No. 20-2056

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Adham Amin Hassoun,
Appellee-Petitioner,

v.

Jeffrey Searls, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Facility,
Appellant-Respondent.

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

APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL ACTION REQUESTED BY 12:00 PM JULY 2, 2020

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should stay pending appeal the district court's final judgment ordering the Department of Homeland Security (DHS) to release from custody, by noon on July 2, 2020, Appellee-Petitioner Adham Amin Hassoun, a three-time convicted terrorist who has been ordered removed from the United States, who indisputably has no right to remain in this country, who the Director of the Federal Bureau of Investigation (FBI) has determined is a national-security threat, and whose continued detention has been certified, in accordance with federal law authorizing preventive detention for profoundly dangerous aliens, by the Acting Secretary of Homeland Security as necessary for national security. The Court should also expedite this appeal and enter an administrative stay of the district court's judgment while the Court considers this stay request. As discussed below, Hassoun has agreed to an administrative stay until close of business on July 15, to allow briefing on this stay request.

An important—but rarely and carefully invoked—federal regulation, 8 C.F.R. § 241.14(d), permits U.S. Immigration and Customs Enforcement (ICE) to detain an alien who poses a significant threat to national security or significant risk of terrorism if released. Despite the importance of that

regulation and the Executive Branch's broad authority to detain dangerous removable aliens, the district court struck down the regulation as ultra vires. That ruling enabled the district court to order the imminent release of a removable alien who poses a significant threat to national security and a significant risk of terrorism.

This Court should stay the district court's judgment pending resolution of the government's appeal. The district court's judgment rests on profound errors of law and risks serious harm to the United States and the public.

On the merits, the district court erred in invalidating Hassoun's detention under the regulation by ruling that the regulation is ultra vires and unconstitutionally fails to afford due process. The regulation's requirements for continued detention are satisfied here—and the district court did not conclude otherwise. The regulation provides for the detention of an alien who has been convicted of a terrorism offense, whose "release presents a significant threat to the national security or a significant risk of terrorism," and for whom "no conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be." 8 C.F.R. § 241.14(d)(1)(i)-(iii).

The district court agreed that Hassoun was convicted of a terrorist act, Jan. 24, 2020 Order at 4-5 (Dkt. No. 75), and the FBI concluded that Hassoun "would pose a significant threat to the national security and a significant risk of terrorism upon release and that no conditions of release can reasonably be expected to avoid the threat to national security or the risk of terrorism." Feb. 21, 2019 FBI Memo. 4 (Dkt. 261-1); *see also* Aug. 9, 2019 DHS Notice (Dkt. 30-1) (Secretary's certification of Hassoun's detention under 8 C.F.R. § 241.14(d)). The district court rejected reliance on the regulation on the view that the statute under which the regulation is issued, 8 U.S.C. § 1231(a)(6), does not authorize the regulation. But § 1231(a)(6) gives the Executive Branch discretionary authority to detain aliens beyond the default 90-day period, and the regulation authorizes such detention for particularly dangerous aliens.

The district court also faulted the regulation for not affording the alien more procedural protections. But the regulation affords a robust set of protections that satisfy constitutional requirements. The regulation can apply only to certain significant national security threats. And the regulation affords the process that the Constitution requires in this context: the government must assemble a record, provide notice to the alien, offer an

opportunity to submit evidence and sit for an interview, solicit the recommendations of two agency heads, and have a Cabinet Secretary certify detention under this regulation. The government provided that process here. The district court had no sound basis for striking down the regulation.

Considerations of irreparable harm and the equities strongly favor a stay. The FBI Deputy Director has concluded that Hassoun's "release would threaten the national security of the United States and the safety of the community." June 5, 2020 FBI Memo. 1 (Dkt. 261-2). Hassoun's release will, given his dangerousness and the need to take measures to mitigate the threat he poses, profoundly burden DHS, the FBI, ICE, and other law enforcement agencies tasked with monitoring Hassoun. Even with monitoring, the FBI has warned that "it is not possible to fully mitigate the threat posed by [Hassoun's] release." Glasheen Decl. ¶ 8 (Dkt. 261-2).

