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 RESPONSE TO RESPONDENT'S BRIEF REGARDING THE PARAMETERS OF THE EVIDENTIARY HEARING

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INTRODUCTION

For nearly a year, the government has imprisoned Mr. Hassoun based on multiple hearsay statements and has denied him any meaningful opportunity to contest the allegations against him. Now, even after one of its two asserted bases for detention has been declared a legal nullity by this Court because of its myriad constitutional defects, the government persists in its attempts to evade judicial scrutiny of its evidence. The government instead asks this Court to treat this evidentiary hearing as if it were exercising collateral review of a prior judicial proceeding in which the petitioner had received due process or review of the battlefield capture of an enemy soldier by the military in wartime, rather than what it is—the executive detention of a civilian in the United States with virtually no prior process at all. This Court should reject the government's attempt to eviscerate the established safeguards that apply to indefinite civil detention and hamstring this Court's ability to effectuate the fundamental purpose of the writ of habeas corpus and the Due Process Clause: to prevent the executive from unjustly depriving individuals of their liberty.

As set forth below: the government bears the burden of proof and must sustain that burden by, at a minimum, clear and convincing evidence; the Federal Rules of Evidence apply to this habeas proceeding and preclude the government from relying on inadmissible hearsay; the government's assertion that Mr. Hassoun poses a national security risk is not entitled to deference; and the hearing should be held in the federal courthouse in either Rochester or Buffalo.[1]

[1] As Mr. Hassoun previously explained, he also has the right to confront and cross-examine any witnesses against him based on the requirements of due process.

ARGUMENT

I. The government bears the burden of proof.

The government offers three reasons why Petitioner bears the burden of proof. All are wrong.

First, the government argues that a habeas petitioner generally bears the burden of proof in demonstrating that his detention is unlawful. ECF No. 61 at 1–2. But a habeas petitioner would bear the burden only when he seeks *collateral* review of a prior determination based on an adversarial proceeding before a neutral decisonmaker, where the government's evidence was rigorously tested, as with petitions for post-conviction review. *See* 28 U.S.C. §§ 2254, 2255. A habeas petitioner does not bear the burden in a habeas case like this one, brought under 28 U.S.C. § 2241, to challenge executive detention *without any* prior judicial process, let alone any meaningful process. Executive detention without charge implicates the writ's "historical core," and "it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also, e.g.*, *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial." (footnote omitted)).

In *every instance* in which the government has sought to confine an individual in civil detention, the government has borne the burden of proof—because the Due Process Clause requires as much. *See* ECF No. 60 at 3–4 & n.1 (citing cases). It is true that most other civil commitment cases were heard by courts not through habeas but under statutes providing for meaningful adversarial testing and rigorous judicial scrutiny. But Congress has specified the federal habeas statute as a review mechanism here, *see* 8 U.S.C. § 1226a(b), and the absence of

any prior adversarial process only underscores that the government must bear the burden in this proceeding.[2]

None of the cases the government cites support its position on the allocation of burden. *See* ECF No. 61 at 1–2. For example, *Johnson v. Zerbst*, 304 U.S. 458 (1938), was a "collateral attack" on a criminal conviction, not a challenge to executive detention without trial. *Id.* at 468. For another, the portion of the opinion the government cites in *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968), involved the separate question of how an individual who had *already* been found ineligible for civil commitment could obtain release. *Id.* at 653. The government ignores the remainder of the opinion, where the court held that individuals found not guilty by reason of insanity must be given the same judicial hearing with substantially the same rigorous procedural safeguards as others facing civil commitment *before* they can be civilly committed. *Id.* at 651. And *Liuksila v. Turner*, 351 F. Supp. 3d 166 (D.D.C. 2018), involved the distinct context of extradition, where the question is not whether the United States can imprison a person for its own purposes but rather whether it can transfer him for criminal trial by another sovereign pursuant to international agreements. *Id.* at 173. As such, extradition review is limited by statute, *see* 18 U.S.C. § 3184, and examines whether there is sufficient basis to transfer under the

[2] Petitioner has argued that the absence of any neutral decisionmaker or meaningful adversary process prior to the Secretary's decision to detain a person indefinitely renders the statute unconstitutional, in violation of the Due Process Clause. *See* ECF No. 60 at 8 n.4; ECF No. 32 at 14; ECF No. 28 at 14–15, 17–18. Petitioner is not aware of any other form of civil commitment in which the executive branch can make a unilateral decision to confine a person indefinitely and the sole opportunity for a fair, impartial hearing is if the detainee files a habeas petition after the fact. *Cf. Hassoun v. Searls*, No. 19 Civ. 370, 2019 WL 6798903, at *9 & n.8 (Dec. 13, 2019) ("[E]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." (quoting *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617–18 (1993))). But even assuming that a scheme that provides only a *post hoc* judicial hearing in an action brought by a detainee can pass constitutional muster, that scheme must, at a minimum, allocate the burden of proof to the government at that hearing. *See* 8 U.S.C. § 1226a(b).

