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 MEMORANDUM OF LAW REGARDING THE PARAMETERS OF THE EVIDENTIARY HEARING

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ARGUMENT

In response to the Court's order of December 20, 2019 (ECF No. 58), Petitioner Adham Hassoun submits this brief regarding the parameters of the evidentiary hearing to be held in his case. As set forth below: (1) the government bears the burden of proving that Mr. Hassoun is a threat to national security and must satisfy that burden by—at a minimum—clear and convincing evidence; (2) the Federal Rules of Evidence apply to this habeas proceeding and prohibit the use of hearsay unless it falls within an established exception; (3) even if the Rules of Evidence do not preclude the use of hearsay, the Constitution independently guarantees Mr. Hassoun the right to confront and cross-examine his accusers; and (4) the evidentiary hearing should be held in the federal courthouse in the Western District of New York, whether in Rochester or Buffalo.

As Mr. Hassoun previously argued, 8 U.S.C. § 1226a violates the right to Substantive Due Process on its face because it authorizes indefinite detention based solely on future dangerousness, without requiring the presence of an additional factor that helps create the danger. ECF No. 28 at 10–13; ECF No. 32 at 7–11. The Court has reserved decision on this issue, as well as on Mr. Hassoun's other constitutional challenges to § 1226a and the statute's application to him, pending the development of a full and complete record. *See* ECF No. 55 at 26. Mr. Hassoun maintains that these constitutional defects require his immediate release.

Even though the Court has reserved decision on Mr. Hassoun's facial challenges, Substantive Due Process remains relevant to the parameters of the evidentiary hearing in the following critical respect. In every instance that the Supreme Court has upheld a statute authorizing detention based on future dangerousness and some additional factor against constitutional challenge, that statute has provided rigorous procedural safeguards. Thus, even if § 1226a *could* constitutionally authorize indefinite detention based on future dangerousness alone, the Constitution would require that authorization to be accompanied by rigorous procedural safeguards.

It has been nearly a year since Chief Judge Geraci concluded that Mr. Hassoun's removal was not foreseeable and ordered his release; since then, Mr. Hassoun has been detained solely on the basis of the government's untested allegations. He has not been afforded anything that remotely resembles a rigorous procedural safeguard. The only opportunity the government has given Mr. Hassoun to challenge the basis for his confinement is an invitation to be interrogated by his jailer, which is no process at all. The forthcoming evidentiary hearing is the *first* point at which the government will be required to prove, before a neutral decisionmaker, that Mr. Hassoun's detention is justified. It is the *first* opportunity that Mr. Hassoun will have to meaningfully challenge the government's evidence against him. And it is the *first* chance for the Court to hold the government to its

constitutional obligations.

In short, the process previously extended to Mr. Hassoun has been virtually non-existent, while the liberty interest at stake is of the highest order. There is nothing collateral about this habeas proceeding, and the hearing must allow for rigorous testing of the government's evidence. The Court should, accordingly, order that the hearing include, at minimum, the procedural safeguards set forth below.

I. Assuming 8 U.S.C. § 1226a is Not Facially Unconstitutional, the Due Process Clause Requires That the Government Bear the Burden of Proving that Mr. Hassoun Is a Threat to National Security by—at a Minimum—Clear and Convincing Evidence.

First, it is essential (and should be uncontroversial) that, in this habeas proceeding, the government bears the burden of proof. As Petitioner has explained previously, that is the proper allocation in cases involving civil detention. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997); *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Addington v. Texas*, 441 U.S. 418, 431 (1979).[1] Quite simply, when the government seeks to

[1] Courts in the Second Circuit have consistently recognized that the government also bears the burden of proof when attempting to justify prolonged immigration detention. *See, e.g.*, *Arce-Ipanaque v. Decker*, No. 19-cv-1076, 2019 WL 2136727, at *3 (S.D.N.Y. May 15, 2019) (noting, in light of Circuit consensus, that the court "need not spill further ink" on the question of whether the government should bear the burden of proof by clear and convincing evidence in bond hearings over prolonged immigration detention); *Singh v. Whitaker*, 362 F. Supp. 3d 93, 105

detain an individual indefinitely on the basis of an executive finding of "dangerousness," the heavy weight of the liberty interest at stake requires that the government—not the Petitioner—bear the burden of proving the facts justifying the detention. *See, e.g.*, *Foucha*, 504 U.S. at 86 (explaining that the government bears the burden of proving "insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists").[2]

Second, the government must prove that Mr. Hassoun "will threaten the national security of the United States or the safety of the community or any person," 8 U.S.C. § 1226a(a)(6)—not only that he was properly certified under § 1226a(a)(3). In other words, the government bears the burden of proving *both* that Mr. Hassoun was properly certified under (a)(3) *and* that his continued

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(W.D.N.Y. 2019); *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018); *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794, at *15 (S.D.N.Y. Dec. 27, 2018).

