No. 20-2056

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADHAM AMIN HASSOUN,

Petitioner–Appellee,

v.

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

Respondent–Appellant.

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

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

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INTRODUCTION

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

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

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

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

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

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

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

PROCEDURAL HISTORY & FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL STANDARD

This Court reviews a district court's denial of a stay pending appeal for abuse of discretion. *United States v. Grote*, 961 F.3d 105, 123 (2d Cir. 2020).

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

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

findings against the government relevant to these factors must be accepted unless "clearly erroneous." Fed. R. Civ. P 52(a)(6).

Traditionally, this Circuit has weighed the stay factors on a "sliding-scale." *See, e.g.*, *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006). Under this approach, parties can satisfy the first factor by showing that their appeal raises a substantial legal question—but only if *all three* of the other factors "tip[] *decidedly* in their favor," *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019) (emphasis added), *rev'd on other grounds*, *Trump v. Mazars USA*, 2020 WL 3848061 (U.S. July 9, 2020).

Here, the government cannot show that *any* of the three other factors tip in its favor—much less *decidedly*. Therefore, the government cannot obtain a stay without establishing that it is likely to succeed on the merits. Its legal positions are so extreme that they do not even raise a substantial question on the merits.

ARGUMENT

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

In denying the government's motion for a stay below, the district court correctly concluded that the government could not demonstrate a likelihood of success "or even that there is a substantial case going to the merits." Stay Denial 15. The government cannot show a likelihood of success for three independent reasons: first, the D.C. Circuit has exclusive jurisdiction over this appeal; second,

even if this Court does have jurisdiction, 8 C.F.R. § 241.14(d) violates procedural due process; and third, the Supreme Court's authoritative interpretation of that regulation's authorizing statute render the regulation *ultra vires*.

A. This Court lacks jurisdiction over the government's appeal.

The government cannot show likelihood of success on the merits because it cannot even show that this Court has jurisdiction over the appeal. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) (jurisdictional issues "mak[e] such success [on the merits] more unlikely due to potential impediments to even reaching the merits"). The district court ordered Petitioner's release after rejecting his detention under two related authorities, 8 U.S.C. § 1226a ("the statute") and 8 C.F.R. § 241.14(d) ("the regulation"), both of which purportedly allow the indefinite detention of individuals determined to be national-security risks. The government seeks to appeal the rulings on each authority to separate courts, but § 1226a vests exclusive jurisdiction over *all* appeals in this habeas proceeding in the D.C. Circuit.

The statute's text makes this clear. It provides: "Notwithstanding any other provision of law. . . in habeas corpus proceedings described in paragraph (1) . . . the final order shall be subject to review, on appeal, by the [D.C. Circuit]" and that "[t]here shall be no right of appeal in such proceedings to any other circuit court of appeals." § 1226a(b)(3). The "proceedings" here are a single habeas petition

bringing claims for judicial review of detention under both the statute and regulation; the district court's "final order" disposes of both. The statute does not limit the D.C. Circuit's exclusive jurisdiction to particular *claims* covered by "a final order" or within a "proceeding," but provides simply that any such "final order" should be appealed to the D.C. Circuit and no other court. *Id.*

The statute's unambiguous text regarding appellate jurisdiction comports with Congress's clear intent. Congress enacted the statute to concentrate both expertise and the development of the law concerning indefinite national-security detention in a single circuit. It sought to prevent the development of "inconsistent standards . . . by reviewing courts, which interferes with the government's ability to pursue detention and removal under a known and consistent standard." *Hearing on Draft of USA PATRIOT Act Before the H. Comm. on the Judiciary*, 2001 WL 34113841, at *63 (Sept. 24, 2001); *cf. Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004) (D.C. Circuit is the "proper venue" for enemy-combatant habeas cases). Permitting dueling appeals would flout Congress's intent by inviting inconsistent decisions in a single case.[3]

[3] Petitioner's challenges to both authorities depend on the same administrative record, the same unilateral executive branch certification process, and the same certifying document—*i.e.* the discredited FBI memo—and raise similar issues with respect to the constitutional and other legal questions decided by the district court.