relevant treaty, not whether there is a factual basis for continued detention. *See, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 292–95 (1933); *see also Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

Not only does the government's position lack support, but if accepted, it could be used to justify unprecedented domestic lock-up power. Under the government's view, Congress could authorize a federal official to grab any person—or at least any non-citizen[3]—off the streets of the United States and imprison them based solely on executive say-so, and when that person filed a habeas petition they would bear the burden of proving that their detention was unlawful. The government's purported "rule" on burdens in habeas cases is a gross distortion of precedent and has no application to a case challenging executive detention without any meaningful process.

Second, the government attempts to distinguish this Court's ruling invalidating 8 C.F.R. § 241.14(d) due to the "serious questions regarding the constitutional adequacy of its procedures," *Hassoun*, 2019 WL 6798903, at *10, arguing that the procedures under § 1226a are more "robust." ECF No. 61 at 2. But unlike the regulation, § 1226a provides no procedural safeguards at the agency level at all. It is preposterous for the government to suggest that this review should be limited where it is the *only* opportunity for Petitioner to challenge his indefinite detention, even before the agency itself or a non-Article III neutral decisionmaker. As a result, this Court's habeas review is not "a countervailing due process consideration," ECF No. 61 at 2, but rather the sole means of enforcing the requirements of due process. And for the reasons explained previously, the Due Process Clause mandates that the government bear the burden of proof. *See* ECF No. 60 at 3–14.

[3] The government does not offer any reason why its argument regarding the allocation of the burden would not apply equally to a congressional statute authorizing § 1226a-style indefinite detention based on dangerousness that encompassed citizens. Indeed, many of the cases the government cites to support its position on burden involve citizens.

The government cites *Boumediene v. Bush*, 553 U.S. 723 (2008), *see* ECF No. 61 at 3, but *Boumediene* directly undermines its argument. As the Supreme Court explained, "the necessary scope of habeas review in part depends upon the rigor of earlier proceedings." *Boumediene*, 553 U.S. at 781. Here, where there have been no prior proceedings, let alone rigorous proceedings, *and* where habeas serves as the sole means of enforcing the Due Process Clause, the review must be robust and the government must bear the burden of proof.[4]

Third, the government argues that if the Court disagrees that the burden of proof lies with Petitioner, it should apply the "*Hamdi* burden-shifting framework." ECF No. 61 at 4. This Court should reject this radical—and dangerous—invitation to extend procedures designed specifically for the overseas battlefield capture of alleged enemy soldiers to the domestic detention of civilians inside the United States. The Supreme Court expressly "tailored" those unique habeas procedures to the "exigencies of the circumstances . . . to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). In the exceptional circumstance of an overseas battlefield capture by the military, the Court deemed a burden-shifting scheme appropriate to "ensur[e] that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error" without unduly impeding on the military's ability to wage war. *Id.* at 534. But it is a gross misreading of *Hamdi* to suggest that it in any way supports applying this unique burden-shifting framework for battlefield captures by the military to civil detentions by law enforcement authorities in the

[4] The government also cites *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008). *See* ECF No. 61 at 3. While the Tenth Circuit alluded to the availability of habeas review, it did not prescribe the scope. *See Hernandez-Carrera*, 547 F.3d at 1255. More importantly, this Court expressly noted that the regulation at issue in *Hernandez-Carrera* provided "robust procedural protections," *Hassoun*, 2019 WL 6798903, at *8, none of which was afforded to Mr. Hassoun here.

United States.[5] To do so, moreover, would eviscerate the presumption of innocence that has governed within this country since its founding, requiring that the government bear a heavy burden before stripping a person of his liberty, including someone, like Mr. Hassoun, who has served a criminal sentence.

In sum, the burden should remain on the government to justify Mr. Hassoun's detention, as it remains on the government in every other civil detention case, including cases of individuals whom the government regards—rightly or wrongly—as particularly dangerous.

II. The government must justify Mr. Hassoun's detention by—at a minimum—clear and convincing evidence.

In arguing for a mere preponderance-of-the-evidence standard, the government relies on *Hamdi* and a Guantánamo detainee case, *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010). *See* ECF No. 61 at 4–5. The government concedes that these decisions do not control here, but asks the court to "extend" the "*Hamdi* line of cases" to the context of domestic civil detention based on dangerousness. ECF No. 61 at 5. The government's reasons for doing so are wrong.