This Court should grant a stay to maintain the status quo while this Court considers and resolves the important legal questions presented in this

case and to avert the profound harms that could result if the district court's judgment takes effect.[1]

Counsel for the parties met and conferred regarding this motion on June 30, 2020. Counsel for Hassoun agreed to an administrative stay to allow for the following agreed briefing schedule: Hassoun will respond to the motion by 5 p.m. EST, July 10, 2020, and the government will file a reply by 5 p.m. EST, July 15, 2020. Hassoun otherwise opposes a stay.

STATEMENT

Legal Background. Title 8 U.S.C. § 1231 provides that the government "shall" detain an alien ordered removed during an initial 90-day "removal period." 8 U.S.C. § 1231(a)(2). Section 1231(a)(6) provides that the alien "may be detained beyond the removal period" if the alien falls within a certain category, including aliens whom the Secretary of Homeland Security determines to be a risk to the community. *Id.* § 1231(a)(6).

[1] Appeals from rulings under 8 U.S.C. § 1226a must be taken to the D.C. Circuit. 8 U.S.C. § 1226a(b)(1). The government is pursuing an appeal from the D.C. Circuit on the district court's statutory rulings, as well as an emergency stay pending appeal. *See Hassoun v. Searls*, pending filing in the Court of Appeals for the D.C. Circuit.

Consistent with those authorities, a regulation, 8 C.F.R. § 241.14(d), permits the detention of an alien when: (1) the alien is described in 8 U.S.C. § 1182(a)(3)(B), which describes aliens who conduct terrorism-related inadmissibility activities or who have engaged in any activity "that endangers the national security"; (2) the alien's "release presents a significant threat to the national security or a significant risk of terrorism"; and (3) "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism." 8 C.F.R. § 241.14(d)(1)(i)-(iii). To invoke this authority, ICE must notify the alien that it intends to detain him under § 241.14(d), describe to the alien the factual basis for that detention, and afford the alien a reasonable opportunity to examine the evidence, to submit a written statement, and to present evidence on his behalf. *Id.* § 241.14(d)(2)(i)-(ii). In certain cases, the government must conduct a sworn interview of the alien if possible—an option offered to Hassoun here—and, if requested, allow for an interpreter and the presence of the alien's attorney. *Id.* § 241.14(d)(3)(i)-(ii). The ICE Director then makes a recommendation to the Secretary on whether to detain the alien under this regulation. *Id.* § 241.14(d)(4)-(5). The FBI Director also submits a recommendation. *Id.* § 241.14(d)(6).

Based on this record, the Secretary then may certify that an alien should continue to be detained on security or terrorism grounds. *Id*. Before the Secretary makes a certification, the regulation provides that the Secretary "shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national-security and classified information and to comply with the requirements of due process." *Id.* A certification by the Secretary is subject to ongoing review every six months and continued detention requires re-certification by the Secretary or Deputy Secretary of Homeland Security. *Id.* § 241.14(d)(7).

Factual Background and Proceedings Below. Adham Amin Hassoun was born in Lebanon to Palestinian parents. Decl. of Michael Bernacke (Dkt. 17-1), ¶ 4. He was admitted to the United States in 1989 as a nonimmigrant visitor. *Id*. He failed to comply with the visa requirements, and in 2002 was ordered removed. *Id.* ¶¶ 4-5.

Before he could be removed, Hassoun was taken into custody on criminal charges, including Conspiracy to Murder, Kidnap, and Maim Persons in a Foreign County; Conspiracy to Provide Material Support for Terrorism; and Material Support to Terrorists. *Id.* ¶ 7; Judgment, *United*

