"); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (emphasizing that the "Due Process Clause . . . forbids arbitrary deprivations of liberty"). Under these circumstances, the statute cannot constitutionally be applied to anyone, including Petitioner.[8]

Finally, the government disputes Mr. Hassoun's argument that the Due Process Clause entitles him to pre-deprivation notice and an opportunity to be heard, *see* Pet. Reply 19–20, arguing that it may "defer providing notice in situations where harm to the public is threatened

[7] As Mr. Hassoun has explained, the regulation's procedures also violate procedural due process. Pet. Reply 10–22; Pet. Br. 24–32.

[8] The government attempts to paper over these flagrant violations by suggesting throughout its brief that Petitioner had a chance to "see and respond to the evidence" against him. Opp. Supp. 16. This is utterly misleading. The truth is that the "record" considered by the Secretary contained no actual evidence post-dating his arrest in 2002. The new (and false) allegations in the FBI letter are not evidence; they are unsworn statements which have no evidentiary value in themselves and are not supported by a single shred of corroborating evidence. It is perhaps telling that the government's supplemental brief does not even mention those allegations, instead relying exclusively on the facts of his conviction to justify his certification for detention. Opp. Supp. 28. But to the extent the government is seeking to detain Mr. Hassoun indefinitely solely on the basis of his conviction, that raises grave substantive due process and Double Jeopardy questions. *See* Pet. Br. 22 n. 9; *infra* 22

and the gravity of the risk to the public outweighs the individual's interest in pre-action notice" Opp. Supp. 19–20. But while it is true that, at times, an extraordinarily weighty public interest may justify a slight delay in notice prior to government action, even the government's own cases explain that such a decision can only be justified where "the private interest infringed is reasonably deemed of less importance," *Goldberg*, 397 U.S. at 263 n.10; *see Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947); *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315 (1908); *R.A. Holman & Co. v. Sec. & Exch. Comm'n*, 299 F.2d 127, 131 (D.C. Cir. 1962), or (at worst) where an opportunity to contest that action happens "as promptly as convenient . . . while information is fresh and sources are available," *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). Clearly, neither of those conditions applies here. As the Court is aware, Mr. Hassoun has been in ICE custody since October 10, 2017, and has been detained under the regulation since February 22, 2019; briefing on that detention was completed on August 9, 2019; and the government then triggered months of additional briefing by separately designating Mr. Hassoun under the statute on August 12, 2019. Under these circumstances there is no reason to delay notice. It is preposterous for the government to claim that his liberty interest is "of less importance" or that his opportunity to regain his liberty has been "prompt."

IV. THE GOVERNMENT CONTINUES TO MISCHARACTERIZE—AND FAILS TO ADDRESS—PETITIONER'S EQUAL PROTECTION CHALLENGE TO THE STATUTE.

For a second time, the government misstates basic equal protection principles and fails to properly address Mr. Hassoun's equal protection challenge—this time to § 1226a. Opp. Supp. 20–24. Contrary to the government's position, this Court should apply heightened scrutiny, not rational basis review. Heightened scrutiny applies because § 1226a, like 8 C.F.R. § 241.14(d), infringes on Mr. Hassoun's fundamental right to be free from potentially indefinite civil detention. *See* Pet. Br. 36–37.

In arguing for rational basis review of § 1226a, the government cites to a series of irrelevant cases, none of which considers equal protection in light of a fundamental right. *See Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (welfare benefits were not considered a fundamental right); *Narenji v. Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1979) (program requiring reporting requirements did not infringe on a fundamental right); *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (same).

The government also recycles inapposite references to *Demore v. Kim*, 538 U.S. 510 (2003), and *Reno v. Flores*, 507 U.S. 292 (1993), to suggest the § 1226a does not infringe on a fundamental right. Opp. Supp. 21. Yet, as Mr. Hassoun has already explained, neither case undermines his argument. *Reno* did not involve physical liberty at all, and *Demore* concerned only term-limited detention. Pet. Reply 27–28; *see Demore*, 538 U.S. at 529 (considering detention with "a definite termination point"); *Reno*, 507 U.S. at 302 (holding freedom from physical restraint was not at issue in the case). Neither *Demore* nor *Reno* dealt with the right at issue here: freedom from indefinite detention in government custody. Where indefinite civil detention is at stake, equal protection requires more than rational basis review. Pet. Br. 36–37.