First, *Hamdi* did not cast the slightest doubt upon, let alone overrule, the unbroken line of precedent applying, at minimum, a clear-and-convincing standard of evidence in civil commitment cases. *See supra* at 4 (discussing *Hamdi*); ECF No. 60 at 5–8 (discussing standard

[5] Remarkably, the government cites Justice Scalia's dissent in *Hamdi*. ECF No. 61 at 3. Justice Scalia's opinion directly supports Petitioner's contention that § 1226a violates Substantive Due Process on its face, since no procedures, short of a criminal trial, would justify his detention. ECF No. 28 at 11. As Justice Scalia explained, civil detention is a narrowly limited exception to the constitutional requirement that individuals be charged with a crime if they are to be imprisoned, and that exception does not include detention based solely on alleged future dangerousness. *See Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting) ("It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting it was incapacitating dangerous offenders rather than punishing wrongdoing.").

in civil commitment cases).[6] The government's sole argument is that the *Hamdi* line of cases "involves similarly special threats: national security risks." ECF No. 61 at 5. But as *Hamdi* makes clear, the justification for the wartime detention of enemy combatants is not premised on whether a particular individual poses some special security risk; rather, it is premised on the legal principle that all combatants are detainable by virtue of their *status* as members of an opposing armed force, and, as such, may be held for the duration of the war. *See* 542 U.S. at 518 ("The purpose of [enemy combatant] detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." (citation omitted)); *id.* ("Captivity [of enemy combatants] is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character. . . . A prisoner of war is no convict; his imprisonment is a simple war measure." (citation and quotation marks omitted)). *Hamdi* further explained that overseas battlefield captures also warrant a lower standard of review because they involve unique "practical difficulties" and "burdens," *id.* at 531–32, and because the government determination in those cases is narrow and straightforward: "proof of enemy-combatant status," *id.* at 523.

Mr. Hassoun was not an enemy combatant captured by the military on an overseas battlefield. His civil detention by law enforcement authorities presents not even a shadow of the kinds of obstacles or exigencies relevant to the Supreme Court's discussion of these matters in *Hamdi*. Nor does it involve a mere status determination, but a substantive judgment about his alleged dangerousness, a vague and broad standard that multiplies the risk of error and demands a higher standard of proof to reduce it. *See Hassoun*, 2019 WL 6798903, at *10.

[6] As previously explained, the nature of Petitioner's detention warrants the highest standard of evidence, proof beyond a reasonable doubt. *See* ECF No. 60 at 8–11.

Second, contrary to the government's suggestion that this case involves "special threats," ECF No. 61 at 5, the civil commitment cases, too, require judgments about whether people present grave threats to society—and the Supreme Court has repeatedly required that the government justify such people's confinement by a clear and convincing standard of evidence, at a minimum. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 351 (1997) (civil commitment of a "small but extremely dangerous group of sexually violent predators" (citation omitted)). Thus, a baseline clear-and-convincing standard of proof has been mandated with serious dangers in mind, and reflects the bedrock rule that if the government seeks to deprive a person of liberty in this country without a criminal trial, it can do so only under a rigorous standard of proof. This Court should reject the government's unprecedented effort to replace the well-established standards for domestic civil detention with a standard tailored to the *sui generis* context of enemy soldiers captured on a foreign battlefield.[7]

Third, the government seeks to cast doubt on the relevance of *Addington v. Texas*, 441 U.S. 418 (1979)—which applied a clear-and-convincing standard of evidence to civil commitment *and* whose reasoning the Court has already found "persuasive in this context," *Hassoun*, 2019 WL6798903, at *10—by suggesting that its holding would have changed post-*Hamdi*, and pointing out that it was a "non-habeas" case, ECF No. 61 at 5. As explained above, *Hamdi* is an entirely different case than the set of civil commitment cases of which *Addington* is a part. And as also explained above, the Supreme Court's holding that the minimum burden of proof in the context of civil commitment is "clear and convincing evidence" had little to do with whether it came in a habeas case or not. *Addington*, 441 U.S. at 433. Indeed, it would be perverse

[7] Indeed, even if the Court rejects (or finds it unnecessary to rule on) Mr. Hassoun's facial challenge to § 1226a under Substantive Due Process, the absence of a "plus" factor in the statute's "dangerousness" standard strongly suggests that the government's burden in this case should be higher than other civil commitment cases that required a "plus" showing.

if, as the government insists, a person's due process right to be free of unlawful executive detention could be weakened because of the availability of habeas corpus, the core purpose of which is to prevent against unlawful executive detention. *See Fay v. Noia*, 372 U.S. 391, 402 (1963) ("Vindication of due process is precisely [habeas'] historical office.").

III. The Court should conduct the evidentiary hearing under the Federal Rules of Evidence and exclude inadmissible hearsay as governed by those rules.