Confronted with another statute that gives exclusive jurisdiction to a single court of appeals, the Supreme Court came to the same conclusion. In *United States v. Hohri*, 482 U.S. 64, 70 (1987), the Court considered whether an appeal from a judgment under the Little Tucker Act and the Federal Tort Claims Act should be brought in the Federal Circuit, which has exclusive appellate jurisdiction over the former, or in the regional Courts of Appeals, which ordinarily have jurisdiction over the latter. The Court held that the Federal Circuit was the appropriate venue on appeal for *both* claims because Congress had created the Federal Circuit to address "the special need for nationwide uniformity in certain areas of the law." 482 U.S. at 71–72 (cleaned up). The Court rejected bifurcating the appeals in a single case because it "would result in an inefficient commitment of the limited resources of the federal appellate courts." 482 U.S. at 69 n.3. Here, the government has taken the approach the Supreme Court explicitly rejected in *Hohri*.

This Court lacks jurisdiction over this appeal—but even if it presents a close question, the presence of a jurisdictional impediment weakens any government claim that it is likely to prevail on the merits. *See Munaf*, 553 U.S. at 690.

B. The regulation violates procedural due process.

"An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542

(1985). The sufficiency of process in any given case depends on: (1) the importance of the individual interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All three factors weigh against the regulation.

First, "[t]he liberty interest at stake in this case is of the highest order, inasmuch as Petitioner faces the possibility of indefinite civil detention." Regulation Ruling 20–21; *see Zadvydas*, 533 U.S. at 690.

Second, the regulation's failure to establish basic procedural safeguards creates an immense risk of erroneous deprivation. The regulation lacks "one of the most fundamental due process protections: a neutral decisonmaker." Stay Denial 17. It does not articulate any burden or standard of proof. And it does not afford those subject to it the opportunity to meaningfully confront or examine the evidence and witnesses against them, or to call witnesses in their favor, as constitutional civil-detention schemes must. *See Addington v. Texas*, 441 U.S. 418, 421 (1979); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997). What the government describes as "ample process," Stay Mot. 16, is nothing more than an executive prerogative to imprison Petitioner "for the rest of his life based on a non-

adversarial proceeding with no judicial oversight of the factual findings." Stay Denial 24.

The facts of this case bear this out. Once the government's justifications for detaining Petitioner were exposed to "meaningful scrutiny" below, they collapsed. The government's insistence that it may detain Petitioner indefinitely on the basis of debunked allegations "runs counter to well-established due process jurisprudence" and does not have "even a moderate chance of succeeding." Stay Denial 18. Indeed, the government's argument boils down to this: once the Secretary concludes that the regulation is satisfied, indefinite detention is permitted, *even if the supposed facts on which the Secretary relied are demonstrably untrue*. This argument is repugnant to the Constitution, and must be among the most extreme and unapologetic arguments for unreviewable executive power the government has ever put to paper.[4]

Third, the government's interests cannot outweigh the regulation's procedural flaws. Although the government's interest in preventing terrorism is weighty, the government has *no* legitimate interest in detaining individuals based

[4] The government complains that Petitioner cannot succeed on his due process challenge because he refused to sit for an interview with an immigration officer, but this argument is refuted both by Supreme Court precedent and what actually transpired in this case. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 70–71 (2009); Regulation Ruling 20 n.7.

on mistakes. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint."). Providing a meaningful process to avoid such errors is not unduly burdensome and would not harm national security. Regulation Ruling 18–19, 24–25. This is especially true because the regulation at issue here is "rarely" invoked, Stay Mot. 1, and any administrative or fiscal burdens resulting from increased procedural protections would apply only in "a small number of cases," Regulation Ruling 25.

C. The regulation is ultra vires.

In addition to holding the regulation unconstitutional on its face, the district court correctly held that it was *ultra vires*. In *Zadvydas*, the Supreme Court held that 8 U.S.C. § 1231(a)(6)—the statute under which the regulation was promulgated—does not permit indefinite detention. 533 U.S. at 689. Later, in *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court clarified that its holding in *Zadvydas* encompassed *all* non-citizens detained under § 1231(a)(6)—not merely a subset. *Id.* at 380; *see* Regulation Ruling 17. Thus, the regulation exceeds the authority granted by § 1231(a)(6).

Seizing on a line of dicta, the government asserts that *Zadvydas*'s limit on indefinite detention under § 1231(a)(6) does not apply in cases involving "terrorism or other special circumstances," 533 U.S. U.S. at 696. Stay Mot. 15.