Moreover, the government still has not satisfied rational basis review, let alone heightened scrutiny. Although rational basis is a lenient standard, the government must still explain the relation between the statutory classification created by § 1226a (non-citizens) and the government's stated objective (public safety and national security). Pet. Reply 28. As it failed to do with 8 C.F.R. § 241.14(d), Opp. 37–38, the government again fails to provide a single reason (let alone a compelling one) to explain why under § 1226a non-citizens like Mr. Hassoun pose any more of a public safety or national security risk than other similarly-situated U.S. citizens. Opp. Supp. 23–24; *see also* Pet. Br. 37–38 (explaining under heightened scrutiny the government

must show a compelling interest sufficiently tailored to serve that interest). For example, 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.

Instead of explaining the relationship between the classification and the objective, the government again attempts to bypass this inquiry by re-characterizing the statutory classification as "aliens who pose a threat to national security or public safety," Opp. Supp. 24, and arguing that national security and public safety could be rational bases to survive scrutiny. *Id.* at 23. But this misses the point. To say that § 1226a only targets allegedly dangerous non-citizens says nothing about *why* non-citizens should be singled out in the first place. Section 1226a thus violates equal protection.

V. IF THE COURT DOES NOT INVALIDATE THE STATUTE, IT SHOULD DETERMINE THAT MR. HASSOUN'S DETENTION IS UNJUSTIFIED ON THE CURRENT RECORD, OR ALTERNATIVELY, HOLD A FULL EVIDENTIARY HEARING AS DUE PROCESS, THE HABEAS STATUTE, AND SUSPENSION CLAUSE REQUIRE.

The government argues that this Court's habeas review of agency decisions in the immigration context is so narrow and so deferential that the Court cannot meaningfully consider the merits of the Secretary's decision to subject Mr. Hassoun to indefinite detention. Opp. Supp. 25–27. But the government's cramped view of the Court's habeas authority is unsupportable. It ignores the plain text of § 1226a(b)(1), which explicitly authorizes "judicial review of the merits of" the Secretary's decisions under § 1226a. It flouts the requirements of the habeas statute, *see* 28 U.S.C. § 2241 *et seq.*, which provides the procedures this Court must employ to ensure meaningful judicial review of executive detention. And it violates the Constitution, which mandates that this Court exercise its habeas power to ensure the fair process required by the Due Process Clause where no such process has previously been provided.

This Court is not a rubber stamp; its authority to review the merits of Petitioner's detention is explicitly granted by Congress, confirmed by Supreme Court precedent, and supported by the Constitution's Suspension Clause—even (and perhaps especially) in the "national security" context. *Boumediene v. Bush*, 553 U.S. 723, 783 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). This Court should reject the government's position and require it to prove by clear and convincing evidence that Mr. Hassoun qualifies for indefinite detention under § 1226a. *See* Pet. Br. 28; *supra* at 11–13 (indefinite civil detention must be supported by clear and convincing evidence). Since the government cannot meet its burden on the current administrative record, the Court should grant Mr. Hassoun's petition and order his release. Otherwise, the Court should preside over a fair discovery process and an evidentiary hearing that employs the full tools of the habeas statute, as informed by the due process clause, to test the legality of Mr. Hassoun's confinement.

A. Section 1226a, the Federal Habeas Statute, and the Constitution Mandate this Court's Meaningful Review of the Merits of Mr. Hassoun's Detention

The government asserts that this Court "must accept the agency's facts" virtually without exception, and would thus strip this Court of its power to meaningfully review the merits of the Secretary's decision to detain Mr. Hassoun indefinitely. Opp. Supp. 26. The government's position flouts the plain language of the statute. Section 1226a(b)(1) specifies that "judicial review of any action or decision relating to [§ 1226a]" is available in habeas proceedings, "including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6) . . . ." Remarkably, the government never even *mentions* this provision of the very law it relies on to imprison Mr. Hassoun.