The government asks the Court to "reject" a "categorical[] bar" on the introduction of hearsay and instead consider hearsay on a "case-by-case basis." ECF No. 61 at 7–8. But Mr. Hassoun does not seek a categorical bar on hearsay; he simply asks the Court to apply the Federal Rules of Evidence ("Federal Rules") when considering the admissibility of whatever evidence the government chooses to introduce. Indeed, it is the *government* that seeks two categorical orders from this Court—orders that would immediately admit every piece of evidence the government wishes to admit, before any individualized assessment of credibility or reliability, whether it is hearsay under the Federal Rules or not. *See* ECF No. 61 at 10 ("Therefore, the Court should issue two orders."). This is legally unjustified and wildly improper.

A. The Federal Rules of Evidence, including the prohibition on hearsay, apply to the evidentiary hearing.

The government concedes that the Federal Rules generally apply to habeas proceedings, yet urges the Court to adopt an *ad hoc* approach to hearsay during the evidentiary hearing in this particular habeas case. *See* ECF No. 61 at 8. That the government seeks to avoid a "categorical[]" bar on hearsay comes as little surprise, since the government's entire case appears to rest on hearsay. *See* ECF No. 61 at 10 ("[T]he government has produced to Petitioner the full factual basis for his detention[.]"). Mr. Hassoun has explained why the Federal Rules of Evidence should apply here, *see* ECF No. 60 at 15–18, and the government fails to persuade that,

in *this* context, an *ad hoc* approach to the introduction of hearsay is either permitted or appropriate.[8]

To justify its argument that the Court should depart from the Federal Rules, the government contends that in two "other contexts," ECF No. 61 at 9, the Supreme Court has permitted the relaxation of certain evidentiary constraints during habeas proceedings: (1) habeas proceedings initiated by enemy combatants subject to military detention during wartime; and (2) collateral proceedings in which a person convicted of a crime under state law seeks to obtain habeas review of otherwise-forfeited claims of constitutional error in his criminal proceedings on the basis of a gateway claim of actual innocence, *id*. Neither of these contexts is remotely applicable here.

First, Mr. Hassoun addressed the inapplicability of enemy-combatant case law in his previous filing, *see* ECF No. 60 at 16–18, and again above. In short, to the extent that enemy-combatant cases permit reliance on hearsay that would be inadmissible under the Federal Rules, they do so based on legal and practical considerations unique to the context of wartime military detention. *See, e.g.*, *Hamdi*, 542 U.S. at 533 ("some of the 'additional or substitute procedural safeguards' suggested by the District Court are unwarranted in light of their limited 'probable value' *and the burdens they may impose on the military in such cases*" (emphasis added));[9] *see*

[8] Regardless, the Federal Rules of Evidence do not "categorically" bar hearsay. Instead, the Federal Rules require that the government satisfy an exception to the rule against hearsay.

[9] *Hamdi*, in fact, does not explicitly reject the Federal Rules' prohibition of hearsay in habeas proceedings involving enemy combatants. *Hamdi* merely states that hearsay "*may* need to be accepted as the most reliable available evidence from the Government in such a proceeding." 542 U.S. at 533–34 (emphasis added). *Hamdi* merely suggests that in some circumstances, evidence from the battlefield could satisfy one of the Rules' hearsay exceptions. *See* Fed. R. Evid. 803(6) (record "kept in the course of a regularly conducted activity"); Fed. R. Evid. 807 (statement that is "supported by sufficient guarantees of trustworthiness" and that is "more probative on the point for which it is offered than other evidence that the proponent can obtain through reasonable efforts"). As the government noted in *Hamdi*, "documentation regarding

also ECF No. 61 at 8 (stating in parenthetical that *Boumediene* concerns "the unique circumstances of the proceedings for military detainees").[10]

Second, the government's reliance on cases involving collateral claims of actual innocence—namely, *House v. Bell*, 547 U.S. 518 (2006), and *Schlup v. Delo*, 513 U.S. 298 (1995)—is similarly misplaced. Both *House* and *Schlup* involved a narrow issue: whether, to avoid a "miscarriage of justice," state prisoners who produced new evidence of actual innocence could obtain federal habeas review of constitutional claims that they failed to raise during their state criminal proceedings. *House*, 547 U.S. at 536 (punctuation omitted); *see also Schlup*, 513 U.S at 314–16. In such cases, unlike here, the court's role is not to test the government's evidence and *grant* habeas relief based on the illegality of the petitioner's imprisonment. *Schlup*, 513 U.S. at 315 (petitioner's claim of innocence "does not by itself provide a basis for relief"). Rather, the court's role is to decide whether the petitioner may pass through a narrow procedural gateway and *seek* habeas relief based on otherwise defaulted claims of constitutional error. *Id.* at 316 (the question is whether the petitioner's "evidence of innocence [is] so strong that [the] court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error"). When considering procedural-gateway claims, the court "is not bound by the rules of admissibility that would govern at trial," *id.* at 327, because the question before the court is not whether petitioners are entitled to habeas relief, but whether

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battlefield detainees is already kept in the ordinary course of military affairs." 542 U.S. at 534.