States v. Hassoun, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008) (Dkt. 13-3). The indictment alleged that "it was the purpose and object of the conspiracy to advance violent jihad, including supporting and participating in armed confrontations in specific locations outside the United States, and committing acts of murder, kidnapping, and maiming for the purpose of opposing existing governments." *United States v. Jayyousi*, 657 F.3d 1085, 1105 (11th Cir. 2011) (appeal in Hassoun's criminal case). To prevail, the government had to prove that Hassoun knew that he was "supporting mujahideen who engaged in murder, maiming, or kidnapping in order to establish Islamic states." *Id*. at 1105. Hassoun was convicted and found to have engaged in this criminal conduct beginning in 1993 and continuing beyond October 26, 2001. *See id*. at 1091-92. "[T]he record show[ed] that the government presented evidence that [Hassoun and his co-defendants] formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that [they] knew used violence in their efforts to establish Islamic states." *Id*. at 1104. "[I]n finding [Hassoun and his co-defendants] guilty, the jury rejected the . . . premise that they were only providing nonviolent aid to Muslim

communities." *Id.* at 1115. Hassoun was sentenced to 188 months in prison. Judgment, *Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008).

Upon Hassoun's release from prison in October 2017, ICE detained him in Batavia, New York, under 8 U.S.C. § 1231(a)(2)—the default authority for detaining an alien who has been ordered removed—and later under § 1231(a)(6). Bernacke Decl. ¶ 8. Hassoun sought a writ of habeas corpus in 2018. *Hassoun v. Sessions*, No. 18-cv-0586, 2019 WL 78984, at *1 (W.D.N.Y. Jan. 2, 2019). The district court concluded that there was no significant likelihood of Hassoun's removal in the reasonably foreseeable future (which the Supreme Court has concluded to be a limit on detention under § 1231(a)(6), *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)) and that, therefore, the government had "exceeded its authority to detain [Hassoun] under" 8 U.S.C. § 1231(a)(6)." *Id.* at *8. The court ordered his release. *Id.*

After that decision and in February 2019, ICE notified Hassoun that it intended to detain him under a separate provision authorizing an alien's detention in certain circumstances—8 C.F.R. § 241.14(d), the regulation at issue here. *See* Dkt. 17-2. In a new habeas proceeding commenced in March 2019, Hassoun claimed that 8 C.F.R. § 241.14(d) was ultra vires and unconstitutional. Dkt. 13.

On August 9, 2019, the Secretary certified Hassoun for continued immigration detention under the authority of both 8 C.F.R. § 241.14(d), and 8 U.S.C. § 1226a, a provision of the USA PATRIOT ACT that authorizes preventive detention of dangerous terrorist aliens. *See* Dkt. Nos. 26-1, 26-2 (certification orders). Hassoun challenged his detention in the habeas petition here.

In December 2019, the district court issued an order concluding that (1) Hassoun's continued detention is not lawfully authorized by 8 C.F.R. § 241.14(d) and (2) an evidentiary hearing would be necessary to determine whether Hassoun's continued detention was lawfully authorized by 8 U.S.C. § 1226a(a)(6). Dec. 13, 2019 Order at 1-2 (Dkt. 55). The court held that § 241.14(d) is inconsistent with the Supreme Court's interpretation of the statute invoked to authorize the regulation, 8 U.S.C. § 1231(a)(6). *Id.* at 12. The court reasoned that permitting detention pursuant to the regulation raised procedural-due-process concerns, that the regulation was not entitled to the court's deference and that the regulation was inconsistent with § 1231(a)(6), because it permitted indefinite detention without adequate procedures. *Id.* at 25. On 8 U.S.C. § 1226a(a)(6), the district court concluded that the administrative record did not sufficiently demonstrate the

lawfulness of Hassoun's detention and ordered an evidentiary hearing to consider that issue. *Id.* at 27.

On June 18, 2020, the government moved the district court to cancel the evidentiary hearing. Dkt. 226. The government maintained that "under the law, [the government] has met [its] burden of justifying [Hassoun's] continued detention," but explained that, in light of "th[e] Court's prior rulings" on legal and evidentiary matters to which the government maintained its objections, the government could not "meet the burden and standard of proof that th[e] Court has held to apply in this case." *Id.* at 1, 3. The court canceled the evidentiary hearing. Dkt. 238.

On June 29, 2020, the district court granted the habeas petition and ordered Hassoun's release. Dkt. 256. The court imposed several conditions on that release. *Id.* These conditions are in addition to those conditions of supervision that remain in place due to Hassoun's criminal convictions for terrorism-related offenses. *See* Judgment, *Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008). The court denied the government's motion for a stay pending appeal. Dkt. 256.