The government's emaciated version of habeas review under § 1226a is incompatible with the Supreme Court's guidance in habeas cases involving indefinite detention. The Court has

made it clear that robust habeas review of executive decisionmaking is most essential when the executive has authorized a person's indefinite detention without the involvement of a neutral magistrate. *Hamdi,* 542 U.S. at 537 (holding that reflexive deference to agency fact-finding is "ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker"); *see also Boumediene*, 553 U.S. at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.").[9]

Indeed, it is settled practice for courts to review factual findings when entertaining habeas petitions for individuals facing potentially indefinite detention. *See Zadvydas*, 533 U.S. at 699; *Clark v. Martinez*, 543 U.S. 371, 383 (2005); *Vaz v. Skinner*, 634 F. App'x 778, 780 (11th Cir. 2015); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008); *Hechavarria v. Whittaker*, 358 F. Supp. 3d 227, 238–43 (W.D.N.Y. 2019) (Vilardo, J.); *Senor v. Barr*, No. 19-CV-716, 2019 WL 3821756, at *8 (W.D.N.Y. Aug. 15, 2019) (Vilardo, J.); *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 397-406 (W.D.N.Y. 2009) (Arcara, C.J.). Petitioner himself was

[9] The government relies on a series of inapposite habeas decisions for the proposition that this Court should not review the facts underlying Petitioner's detention, but none of those cases concerns challenges to executive detention. Opp. Supp. 25–26. Five of those cases—*Heikkila v. Barber*, *INS v. St. Cyr*, *Sol v. INS*, *U.S. ex rel. Bilokumsky v. Tod*, and *I.N.S. v. Aguirre-Aguirre*—concerned habeas review of the government's decision to remove or deport an alien following a full and fair administrative hearing. The other, *Terlinden*, concerned extradition. None of them involved a statute that, like § 1226a, specifically provided for judicial review of the merits of a habeas petitioner's detention. To the contrary, in these cases the Court was grappling with the proper scope of habeas review in the face of congressional statutes that appeared to revoke or limit judicial review of the merits of agency decisions to remove aliens (or extradite them). *See Heikkila v. Barber,* 345 U.S. 229, 232–36 (1953); *INS v. St. Cyr*, 533 U.S. 289, 309–12 (2001); *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424–26 (1999); *Bilokumsky*, 263 U.S. at 154–55; *Terlinden v. Ames*, 184 U.S. 270, 278 (1902). That is not the case here.

the beneficiary of such review when Chief Judge Geraci determined—in the face of government determinations to the contrary—that Mr. Hassoun's removal was not reasonably foreseeable and, therefore, that his detention was unlawful under *Zadvydas v. Davis*. *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *6 (W.D.N.Y. Jan. 2, 2019) (declining to defer to the government's determination that Mr. Hassoun's removal was reasonably foreseeable). The government would have the Court ignore this precedent and provide Petitioner weaker habeas review than an ordinary *Zadvydas* detainee even though Congress has explicitly provided for merits review here and even though he faces a far more severe deprivation of liberty on flimsier allegations. The government's position is untenable and should be rejected.

As Mr. Hassoun has argued throughout this litigation, when the government seeks to subject a person to potentially indefinite detention, it must prove that the detention is lawful by clear and convincing evidence. *See, e.g.,* Pet. Br. 28; Pet. Reply 14-15; Pet. Supp. 24. The government now counters that it is *the detainee* who bears the burden of proving by a preponderance of the evidence that the Secretary's findings "are wholly unsupported by the evidence." Opp. Supp. 26–27. According to the government, if he fails to meet his burden, the Court "must accept the agency's facts." *Id.* Put differently, the government claims the power to detain Petitioner forever on probable cause or less without *ever* proving its case to any impartial judge, and would keep Petitioner imprisoned until he can *disprove* the allegations on a more stringent standard.

The government offers no support for this striking assertion. Its quotation of dicta from *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923), is misleading. In *Bilokumsky*, the Supreme Court held that a non-citizen's "failure to claim that he was a citizen and . . . refusal to testify on this subject" constituted evidence that he was not, in fact, a citizen. *Id.* at 154. That

case does not shift the burden of proof to a habeas petitioner challenging his indefinite detention; nor does it lower the government's burden.