[10] Notably, even if *Boumediene* were not limited to the habeas rights of enemy combatants, its legal relevance would be questionable, because it involves the requisite scope of habeas proceedings under the Suspension Clause—*not* the requisite scope of habeas proceedings under § 2241, anchored by the Due Process Clause. *See* ECF No. 60 at 12. Indeed, it remains to this day an open question whether military detainees at Guantánamo Bay even have rights under the Due Process Clause, *see Qassim v. Trump*, 927 F.3d 522, 524 (D.C. Cir. 2019), whereas the Supreme Court has squarely held that civil detainees in Mr. Hassoun's position are fully protected, *see Zadvydas v. Davis*, 533 U.S. 678, 690–96 (2001).

petitioners may proceed with their habeas claims despite a formal procedural bar.

By contrast, the evidentiary hearing on Mr. Hassoun's detention presents a fundamentally different question: whether the government may, on the strength of its evidence, legally subject Mr. Hassoun to indefinite civil detention. Because the question is fundamentally different, the nature of the Court's inquiry here is unlike the nature of the inquiry in procedural-gateway cases.

B. The core allegations in the administrative record are not admissible under Federal Rule of Evidence 803(8), the public records exception to the hearsay rule.

The Court should exclude from evidence every portion of the administrative record that is inadmissible under the Federal Rules.[11] The government asks the Court to admit the entire administrative record into evidence now because, according to the government, the administrative record "has indicia of reliability analogous to those recognized" in Federal Rule 803(8), the public records exception. ECF No. 61 at 10. The government does not substantively elaborate on its assertion, but there are at least five reasons why the administrative record does not satisfy Rule 803(8).

First, the public records exception in Rule 803(8) was never intended to allow the government to introduce hotly contested testimonial hearsay at the core of the government's case against a person by inserting it into an "administrative record" and thereby lending it the imprimatur of public office. On the contrary, "Rule 803(8) grew out of the common-law public records exception to hearsay, which developed to admit the sundry sorts of public documents for which no serious controversy ordinarily arises about their truth." *United States v. Fryberg*, 854 F.3d 1126, 1132 (9th Cir. 2017) (quotation marks omitted). The administrative record in this case simply does not fit that description.

[11] *See, e.g.*, ECF No. 17-2 at 9–13; 123–28.

Second, the administrative record as a whole lacks Rule 803(8)'s bedrock indicator of reliability: it was not prepared for the purpose of objective fact finding and evaluation. Indeed, the administrative record was created specifically for the purpose of making a recommendation to the Secretary and justifying his ultimate decision to detain Mr. Hassoun under 8 C.F.R. § 241.14(d). This presents the type of "motivation problem[ ]" that undermines the reliability of a purported public record. Fed. R. Evid. 803(8), Advisory Committee Note to Paragraph 8. Far from the kind of the public record that "record[s] routine, objective observations, made as part of the everyday function of the preparing official or agency," the preparation of the administrative record plainly involved "factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime . . . ." *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985); *see Gilmore v. Palestinian Interim Self-Gov't Auth.*, 53 F. Supp. 3d 191, 204 (D.D.C. 2014) ("Rule 803(8) is based on the notion that public records are reliable because there is a lack of . . . motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter." (quotation marks omitted)), *aff'd*, 843 F.3d 958 (D.C. Cir. 2016). Here, the regulation under which the administrative record was made specifically contemplates that the government is to compile a record for the purpose of "making a recommendation to the [Secretary] that an alien should not be released from custody." 8 C.F.R. § 241.14(d)(4)–(5). Its compilation was anything but mechanical or unmotivated. *Compare Hassoun v. Sessions*, No. 18 Civ. 586, 2019 WL 78984 (Jan. 2, 2019) (ordering Mr. Hassoun's release by March 1, 2019), *with* ECF No. 13-4 (May 14, 2019) (notice of intent to continue Mr. Hassoun's detention under 8 C.F.R. § 241.14(d) dated February 22, 2019).

Third, both the "source of information" in the administrative record and the "other

circumstances" surrounding the record's creation "indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(B). For similar reasons, it has long been the case that business records "based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto" are not admissible evidence. *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930) (excluding memorandum "made from hearsay statements of third persons" when "[t]he policeman who made it was not present at the time of the accident"). Here, the information contained in the FBI Letter is manifestly untrustworthy, as it is conveyed via an unsworn document relaying the third-hand statements of anonymous jailhouse informants. It was not only acquired for the purposes of justifying an executive-branch decision to continue detaining Mr. Hassoun, but also under the authority of 8 C.F.R. § 241.14(d), a regulation with so few procedural safeguards—and posing such a grave risk of an erroneous outcome, *Hassoun*, No. 19 Civ. 370, 2019 WL 6798903, at *8–*9—that this Court deemed it a "legal nullity," *id.* at *10.