ARGUMENT

This Court should stay the district court's final judgment ordering Hassoun's release. The government is likely to prevail on appeal, and considerations of harm and the equities favor a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This appeal also warrants expedited consideration, including expedited consideration of this stay request, and this Court should grant an administrative stay while it considers this stay request.

A. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS

The district court's judgment rests on serious errors of the law, and the government is likely to prevail on appeal. A stay is particularly warranted because the appeal will raise novel and "difficult legal question[s]." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The government thus needs to show only "a substantial case on the merits," given that "the balance of the equities weighs heavily in favor of granting the stay," *LaRouche v. Kezer*, 20 F.3d 68, 72-73 (2d Cir. 1994) (internal quotation marks omitted).

The government is likely to succeed—and surely has a substantial case—on the argument that 8 C.F.R. § 241.14(d) authorizes Hassoun's

detention and is a permissible and constitutional interpretation of its implementing statute, 8 U.S.C. § 1231(a)(6).

The regulation's requirements for continued detention are satisfied here—and the district court did not conclude otherwise. The regulation provides for the detention of aliens: (1) who qualify under certain terrorism-related inadmissibility provisions or have "engaged or will likely engage in any other activity that endangers the national security"; (2) whose "release presents a significant threat to the national security or a significant risk of terrorism"; and (3) for whom "no conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be." 8 C.F.R. § 241.14(d)(1)(i)-(iii). Each element is satisfied. The district court determined that the first element was satisfied because Hassoun was convicted of an act described by 8 U.S.C. § 1182(a)(3)(B). Jan. 24, 2020 Order at 4-5. On the remaining elements, the FBI concluded that Hassoun "would pose a significant threat to the national security and a significant risk of terrorism upon release and that no conditions of release can reasonably be expected to avoid the threat to national security or the risk of terrorism." Feb. 21, 2019 FBI Memo. 4 (Dkt. 261-1). This satisfies the remaining two elements of the regulation providing for Hassoun's

continued detention. *See also* Aug. 9, 2019 DHS Notice (Dkt. 30-1) (Secretary's certification of Hassoun's detention under 8 C.F.R. § 241.14(d)).

In concluding that Hassoun's "continued detention is not lawfully authorized by 8 C.F.R. § 241.14(d)," Dec. 13, 2019 Order at 1, the district court concluded that the regulation "is inconsistent with" the statute that it implements, 8 U.S.C. § 1231(a)(6). *Id.* at 11. That was clearly incorrect.

Section 1231(a)(6) provides that the Secretary "may" detain, beyond the removal period, an alien who has been ordered removed. 8 U.S.C. § 1231(a)(6). The regulation at issue here, 8 C.F.R. § 241.14(d), was promulgated using the discretionary authority provided in § 1231(a)(6). *See* 8 U.S.C. § 1103(a)(3). The district court believed that the regulation exceeded what § 1231(a)(6) permits because the statute, as interpreted by the Supreme Court in *Zadvydas*, does not permit for indefinite detention of any class of aliens. Dec. 13, 2019 Order at 25. In *Zadvydas v. Davis*, the Supreme Court recognized that once removal was no longer reasonably foreseeable in the typical case, detention would no longer bear a reasonable relationship to preventing flight. *Id.* at 699. The Supreme Court emphasized, however, that it was not considering "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for

heightened deference to the judgments of the political branches with respect to matters of national security." *Id.* at 696. The Court stressed that "the statute before us applies *not only to terrorists* and criminals, but also to ordinary visa violators." *Id.* at 697 (emphasis added). Thus, *Zadvydas* allowed for potential civil detention of a certain narrow set of persons if the danger their release poses is of a particularly serious nature—like the release of Hassoun here, an alien who has been convicted of serious offenses related to the nation's security including material support for terrorism and terrorists.