[2] Earlier in this litigation, the government "concede[d]" that it had "to prove the various facts necessary to justify detention" under 8 C.F.R. § 241.14(d). ECF No. 17-4 at 42. Curiously, the government has taken a different position with respect to the Court's habeas review of 8 U.S.C. § 1226a, *see* ECF No. 26, but it has not offered any explanation whatsoever for the discrepancy, nor has it cited any cases supporting its position as to the statute. *See* ECF No. 32 at 21–22 (explaining why the government's only two cases concerning the placement of the burden of proof do not support its argument).

indefinite detention is justified under (a)(6).[3] Indeed, the government previously acknowledged that Mr. Hassoun's detention is based upon two distinct findings by the executive branch. *See* ECF No. 30 at 17 n.11 (explaining that "to certify Petitioner's detention under § 1226a, the Secretary had to" make a finding under (a)(3), and that "to continue his detention," the Secretary had to make a finding under (a)(6)). And section 1226a(b), which provides for habeas review, states that this review applies to determinations made under both sub-sections (a)(3) and (a)(6), and does not distinguish between the review of either determination. *See* 8 U.S.C. § 1226a(b)(1).

Third, the government must prove that Mr. Hassoun satisfies the requirements of the statute by—at minimum—clear and convincing evidence. This Court recently concluded that "the failure to impose a clear and convincing evidence standard in 8 C.F.R. § 241.14(d) violates the requirements of procedural due process," ECF No. 55 at 24, and the Court's logic extends to 8 U.S.C. § 1226a as well. The Court followed the Supreme Court's analysis in *Addington*—which held that "the preponderance standard falls short of meeting the demands of due process" in connection with civil commitment, 441 U.S. at 431—as "persuasive in this context." ECF No. 55 at 24. As the Court noted, *Addington* was based on a

[3] Counsel expects the evidentiary hearing to focus on whether Mr. Hassoun's release "will threaten the national security of the United States or the safety of the community or any person," as required to continue detaining a non-citizen whose removal is not foreseeable. 8 U.S.C. § 1226a(a)(6).

consideration of "the difficulty inherent in proving dangerousness" as well as the fact that "the preponderance standard . . . increases the risk of inappropriate commitment and fails to impress upon the factfinder the importance of the decision to deprive an individual of his or her liberty." *Id.* (citing *Addington*, 441 U.S. at 426–27, 429).

Addington is consistent with the Supreme Court's repeated command that prolonged detention must be justified, at minimum, by a showing of clear and convincing evidence—the most stringent standard of proof short of the reasonable-doubt standard in criminal cases. "[T]he Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma." *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quotation marks omitted); *see also Woodby v. INS*, 385 U.S. 276, 285–86 (1966); *Chaunt v. United States*, 364 U.S. 350, 353 (1960).

In *Foucha*, for example, the Court held that indefinite civil commitment of a mentally ill and dangerous person was unconstitutional unless the government "establish[es] the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence." 504 U.S. at 86 (citation omitted). Even in the context of pre-trial criminal detention, where the length of detention is limited both by the pendency of criminal proceedings and speedy trial guarantees, the

government must "prove[] by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community" and that "no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750–51.

Similarly, in immigration cases, when the government seeks to hold noncitizens for extended periods during removal proceedings, due process requires that the government meet a clear and convincing evidence standard to prove that prolonged detention is necessary, as district courts in this Circuit have consistently recognized. *See, e.g.*, *Singh v. Whitaker*, 362 F. Supp. 3d 93, 105 & n.11 (W.D.N.Y. 2019) ("[T]he government may not continue to detain Singh unless no later than fourteen days from the date of this decision, it demonstrates by clear and convincing evidence before a neutral decision maker that he is a danger to the safety of other persons or of property or is not likely to appear for his removal."); *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421, at *8–9 (W.D.N.Y. Nov. 2, 2018) (holding that immigration detention statute was unconstitutional as applied to petitioner on Procedural Due Process grounds in part because it did "not require the government to demonstrate by clear and convincing evidence that his detention necessarily serves a compelling regulatory purpose," and collecting cases); *Bermudez Paiz v. Decker*, No. 18-cv-4759, 2018 WL 6928794, at *15 (S.D.N.Y. Dec. 27, 2018) (explaining that "the overwhelming consensus of judges