Fourth, with respect to the core of the administrative record—*i.e.*, the allegations contained in the FBI Letter—it would violate Mr. Hassoun's constitutional right to confront and cross-examine his accusers if the government were allowed to launder hearsay through the public records exception. *See* ECF No. 60 at 18–21. For this very reason, the public records exception itself does not permit the admission of investigative findings against the accused in a criminal case. *See* Fed. R. Evid. 803, Advisory Committee Note to Paragraph 8; *see also United States v. Smith*, 521 F.2d 957, 965 (D.C. Cir. 1975) (citing *Lutz* as the "leading case" on the admission of hearsay statements found in business records, and explaining that "police record[s]" are not "admissible in a criminal proceeding . . . as substantive evidence" for "the prosecution," in part based on "confrontation clause values"). Even if Mr. Hassoun's case is not formally criminal, it is not, contrary to the government's implication, "ordinary civil litigation," ECF No. 61 at 10.

See, e.g., *Santana v. United States*, 98 F.3d 752, 754 (3d Cir. 1996) ("[H]abeas proceedings are often determined to be outside the reach of the phrase 'civil action.'"). To the contrary, it is functionally as close to a criminal proceeding as possible, given the nature of the accusations leveled against Mr. Hassoun, the gravity of the liberty interest at stake, and the absence of any underlying adversarial proceedings (as opposed to in run-of-the-mill collateral habeas review cases). And the constitutional problems with the admission of hearsay are thus just as acute as in a criminal prosecution.

Finally, even when a public record constituting hearsay is admissible under 803(8), "instances of double or even triple hearsay" within the admitted record must be excluded unless "'each part of the combined statements conforms with an exception to the hearsay rule provided in' the Federal Rules . . . ." *Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers*, 467 F. Supp. 2d 91, 94 (D.D.C. 2006) (quoting Fed. R. Evid. 805). This, again, applies to the FBI Letter.

C. The confidential-informant privilege is irrelevant to the admissibility of the government's evidence.

The government references the confidential-informant privilege in its discussion of hearsay, ECF No. 61 at 8, but that privilege is not an exception to the rule against hearsay and does not permit the government to introduce a confidential informant's out-of-court statements into evidence. *See, e.g.*, *Moore v. United States*, 429 U.S. 20, 22 (1976) (confidential informant's out-of-court declaration was inadmissible hearsay which "deprived [defendant] of the chance to show that the witness' recollection was erroneous or that he was not credible"); *United States v. Check*, 582 F.2d 668, 678 (2d Cir. 1978) (law enforcement officer's testimony as to out-of-court statements of confidential informant was inadmissible hearsay). Simply put, the government may not deploy untestable hearsay allegations simply because it prefers not to allow its key witnesses

to testify and be cross-examined.

Even if the Federal Rules of Evidence did not control, and the Court were willing to permit the introduction of some otherwise-inadmissible hearsay, it would be unjust—and clearly a violation of Mr. Hassoun's constitutional rights—for the Court to permit the government to rely on double- and triple-hearsay statements originating with confidential informants. *See* ECF No. 60 at 18–20. Such statements are virtually impossible to test for accuracy or credibility. Unsurprisingly, Mr. Hassoun is not aware of—and the government does not cite—a single judicial opinion permitting the government to (1) predicate its case on an informant's personal knowledge of alleged wrongdoing, (2) introduce the informant's hearsay statements into evidence, and (3) refuse to reveal the informant's identity or make the informant available for cross-examination.[12]

IV. The Court owes no deference to the Acting Secretary's conclusions.

The government sweepingly argues that the Acting Secretary's conclusion that "Petitioner's release will threaten the national security of the United States" is entitled to "broad deference." ECF No. 61 at 5. It does so by asserting that this conclusion is "factual," and by

[12] The confidential-informant privilege is not an evidentiary privilege but a discovery one. But even in the discovery context, it is limited by the "fundamental requirements of fairness." *Roviaro v. United States*, 353 U.S. 53, 60 (1957). It is well-established that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 61. Indeed, even where *state* rules of evidence *do* provide for a confidential-informant privilege, that privilege must give way "if the informant's testimony is necessary to fairly determine the accused's guilt or innocence." *Padilla v. State*, No. 08-07-53-CR, 2010 WL 337673, at *8 (Tex. Ct. App. Jan. 29, 2010) (discussing Tex. R. Evid. 508); *see also, e.g.*, *Moore v. State*, 370 S.E.2d 511, 514–15 (Ga. Ct. App. 1988) (similar, and citing *Roviaro*).

In any event, whether the government objects to any of Mr. Hassoun's discovery demands on the basis of the confidential-informant privilege (or even prevails in doing so) is irrelevant to whether it may introduce hearsay evidence based on out-of-court hearsay statements by confidential informants, whether through the administrative record or otherwise.