Consistent with the Supreme Court's guidance, the Executive Branch lawfully adopted the regulation at issue here to address the preventive detention of dangerous aliens, setting strict limits in accordance with Supreme Court guidance on the use of post-removal-period detention for all categories of covered aliens. "Given the plenary authority of the political branches in the field of immigration, the judiciary must be particularly careful not to cut off the Attorney General's earnest effort to fulfill the function entrusted to him by Congress within constitutional limits." *Thai v. Ashcroft*, 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, J., dissenting from denial

of rehearing en banc) (citation omitted). The regulation is consistent with the statute. The district court erred in ruling otherwise.

The district court also raised concerns that the regulation did not provide adequate procedural protections and thus was not entitled to deference. The district court reasoned that, because the regulation provides for potentially indefinite civil detention but does not provide for review of detention by a neutral decisionmaker, and does not give the government an evidentiary burden of clear and convincing evidence, the regulation did not reflect a permissible reading of § 1231(a)(6); the court relied on *Zadvydas* to conclude that the regulation does not permit for indefinite detention of any class of aliens. Dec. 13, 2019 Order at 25.

Again, the district court erred. The regulation provides ample process and does not raise constitutional concerns, as shown by considering the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Even if the first *Mathews* factor, Hassoun's interest in avoiding the possible indefinite curtailment of his liberty, favored Hassoun, *but see infra* Part B, the second and third factors weigh strongly in favor of the government. The second *Mathews* factor, the risk of an erroneous deprivation of Hassoun's liberty, is minimized here. The process provided to Hassoun under the regulation and

the statute satisfies the Due Process Clause. Those authorities offer Hassoun sufficient safeguards, including:

- Before the Secretary certifies an alien for continued detention on account of security or terrorism concerns, ICE must notify the alien that it intends to detain under 8 C.F.R. § 241.14(d), describe the factual basis for that detention, and afford the alien a reasonable opportunity to examine the evidence, to submit a written statement, and to present evidence on his behalf. *Id.* § 241.14(d)(2)(i)-(ii).
- Where the legal basis for removal is not a statutory national-security ground, an immigration officer must conduct a sworn interview of the alien, as was offered here, and, if requested, allow for an interpreter and the presence of the alien's attorney. *Id.* § 241.14(d)(3)(i)-(ii).
- ICE must make the record available to the Secretary for review. *Id.* § 241.14(d)(5), (6).
- Before the Secretary makes a final detention decision, if he finds it necessary, he must offer the detainee additional procedures or review as needed. *Id.* § 241.14(d)(6).

- A certification by the Secretary is subject to ongoing review every six months and continued detention requires re-certification by the Secretary or Deputy Secretary. *Id.* § 241.14(d)(7).

- Legal challenges to the regulation are reviewed by Article III judges in habeas. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1254 (10th Cir. 2008) (ruling that 8 C.F.R. § 241.14(f), another special-case detention provision in the same regulation as § 241.14(d), is lawful on this basis).

It merits noting, moreover, that Hassoun failed to take advantage of all the process offered to him. Under the regulation, ICE gave Hassoun the opportunity to submit evidence and be interviewed, but Hassoun "declined to participate" in an interview, Pet'r's Br. in Supp. of Am. Habeas Pet. 31 n.14 (Dkt. 14). He cannot plausibly complain of a lack of process when he has refused to use offered procedures. And he is already subject to supervision conditions due to his criminal conviction. Judgment, *Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008). Even without detention under the regulation (or the statute), Hassoun, due to his multiple criminal convictions, has had his liberty constrained. *See United States v. Salerno*, 481 U.S. 739, 745 (1987)

(in facial challenge, challenger must establish that no set of circumstances exist under which the Act would be valid).

Finally, on the third *Mathews* factor, the government's interest, the government has a compelling public-safety interest in not having especially dangerous individuals who pose serious national-security risks—such as convicted terrorists who are not citizens of the United States—released into society. *See* Resp.'s Opp. 25-26; *see also infra* Part B (demonstrating irreparable harm to government absent stay). "[T]he Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 35 (2010); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."). The government's interest here is paramount. The due-process analysis strongly favors the government. The district court was wrong to conclude otherwise.