in this District . . . is that once an alien's immigration detention has become unreasonably prolonged, he or she is entitled to a bond hearing at which the government bears the burden to demonstrate dangerousness or risk of flight by clear and convincing evidence" (quotation marks omitted)).

While this case calls for a standard of proof *at least* as stringent as the one applied in habeas challenges under the aforementioned civil detention schemes, the stakes—Mr. Hassoun is effectively facing a possible life sentence—make the most appropriate standard of proof "beyond a reasonable doubt." Indeed, the Supreme Court approved of the civil detention scheme in *Hendricks* in part because the state statute authorizing the detention imposed that higher standard. *See* 521 U.S. at 352–53.[4]

There are other important differences between the detention scheme at issue here and the detention schemes at issue in Supreme Court cases approving of the "clear and convincing evidence" standard. Most critically, detention based on mental illness can, at least in theory, be re-evaluated based on progress reports

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[4] Notably, Mr. Hassoun has not received even the *initial* process provided in *Hendricks*, where the state was required to demonstrate to a judge that there was probable cause to support a finding that an individual was a sexually violent predator and thus eligible for civil commitment, pending a full trial to determine beyond a reasonable doubt whether the individual was a sexually violent predator. *Hendricks*, 521 U.S. at 352–53. *See* ECF No. 28 at 14–15, 17–18 (section 1226a violates procedural due process because it provides no procedural safeguards before decision made to detain a person indefinitely); ECF No. 32 at 14 (same).

from medical experts. *See, e.g.*, *Hendricks*, 521 U.S. at 363 (noting that, per the civil-commitment statute, "the confinement's duration is . . . linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others"); *Foucha*, 504 U.S. at 74–75 (state not permitted to hold "insanity acquitee" against his will in mental hospital when doctors testified that detainee was no longer suffering from "a mental disease"). The type of "dangerousness" at issue in a § 1226a(a)(6) determination does not appear to lend itself to such re-evaluation. Unlike the statutes at issue in "dangerousness-plus" determinations, § 1226a does not authorize detention based on any mental disease or abnormality; thus, it contains no provision for professional care or treatment. *Compare, e.g.*, *Hendricks*, 521 U.S. at 353 (state involuntary confinement scheme required that confined person be provided with "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large" (citation omitted)). Although the statute purports to provide for periodic review of Mr. Hassoun's confinement, the fact that the statute authorizes indefinite detention entirely divorced from any type of disease or abnormality that might be susceptible to professional medical treatment makes it difficult to see how Mr. Hassoun could ever, in the government's eyes, demonstrate a transition from

dangerousness to non-dangerousness.[5]

Indeed, the statute places no limitations on the relevance of older evidence of dangerousness—and as the arguments to date make clear, the government believes that even nonviolent actions that Mr. Hassoun took almost twenty years ago are relevant to a finding of current dangerousness under the statute. *See, e.g.*, ECF. No. 30 at 15 n. 9; ECF No. 17-4 at 6 (stating that Mr. Hassoun's alleged dangerousness is based in part on his "criminal history"). Thus, if the government meets its burden (whatever it may be) at the forthcoming habeas hearing, the government will almost certainly consider the results of the hearing sufficient to justify continuing Mr. Hassoun's detention, if not forever, then for an exceedingly long period with no known end.[6]

In other words, if the government carries its burden at the evidentiary

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[5] That is surely one reason why the Supreme Court has never allowed indefinite detention to be based on anything other than "dangerousness-plus." The "plus" factor speaks to the importance of ensuring that detainees' ongoing conditions, rather than their past actions, form the basis of a decision to indefinitely imprison. *See Foucha*, 504 U.S. at 78 ("[K]eeping [a detainee] against his will in a mental institution is improper absent a determination in civil commitment proceedings of *current* mental illness and dangerousness." (emphasis added)).