"[c]ombining" the supposed "limited review in habeas cases" (specifically, "immigration" cases) and the supposed "limited review in matters of national security" generally. *Id.*[13] These arguments are entirely off base.

The government's bid for deference based on supposed analogies to other forms of immigration habeas fails. First, because Mr. Hassoun's detention is not reasonably foreseeable and his detention serves no immigration-related purpose, this is not an "immigration case" at all, but rather a civil indefinite detention case that happens to involve a non-citizen. *See Zadvydas*, 533 U.S. at 690 (holding that once an individual's removal is no longer reasonably foreseeable, their detention ceases to bear a "reasonable relation" to its purported immigration purpose (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972))). It is, instead, as pure an executive detention habeas case as there could be, involving a unilateral executive decision to detain an individual—a decision that implicates the "core" of habeas review and is not entitled to any deference at all. *St. Cyr*, 533 U.S. at 301; *see* 28 U.S.C. § 2243; 8 U.S.C. § 1226a(b)(2) (citing provisions of 28 U.S.C. § 2241). Label aside, the significance of the distinction is made even clearer upon examination of the "immigration habeas cases" the government relies upon to argue that the Court should apply a "standard of review" that is "generally more limited than on direct review." ECF No. 61 at 6 (citing *Heikkila v. Barber*, 345 U.S. 229, 235–36 (1953)); *St. Cyr*, 533 U.S. at 311–13). Those cases involved habeas review of administrative determinations regarding removal proceedings, where the government's powers are arguably at their most plenary, not decisions regarding detention (let alone detention, like Mr. Hassoun's, that served no immigration purpose).

[13] The government has explicitly waived any reliance on *Chevron* deference in this case. *See* Tr. of Hearing (Nov. 22, 2019) (not yet available); *see also Hassoun*, 2019 WL 6798903, at *7.

Second, while the government correctly asserts that "immigration habeas review is narrower than judicial review" and that they "are historically distinct" concepts, ECF No. 61 at 6, Congress expressly chose the latter (more robust) type of review in § 1226a when it specifically required "[*j*]*udicial review* of any action or decision relating to this section (including *judicial review of the merits* of a determination made under subsection (a)(3) or (a)(6))." 8 U.S.C. § 1226a(b)(1) (emphasis added). That review includes all of the tools of the statutory habeas court, including the power to "hear and determine the facts," 28 U.S.C. § 2243, and take evidence, *id.* § 2246. By contrast, the type of habeas review discussed in *Heikkila* (and similar immigration cases)—the kind limited to only that "judicial intervention . . . required by the Constitution," 345 U.S. at 235; *St. Cyr*, 533 U.S. at 311–12—has no application to this case.[14]

Third, the "narrower" type of habeas review (as opposed to "judicial review") discussed in *Heikkila* and *St. Cyr* involves review of the results of full and fair administrative proceedings that comport with due process, including through hearings before Article I judges. *See, e.g.*, *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (requiring "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true" in Article I deportation cases); *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); *see also, e.g.*, *Hassoun*, 2019 WL 6798903, at *9 & n.8 (rejecting the government's argument that an "agency's bottom-line factual conclusion" could be "untouchable" on habeas review). But the agency determination of dangerousness under subsection (a)(6) at issue here—which, as mentioned above, was arrived at using procedures this Court deemed so procedurally deficient that it rendered the regulation

[14] Moreover, the more limited version of habeas review adopted in *St. Cyr* and *Heikkila* relied on the baseline habeas guarantee found in the Constitution's Suspension Clause, not the full panoply of procedures enshrined in the federal habeas statute, *see* 28 U.S.C. § 2241 *et seq.*; *St. Cyr*, 533 U.S. at 300 (citing *Heikkila*, 345 U.S. at 235).

under which the determination was made "a legal nullity," *Hassoun*, 2019 WL 6798903, at *10—looks nothing like those cases, because this Court's review is not a review of a completed fair process, it *is* the fair process.

Likewise, the government's bid for deference based on the executive's "national security" responsibilities is exceedingly weak. As the Supreme Court has repeatedly made clear, the executive's mere invocation of "national security" is not a "talisman" it may "use[] to ward off inconvenient claims" or a "label" it may summon to "cover a multitude of sins." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). Indeed, "[t]his 'danger of abuse' is even more heightened given 'the difficulty of defining' the 'security interest' in domestic cases." *Id.* (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972)).