The government's citation to *Miller v. Cameron*, 335 F.2d 986, 987 (D.C. Cir. 1964) for the proposition that Petitioner must disprove the government's allegations on a preponderance standard is similarly contrived. *Miller* never even mentions a standard of proof and, to the extent that *Miller* suggests that a detainee bears the burden of proof to win his release, it has been squarely overruled. In a series of decisions including *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Supreme Court has made it clear that in circumstances like those in *Miller* (and here), the *government* must prove by clear and convincing evidence that petitioner's ongoing detention is lawful.[10]

B. The Government Has Failed to Justify Petitioner's Detention by Clear and Convincing Evidence.

Here, the government has failed to meet its burden of showing that Mr. Hassoun is a risk of any kind. Strikingly, in its most recent brief justifying detention under § 1226a the only evidence the government explicitly relies on is his criminal conviction; it does not mention or cite the new, hearsay allegations in the FBI letter. To the extent that the government seeks to continue to detain Petitioner solely on the basis of his prior conviction, it raises grave substantive due process and Double Jeopardy Clause concerns. *See* Pet. Br. 22 & n.9; Am. Ver. Pet. ¶¶ 97–99. Moreover, the government's characterization of Petitioner's criminal conviction is deeply misleading. The government presses a description of Petitioner's conviction offered by the FBI, *see* Opp. Supp. 28 (citing FBI Letter, Dkt. No. 17-2), but completely *ignores* the sentencing

[10] It is also worth noting that in *Miller* the detainee was afforded a full evidentiary hearing, including at least three expert witnesses. 335 F.2d at 987. The government would deprive Petitioner of that opportunity here, Opp. Supp. 24–31, even while it seeks to place the burden on Petitioner to prove he cannot be detained.

judge's own characterization of Petitioner's conduct. As previously discussed, Judge Cooke considered and specifically rejected "the government's argument that Mr. Hassoun poses such a danger to the community that he needs to be imprisoned for the rest of his life." *See* Dkt. No. 17-2, Ex. J-3, at 8:14–16 (ICE000388). His conviction therefore shows that continued detention on the basis of dangerousness is specifically *unwarranted*. In a habeas proceeding, these judicial findings at sentencing are evidence, *see* 28 U.S.C. § 2247, the unsworn FBI letter is not.[11]

In any event, the Secretary's formal Notice of Decision to Certify Detention does not specify which specific factual allegations in the administrative record it is crediting, and scrupulously avoids making detailed factual findings in support of its determination. *See* Dkt. No. 30-2. To the extent the government does rely on the new allegations contained in the FBI letter—which are the only facts in the record that post-date Petitioner's arrest in 2002—Mr. Hassoun strongly denies those allegations. Pet. Supp. 24. As he has pointed out repeatedly, those allegations are unsworn and uncorroborated, *see* Pet. Reply 32-36, would constitute unreliable hearsay, Pet. Supp. 6, and would not be admissible in habeas proceedings. *See* Fed. R. Evid. 802 (Rule 802 deems hearsay inadmissible as evidence unless one of several inapplicable exceptions

[11] The government repeats its claim that Mr. Hassoun has submitted "no new evidence" to contest the government's "record." Opp. Supp. 27. This is simply false. Petitioner submitted nearly 150 pages to ICE during the administrative process, including a detailed letter and six exhibits. *See* Dkt. No. 17–2, Ex. J (ICE000350–445). Those exhibits included the transcript of Petitioner's criminal sentencing (which the government had omitted from the record); numerous letters of support from employers, co-workers, friends, and family; the full criminal sentence imposed, including detailed conditions of supervised release (also omitted from the government record); as well as the government's voluntary dismissal of eight additional charges against him. *See* Dkt. No. 17–2, Exs. J–2 to J–6 (ICE000379–000445). Throughout the administrative process and in this litigation, Petitioner has also vigorously denied that he poses any danger and denied the new allegations against him in the FBI letter, while explaining that he cannot properly respond to the unsubstantiated and false new allegations without rudimentary facts about the source of those hearsay allegations—which the government still refuses to provide. Dkt. No. 17–2, Ex. J; Am. Ver. Pet. ¶¶ 75–81.

apply); *Bostan v. Obama,* 662 F. Supp. 2d 1, 3 (D.D.C. 2009) ("the rules governing the admission of evidence in habeas corpus proceedings are indistinguishable from the rules governing civil and criminal cases" (citing Fed. R. Evid. 1101(e))); *Loliscio v. Goord*, 263 F.3d 178, 186 (2d Cir.2001) ("The Federal Rules of Evidence apply in federal habeas proceedings" (citing Fed. R. Evid. 1101(e))). Therefore, the Court should find the government has failed to meet its burden, and grant Mr. Hassoun's petition.