[6] While the statute provides for a review every six months of the determinations under (a)(3) and (a)(6), nothing in the statute provides any limits on the ultimate length of detention. 8 U.S.C. § 1226a(a)(6), (7). To the contrary, the statute's only guidance regarding semi-annual review simply leaves it entirely "in the [Secretary's] discretion" to decide whether to order release and to determine "such conditions [of release] as the [Secretary] deems appropriate." 8 U.S.C. § 1226a(a)(7).

hearing, then the length of Mr. Hassoun's detention will be completely untethered from the pendency of judicial proceedings: it will go on for as long as the government deems appropriate—potentially forever. *See Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). That possibility justifies requiring the government to prove that Mr. Hassoun satisfies § 1226a "beyond a reasonable doubt" before subjecting him to what may effectively become an administrative life sentence.

The most stringent standard of proof is necessary here for yet another reason: the "dangerousness" standard under § 1226a is extraordinarily broad, encompassing any supposed "threat[]" to "the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). In these circumstances, where the detention standard is so capacious and is completely untethered from any foreseeable endpoint or finding of mental illness or other "plus" factor, it is necessary to hold the government to an even higher standard of proof than in other civil commitment contexts. If such an expansive detention standard is even constitutional—Petitioner contends it is not, *see* ECF No. 28 at 10—then the most stringent standard of proof is essential to guard against the "risk of an erroneous deprivation" of liberty that is the core of the Due Process Clause's protections. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).[7]

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[7] In this light, the government's argument that a "reasonable grounds to believe" standard—which the government did not dispute is similar to (and perhaps weaker than) the probable cause standard for mere arrests, *see* ECF No. 32 at 12—is

In arguing that a preponderance (or lower) standard is appropriate here, the government may point to cases involving habeas proceedings initiated by war-on-terrorism detainees held at Guantánamo Bay, Cuba. Those cases are inapposite for at least four reasons.

First, they do not address how the Due Process Clause affects the procedures due to a civilian habeas petitioner who was arrested and detained in the United States. *See Qassim v. Trump*, 927 F.3d 522, 524 (D.C. Cir. 2019) (emphasizing the narrowness of the D.C. Circuit's Guantánamo decisions and noting that even with respect to Guantánamo petitioners, the applicability and effect of the Due Process Clause remain open questions). Instead, those cases were decided exclusively under the Constitution's habeas corpus Suspension Clause, which is the sole constitutional right courts have to date said extends to enemy combatants at Guantánamo. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

Second, the procedures developed in the Guantánamo cases are rooted in the *sui generis* circumstances surrounding the battlefield capture of enemy combatants by the military in wartime. *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010) ("Detention of aliens outside the sovereign territory of the United States

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sufficient here is preposterous. As Mr. Hassoun has pointed out, the government has not cited a single case to support the jaw-dropping proposition that indefinite civil detention can be justified on mere probable cause or less. *See* ECF No. 32 at 12.

during wartime is a different and peculiar circumstance, and the appropriate habeas procedures cannot be conceived of as mere extensions of an existing doctrine.”). Those circumstances have no bearing on this case, as Mr. Hassoun was not captured by the military, is not being detained as a wartime combatant, and is not being held pursuant to the president’s uniquely broad wartime detention powers. Rather, Mr. Hassoun is being detained because civilian law enforcement authorities have asserted that he is particularly dangerous.

Third, in contrast to some Guantánamo cases, holding the government to a meaningful burden here would not require it to preserve, or attempt to recover, evidence of past conduct on the battlefield. *See, e.g.*, *Al-Bihani*, 590 F.3d at 877 (“Requiring highly protective procedures at the tail end of the detention process for [a Guantánamo detainee] would have systemic effects on the military’s entire approach to war. . . . [M]ilitary operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation.”). Mr. Hassoun’s detention rests on a finding of supposed *current* dangerousness based upon just a handful of informants, all of whom are (or were) incarcerated at the same federal detention facility in Batavia, New York, as Mr. Hassoun, and all of whom have apparently reported conduct at that institution dating to a brief period following his transfer to ICE custody there. The practical barriers to evidence-gathering that inform the Guantánamo cases do not exist here.

Fourth, the Guantánamo detentions are based not on subjective evaluations of detainees' alleged dangerousness, but rather, like all detention of combatants under longstanding law-of-war principles, on detainees' membership in an opposing military force; as such, they are strictly circumscribed by the duration of the conflict. *See Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) ("[I]ndividuals may be detained at Guantánamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("It is a clearly established principle of the law of war that detention [of enemy combatants] may last no longer than active hostilities.").