But, as the district court explained, *Clark* rejects that interpretation of the *Zadvydas* dicta. Regulation Ruling 17. First, *Clark* holds that the authority granted by § 1231(a)(6) does not apply differently to non-citizens in different circumstances. Second, *Clark* explains that *Zadvydas* left an opening for *Congress* to pass a new statute that narrowly applies in cases involving "terrorism or other special circumstances," but that it did *not* give the executive branch permission to promulgate a similar regulation that exceeds the authority of the statute Congress actually passed. *See* 543 U.S. at 386 n.8; *see also id.* at 386; *id.* at 387 (O'Connor, J., concurring).

Congress "react[ed] to . . . *Zadvydas*" by enacting legislation granting the agency authority to do what § 1231(a)(6) does not: to detain indefinitely non-citizens who cannot be removed from the country because they allegedly pose a threat to the national security. *Id.* at 386 n.8 (majority op.) (citing 8 U.S.C. § 1226a(a)). This is the very statute that the government has invoked here as additional authority to detain Petitioner.

Congress' grant of exclusive jurisdiction to the D.C. Circuit over all final orders in habeas challenges to detention under 8 U.S.C. § 1226a(a), *supra* Part I.A, reinforces why § 241.14(d) is *ultra vires*. The government's defense of the regulation requires accepting that Congress created exclusive jurisdiction over post-final-order national-security-related indefinite detention in the D.C. Circuit

while simultaneously permitting the agency to promulgate an essentially duplicative regulation under a *different* statute that allows for appellate jurisdiction in any circuit where a challenge is brought. Statutes must be construed to avoid such absurd results. *See, e.g.*, *United States v. Turkette*, 452 U.S. 570, 580 (1981).

The Fifth and Ninth Circuits have already rejected arguments very similar to the one the government makes here. Both Circuits have held that § 1231(a)(6) does not permit the government to indefinitely detain "specially dangerous" non-citizens under § 241.14(f), another subsection of the same regulation. *See Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004). The government cites the Tenth Circuit's decision in *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), which upheld the subsection struck down in *Tran* and *Thai*. But the Tenth Circuit's holding was rooted in *Chevron* deference. The government does not argue that the subsection of the regulation at issue here is entitled to *Chevron* deference, and it waived that argument by not making it below. *See* ECF 56 at 48–49.[5]

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[5] *Hernandez-Carrera* would not save § 241.14(d) in any event. Recognizing that a regulation that raises serious constitutional doubts is not entitled to *Chevron* deference, *Hernandez-Carrera*, 547 F.3d at 1250, the court held that the regulation at issue in that case did not raise any such doubts based on its delineation of important procedural guarantees, *id.* at 1254 (discussing multiple safeguards under § 241.14(f)–(h)). The regulation at issue in this case lacks those protections, raising serious constitutional doubts.

For these reasons, the government cannot succeed on its appeal from the district court's invalidation of § 241.14(d).

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

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

First, the government relies on the two FBI memos recommending that Petitioner be certified as a "threat to national security." *See* Stay Mot. 20–21. As the district court concluded, "[f]ar from demonstrating that Petitioner is so dangerous that he must be detained" the memos "illustrate[] a more potent danger—the danger of conditioning an individual's liberty on unreviewable administrative factfinding." Stay Denial 34–35.

Moreover, the FBI's assessment does not account for the extreme conditions of supervision to which Petitioner will be subject upon release. Though the details remain under seal (and can be provided at the Court's request), the FBI memos explicitly evaluated Petitioner's dangerousness based on assumptions about his freedoms upon release that are entirely foreclosed by the strict conditions of supervision now in place. The conditions Petitioner has agreed will make him the most surveilled "free" man in Florida, if not the country. He will wear an ankle monitor. His every electronic communication will be monitored. He will not leave

his residence without pre-approval, except in a medical emergency. All visitors except for his sister's immediate family members must be pre-approved. The government will even approve where he goes to pray.

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

Because the government has not shown irreparable harm, its bid for a stay must fail. *See Deutsche Bank*, 943 F.3d at 637.

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

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

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

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

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

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

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

government officials tasked with supervising his terms of release. Stay Mot. 23–24. But the public has no interest in "saving resources" by jailing someone unnecessarily—especially when it is already spending untold resources keeping him locked up.

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

CONCLUSION

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

Dated: July 10, 2020

Respectfully submitted,

/s/ *Jonathan Hafetz*

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CERTIFICATE OF SERVICE

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

Date: July 10, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,200 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: July 10, 2020

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