C. Federal Law and the Constitution Require that this Court Conduct a Full and Fair Hearing on the Merits.

The government contends that this Court must accept the government's decision without any kind of hearing, because "the administrative record is more than enough for this Court to fulfill its duty." Opp. Supp. 30. It most definitely is not. *See Zadvydas*, 533 U.S. at 692 ("indefinite, perhaps permanent, deprivation of human liberty," based on "administrative proceedings[] where the alien bears the burden of proving he is not dangerous, without . . . significant later judicial review" would pose a "serious constitutional problem"). An administrative record compiled solely by a person's jailor without any guarantees of due process—let alone where that person bears the burden of proving he is not dangerous (under the government's view)—is plainly insufficient to justify indefinite detention. And this Court is plainly empowered to conduct the requisite fact-finding.

The federal habeas statute, as informed by the Due Process Clause, provides the procedures for cases of executive detention such as this one, where there has been no meaningful prior process. *See Hamdi*, 542 U.S. at 525–26 (outlining the minimum procedures for habeas review required under the statute); *Boumediene*, 553 U.S. at 781 (scope of constitutionally-mandated habeas review "depends upon the rigor of any earlier proceedings," consistent with the

"test for procedural adequacy in the due process context").[12] Specifically, 28 U.S.C. § 2241 and its companion provisions explicitly provide the Court broad power to "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. In aid of that fact-finding function, "evidence may be taken orally or by deposition." 28 U.S.C. § 2246. This form of evidence—*i.e.* live testimony under oath—is the default under the statute; only "in the discretion of the judge" may evidence be taken "by affidavit." *Id*. In that case, "any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits." *Id.* The statute also specifically provides that "transcripts of proceedings upon . . . sentence"—*i.e.*, the findings of Judge Cooke following the jury verdict against Petitioner—"shall be admissible in evidence." 28 U.S.C. § 2247. In addition to these powers specifically enumerated in the statute, the Court may permit the use of the full panoply of additional discovery tools available under the Federal Rules of Civil Procedure. *See* Rules Governing Section 2254 Cases in United States District Courts, Rule 6;Opp. Supp. 29 (conceding that these rules, while not binding in a § 2241 habeas proceeding, may be applied here). And, as explained previously, the Due Process Clause requires that in this habeas proceeding the government bear the burden of proof by clear and convincing evidence and Mr. Hassoun be given a meaningful opportunity to rebut the government's allegations and confront any witnesses against him. *See*

[12] *Hamdi* interprets the constitutional minimum required by § 2241 in the context of wartime detention of suspected enemy combatants captured by the military on a foreign battlefield. Its constitutional holding is not applicable here, in the context of indefinite civil detention at the hands of domestic civilian law enforcement agencies. Instead, as stated above, *supra* 11–13, pursuant to Supreme Court precedent, indefinite civil detention requires greater protections, including, at a minimum, that the government justify detention by clear and convincing evidence. But strikingly, the government would deny Petitioner even the essential due process guarantees the Supreme Court afforded to *wartime battlefield captures* in *Hamdi*, including a meaningful opportunity to rebut the allegations against him before a neutral decisionmaker. 542 U.S. at 537–39.

supra 11–13; Pet. Supp. 14; Pet. Reply 11–16; Pet. Br. 26–31.

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. The statute does not apply to Mr. Hassoun and is otherwise invalid. But even if the statute did apply to Mr. Hassoun and did not suffer from constitutional deficiencies, the Court should order Mr. Hassoun's immediate release because, as a matter of law, the administrative record is devoid of admissible or probative evidence to justify Mr. Hassoun's detention under the statute. In the alternative, the Court should order Mr. Hassoun to be released after a full evidentiary hearing in compliance with the protections due to Mr. Hassoun under federal habeas statute and the Due Process Clause of the Constitution.

Respectfully submitted,

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