In short, this case does not present either the legal or practical considerations that have justified the application of a lower standard of proof in some Guantánamo habeas proceedings.

II. Mr. Hassoun Has the Right to Confront and Cross-Examine His Accusers Before He is Consigned to Indefinite Imprisonment.

The Court should require the government to produce Mr. Hassoun's accusers and give Mr. Hassoun the opportunity to cross-examine them. The Federal Rules of Evidence, which apply to habeas corpus proceedings, so require. Even if they did not, the Fifth Amendment would.

A. The Federal Rules of Evidence apply to this proceeding and prohibit the use of hearsay unless it falls within an established exception.

The Federal Rules of Evidence apply in habeas corpus proceedings. *See* Fed. R. Evid. 1101(e); *see also, e.g.*, *Fullwood v. Lee*, 290 F.3d 663, 680 (4th Cir. 2002); *Loliscio v. Goord*, 263 F. 3d 178, 186 (2d Cir. 2001); *Bostan v. Obama*, 662 F. Supp. 2d 1, 3 (D.D.C. 2009) (generally, "the rules governing the admission of evidence in habeas corpus proceedings are indistinguishable from the rules governing civil and criminal cases"). The sole exception is where matters of evidence are provided for either in statutes that govern habeas procedures or in rules prescribed by the Supreme Court pursuant to statutory authority. *Bostan*, 662 F. Supp. 2d at 3.[8]

Under the Federal Rules of Evidence, hearsay is generally prohibited. *See* Fed. R. Evid. 802; *see also* Fed. R. Evid. 803–807 (describing specific exceptions).

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[8] While the habeas statute authorizes the taking of evidence by affidavits at the judge's discretion, *see* 28 U.S.C. § 2246, this practice is "disfavored because the affiants' statements are obtained without the benefit of cross examination and an opportunity to make credibility determinations," which are especially important in this case. *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *see also, e.g.*, *Dowthitt v. Johnson*, 230 F.3d 733, 742 (5th Cir. 2000) (refusing to consider an affidavit that "is hearsay and does not fall under any exception to the hearsay rule"). In no circumstance, moreover, can an affidavit be admitted that would violate an individual's constitutional right to confront and cross-examine his accusers. *See infra* at 18–21; *see also Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

The rule against hearsay "is premised on the theory that out-of-court statements are subject to particular hazards," *Williamson v. United States*, 512 U.S. 594, 598 (1994)—most critically, the mistaken reliance on "relevant" evidence that is "insufficiently reliable." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). The rule against hearsay thus performs a vital function in ensuring the reliability, trustworthiness, and dependability of evidence. As the Supreme Court has explained, when a witness testifies with hearsay:

> The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements—the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and most importantly, the right of the opponent to cross-examine—are generally absent for things said out of court.

Williamson, 512 U.S. at 598.

This case, in which the government's "evidence" appears to consist entirely of double, triple, even quadruple hearsay statements by jailhouse informants, underscores the enduring logic and force behind this bedrock evidentiary rule. No established exception applies to the government's hearsay evidence, and the Court should not allow the government to sidestep longstanding evidentiary protections by laundering the alleged statements of others through a government officer or investigator.

While it is true that the D.C. Circuit has allowed some hearsay evidence in the habeas proceedings involving prisoners held at Guantánamo Bay, Cuba, caselaw from the *sui generis* context of wartime detention of enemy combatants has little application here. As an initial matter, no decision from the D.C. Circuit has addressed the scope of rights in a habeas proceeding anchored in the Due Process Clause. *See Qassim*, 927 F.3d at 524. Moreover, as explained above, the Guantánamo context (and rationale justifying the use of some hearsay in those cases) is radically different from the one before this Court, as the D.C. Circuit has expressly recognized. For example, in *Al-Bihani*, where the D.C. Circuit concluded that some hearsay was admissible in habeas proceeding initiated by Guantánamo detainees, the court's reasoning was grounded in "the requirements of [the] novel circumstance" of enemy combatants captured in a theater of war. 590 F.3d at 880.