The government's discussion of the national-security deference it believes its (a)(6) determination is due constitutes precisely this kind of dangerous hand-waving, *see* ECF No. 61 at 6–7, and its support does not hold up. The government cites *Department of Navy v. Egan*, 484 U.S. 518 (1988), but that case involved deference to the executive branch's determination about a security clearance—not the validity of the indefinite, potentially lifelong detention of a human being. *See id.* at 528 ("It should be obvious that no one has a 'right' to a security clearance."). It cites *Hamdi* to suggest that national-security judgment is what "*may*" allow for a presumption in favor of the government's evidence, ECF No. 61 at 7, but that suggestion was not based on a notion of deference to the executive; it was based on "the exigencies of the circumstances" surrounding battlefield captures of alleged enemy combatants and their "uncommon potential to burden the Executive at a time of ongoing military conflict," *Hamdi*, 542 U.S. at 533. It cites a snippet from *Boumediene* to suggest that habeas review should be limited here, *see* ECF No. 61

at 6, but omits that the quoted statement was a caveat, not a command, and is preceded by the admonishment that "[w]here 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" and "the need for habeas corpus is more urgent." 553 U.S. at 783. It dips into *Boumediene* again to suggest that it is owed deference in determining who to detain on national-security grounds, *see* ECF No. 61 at 7, but ignores the text that follows its selective quotation:

> Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

553 U.S. at 797. In short, the government's hodgepodge of support for deference to its "dangerousness" determination is incomplete, misleading, and deeply wrong.[15]

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[15] While the Supreme Court in *Zadvydas* suggested in *dicta* that "'terrorism or other special circumstances' might warrant 'heightened deference to the judgments of the political branches with respect to matters of national security,'" ECF No. 61 at 6 (quoting 533 U.S. at 696), Mr. Hassoun has provided a bevy of reasons—based in the Constitution, the nature of the detention standard under (a)(6), the reliability of the government's evidence, as well as his own personal history, the nature of his past criminal conviction, and the determinations of the trial judge at sentencing—why such deference to the government's ultimate judgment as to Mr. Hassoun's supposed dangerousness would not be appropriate in this particular case. Importantly, while the *Zadvydas* dicta might arguably suggest some measure of deference as to the collective importance or weight of particular facts in connection with the application of a specific national-security-related judgment, it does not at all suggest deference to executive *fact-finding* in the first instance.

Relatedly, the government has not indicated that any of the evidence upon which its (a)(6) determination relies is classified. Even if the government does eventually seek to introduce such evidence, federal courts routinely employ tools to deal with these matters to address any security concerns without undermining the constitutional requirements of fairness and due process. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 604 (1988) (noting district courts' "latitude to control any discovery process" so as to protect sensitive intelligence information); *Keith*, 407 U.S. at 320–21 (judicial review does not "fracture the secrecy essential to official intelligence gathering"; "investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved"); *see also, e.g.*, *Qassim v. Trump*, 927 F.3d at 531–32 (leaving open issues of how due process affects required disclosures of classified evidence in Guantánamo cases); Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–

Finally, it is worth clarifying that the conclusion required by the statute regarding dangerousness is plainly not a "factual determination[]," ECF No. 61 at 7. At most, it requires the application of facts—the most relevant of which, under (a)(6), are inadmissible hearsay, *see supra* at 8–15—to a legal standard. In any event, courts regularly treat conclusions of "dangerousness" in civil commitment cases as legal conclusions (or at least mixed questions), not "facts." *See, e.g.*, *State v. Humphrey*, No. 97-3498-CR, 1999 WL 42035, at *1, *4 (Wis. Ct. App. Feb. 2, 1999); *In re Commitment of Giishig*, No. A07-0616, 2007 WL 2601423, at *9 (Minn. Ct. App. Sep. 11, 2007). The notion that the Court owes deference to the "determinations" made by the Acting Secretary after a standardless, executive-only process that was based on an unsworn document recounting double- and triple-hearsay is, quite simply, preposterous.

V. The Court should hold the evidentiary hearing in a federal courtroom.

The government's only argument for holding the hearing at Batavia is its practical interest in not having to transfer Mr. Hassoun or other potential witnesses beyond the walls in which they are presently (or were formerly) confined. *See* ECF No. 61 at 11. Mr. Hassoun maintains that this location raises constitutional problems because it is not as accessible to the public as a federal courthouse and it creates an atmosphere of coercion that could affect the reliability of witness testimony. *See* ECF No. 60 at 21–23. Even if the government's transfer concerns were warranted (which they are not), on balance, Mr. Hassoun's constitutional right to fair and open process counsels toward holding the hearing in Rochester or Buffalo.

CONCLUSION

For the reasons set forth above and in his previous filing, Mr. Hassoun respectfully

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16 (providing detailed procedures governing disclosure and introduction of classified evidence in criminal proceedings).

submits that (1) the government bears the burden of proving that Mr. Hassoun is a threat to national security; (2) the government must satisfy its burden by—at a minimum—clear and convincing evidence; (3) the Federal Rules of Evidence govern this habeas proceeding; (4) the Fifth Amendment gives Mr. Hassoun the right to confront and cross-examine his accusers; (5) the Court owes no deference to the Acting Secretary's conclusions; and (6) the evidentiary hearing should be held in the federal courthouse in the Western District of New York, whether in Rochester or Buffalo.

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