Those circumstances are absent here. The government's evidence is not "buried under the rubble of war." *Hamdi*, 542 U.S. at 532. Nor does it implicate the "strategy or conduct of war." *Id.* at 535. Indeed, gathering evidence against a civilian suspect from domestic jailhouse informants is not "novel." Nor is it "novel" for a court to test the credibility and reliability of such evidence. What *is* "novel" is the government's effort to indefinitely imprison a civilian without bringing criminal charges against him or, for that matter, making any case at all before a judge. In these circumstances, the Federal Rules' general prohibition of

hearsay evidence should not be jettisoned or relaxed; it should be vigilantly applied.[9]

B. Mr. Hassoun has the right under the Fifth Amendment to confront and cross-examine his accusers.

Even if the Federal Rules of Evidence do not require that Mr. Hassoun be given the opportunity to confront and cross-examine his accusers, the Fifth Amendment does. The right to confront and cross-examine one's accusers is "a fundamental aspect of procedural due process," *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969), with "ancient roots," *Greene v. McElroy*, 360 U.S. 474, 496 (1959). The right applies in civil proceedings "where governmental action seriously injures an individual"; it is particularly "important" when the government's evidence "consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene*, 360 U.S. at 496; *see*

[9] To the extent that wartime enemy combatant cases have any bearing here, the Fourth Circuit's decision in *Al-Marri v. Pucciarrelli*, 534 F.3d 213 (4th Cir. 2008), *vacated and remanded sub nom.*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009), provides more relevant guidance. In his controlling opinion, Judge Traxler determined that, even in the case of wartime military detention, an individual seized in the United States remains "entitled to the normal due process protections available to all within this country, including an opportunity to confront and question the witnesses against him," unless "the government can demonstrate . . . that this is impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government." *Id.* at 273 (Traxler, J., concurring in the judgment).

also, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Cinapian v. Holder*, 567 F.3d 1067, 1073–75 (9th Cir. 2009) (right to cross-examine witnesses in deportation hearings based on principles of fundamental fairness); *Olabanji v. INS*, 973 F.2d 1232, 1234–35 (5th Cir. 1992) (same; collecting cases).[10]

The right to confront and cross-examine one's accusers is essential here, where Mr. Hassoun is facing prolonged and potentially lifetime detention. There can be no question that indefinite detention qualifies as a significant injury;[11] for the government to inflict such an injury based on testimonial evidence by

[10] Although it is not a criminal trial, this habeas corpus proceeding places front and center the "principal evil" against which the Sixth Amendment right of confrontation was meant to guard: the use of "*ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). The government's "evidence" consists of statements reportedly made by jailhouse informants—precisely the type of people "whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy." *Greene*, 360 U.S. at 496. The Founders viewed the right to confront and cross-examine such witnesses as a "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, one that is "'implicit in the concept of ordered liberty,'" *Pointer v. Texas*, 380 U.S. 400, 409 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). *See also Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("face-to-face confrontation between accused and accuser" central to fairness); *Greene*, 360 U.S. at 496 (right of confrontation has "ancient roots"); *In re Oliver*, 333 U.S. 257, 273 (1948) (right of confrontation is "basic in our system of jurisprudence").

[11] *Cf., e.g., Abdi v. Duke*, 280 F. Supp. 3d 373, 404 (W.D.N.Y. 2017) (holding prolonged immigration detention causes irreparable harm), *vacated in part sub nom. Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019).

anonymous persons not subject to cross-examination would be antithetical to the Due Process Clause and the reasons the Founders saw it as necessary in the first place. It would also be inconsistent with binding precedent: the Supreme Court has upheld schemes permitting potentially indefinite detention *only* when they are accompanied by robust adversarial proceedings that permit the accused to confront and cross-examine the witnesses against them. *See, e.g.*, ECF No. 14 at 30; *Addington*, 441 U.S. at 421 (individual facing indefinite civil commitment afforded right to confront witnesses); *Hendricks*, 521 U.S. at 353 (alleged extremely violent sexual predators facing indefinite detention afforded right to cross-examine witnesses).

In the criminal context, the right of confrontation and cross-examination is so fundamental that it is required even in pre-trial detention, where the length of detention is necessarily circumscribed, rather than open-ended. *See Salerno*, 481 U.S. at 742, 751. It would be perverse formalism to deny the same right to someone facing open-ended and possibly permanent detention merely because the detention is labeled "civil." Indeed, this Court has already recognized as much. In its analysis of 8 C.F.R. § 241.14(d), the Court pointed out that the absence of any right of cross-examination was one reason why the regulation created "serious constitutional doubts" and could not authorize indefinite detention under 8 U.S.C. § 1231(a)(6). *See* ECF No. 55 at 18–19. That analysis provides an important guide

to the constitutional question at issue here: what raises a serious constitutional issue under § 1231(a)(6) also raises a serious constitutional issue under § 1226a.

Cross-examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted). This Court simply cannot provide Mr. Hassoun a fundamentally fair hearing—let alone develop a full evidentiary record—unless Mr. Hassoun has an opportunity to confront and cross-examine his accusers.

III. The Evidentiary Hearing Should Be Held in the Federal Courthouse.

Mr. Hassoun respectfully submits that the Court should hold the hearing in the federal courthouse for the Western District of New York, either in Rochester or Buffalo. The government has proposed holding Mr. Hassoun's evidentiary hearing in the Batavia Immigration Court inside the Buffalo Federal Detention Facility where Mr. Hassoun is confined, but this jeopardizes his due process right to fair and open process. While the Batavia Immigration Court purports to be open to the public unless certain circumstances require closure, ICE—Mr. Hassoun's jailor—controls access to the court. *See* DOJ Fact Sheet: Observing Immigration Proceedings, *available at* https://www.justice.gov/eoir/observing-immigration-court-hearings ("EOIR does not control entry to the detention facilities in which immigration courts are located.").

As a practical matter, anyone wishing to access the immigration courtroom

at Batavia must traverse a gauntlet of ICE-controlled security measures unlike those at any federal courthouse. First, an individual must approach a gatehouse manned by ICE officers who must grant permission to drive onto the grounds of the detention facility. Then, once inside the detention facility, individuals must surrender an identification card to a detention officer and register as a visitor. Next, the detention officer must assign a visitor pass and allow the individual to proceed through security screening and into a common waiting room that adjoins both the courtroom and the prisoner visitation area. Notably, the facility's visitor registration log requires individuals to disclose not only their names and the purpose of their visit, but also their U.S. citizenship status. At every stage, access is controlled by ICE personnel or contractors. Of course, none of these measures are in place at federal courthouses, where anyone may freely enter off the street to attend court proceedings, without presenting identification, so long as they submit to security screening.[12]

Moreover, the agency can set "additional security restrictions" on entering the immigration court, including requiring "advance clearance to enter the facility." *See* DOJ Immigration Court Practice Manual 66 (2016), *available at* https://www.justice.gov/eoir/file/1205666/download. These restrictions could

[12] Counsel for Petitioner provide these facts based on their personal experience regularly visiting the detention facility. They would be happy to provide the Court with a supporting declaration if the Court wishes.

impede the public's access to the hearing, especially journalists'. In typical immigration cases, EOIR "strongly encourage[s]" the news media to notify the Office of Communications and Legislative Affairs and the Court Administrator before attending a hearing. *See id*. at 63.

Further, the government suggested at the most recent telephonic status conference that it may call live witnesses who are also confined at Batavia to testify in the evidentiary hearing (and, for the reasons explained above, Mr. Hassoun has the right to confront and cross-examine any such witnesses). This creates an atmosphere of coercion that could affect the witnesses' credibility. Immigration detainees whose immigration cases are controlled by ICE may naturally feel reluctant to testify against ICE's interests—and potentially clarify, contradict, or even recant allegations they previously made to ICE officials—when they are testifying in the very same ICE-controlled courtroom and detention facility where their immigration fate will be decided. Finally, to the extent the government has logistical concerns about transporting Mr. Hassoun to a federal courthouse, they are unwarranted. ICE has brought Mr. Hassoun from Batavia to a hospital for treatment several times without issue. Moreover, the government regularly transports individuals actually charged with crimes to court so that they can participate fully in proceedings where their liberty is at stake, as it did during Mr. Hassoun's own criminal trial.

CONCLUSION

For the reasons set forth above, Mr. Hassoun respectfully submits that: (1) the government bears the burden of proving that Mr. Hassoun is a threat to national security and must satisfy that burden by—at a minimum—clear and convincing evidence; (2) the Federal Rules of Evidence apply to this habeas proceeding and require that Mr. Hassoun be able to confront and cross-examine his accusers; (3) the Fifth Amendment independently gives Mr. Hassoun the right to confront and cross-examine his accusers; and (4) the evidentiary hearing should be held in the federal courthouse in the Western District of New York, whether in Rochester or Buffalo.

Respectfully submitted,

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