Although the district court invoked the canon of constitutional avoidance, Dec. 13, 2019 Order at 26, neither the regulation nor the statute presents the type of ambiguity that makes that canon appropriate. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (the canon of constitutional avoidance applies only when "statutory language is susceptible of multiple

interpretations"); *see generally* Dec. 13, 2019 Order (not holding or discussing that the regulation is ambiguous). Especially given the novel legal questions—including the validity of this regulation—the Court should stay pending appeal the district court's final judgment ordering Hassoun's release. *See Holiday Tours, Inc.*, 559 F.2d at 844; *Hamilton Watch Co.*, 206 F.2d at 740.

B. ALL REMAINING CONSIDERATIONS DECISIVELY SUPPORT A STAY

Considerations of irreparable harm and the equities also strongly favor a stay of Hassoun's release pending appeal.

Irreparable Harm. The denial of a stay threatens significant and irreparable harm to the United States and the public. Hassoun has already been indicted, prosecuted, and ultimately found guilty in federal district court of conspiracy to murder, kidnap, and maim persons in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists. *United States v. Hassoun*, 476 F.3d 1181, 1183 (11th Cir. 2007). The Acting Secretary of DHS, the FBI Director, and the Acting ICE Director concluded that Hassoun poses a threat to the nation. *See, e.g.*, Feb. 21, 2019 FBI Memo. (Dkt. 261-1) ("As the FBI Director, I have

considered all the information presented to me regarding the continued detention of Adham Amin Hassoun and assess that release of Hassoun poses a significant threat to national security and significant risk of terrorism that cannot be mitigated or avoided by conditions of release."); Continued Detention Certification Feb. 7, 2020 Order (Dkt. 226-1) (Acting Secretary determining that Hassoun "has engaged in terrorist activity or will likely engage in any other activity that endangers the national security," "his release presents a significant threat to the national security or a significant risk of terrorism," and "no conditions of release can reasonably be expected to avoid those threats"). The Deputy Director of the FBI reiterated this conclusion less than a month ago. June 5, 2020 FBI Memo. 1 ("The FBI assesses that his release would threaten the national security of the United States and the safety of the community.").

Given Hassoun's past conduct, his likelihood of reoffending upon release is high. *See United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) ("[E]ven terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation."). Release would allow the irreparable harms that the Executive Branch has sought to prevent. Hassoun's recent conduct

supports the view that he continues to refuse to conform his conduct to the law. While detained at the Buffalo Federal Detention Facility and during this litigation, he violated the protective order by intentionally revealing the identity of a confidential informant against him. *See* June 18, 2020 Order at 18.

Moreover, Hassoun is a convicted alien terrorist who has a final order of removal. *See* Bernacke Decl. ¶ 5. He does not have a right to remain in the United States, *see Jennings*, 138 S. Ct. at 837 ("Even once inside the United States, aliens do not have an absolute right to remain here."), much less be released from government custody to reside in the United States, *see Zadvydas*, 533 U.S. at 702 (Scalia, J.) (dissenting and noting that in *Shaughnessy v. United States ex rel. Mezei*, 130 U.S. 206 (1953), the Supreme Court upheld continued detention of an inadmissible alien the government "was unable to return anywhere else" as the alien did not have a substantive constitutional right to release in the United States). Considerations of harm strongly favor a stay of Hassoun's release pending appeal. Courts regularly recognize that national-security concerns are so weighty that they commonly warrant granting a stay pending appeal. *See, e.g.*, *Klayman v. Obama*, 957 F. Supp. 2d 1, 10 (D.D.C. 2013) (granting stay in light of "the

significant national security interests at stake in this case and the novelty of the constitutional issues"), *rev'd in government's favor*, 800 F.3d 559 (D.C. Cir. 2015); *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013) (granting stay "given the significant constitutional and national security issues at stake"). That approach is warranted here.

Balance of Equities. "Once [the stay] applicant satisfies the first two factors, the ... stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). That balance strongly favors a stay.

First, releasing Hassoun during appeal would place a significant burden on ICE, the FBI, and others in the federal government more broadly. *See* Decl. of Michael H. Glasheen; Decl. of Michael W. Meade (Dkt. 242-3). If released, the government will not be able to assure Hassoun's reporting and compliance with any terms of release ordered and therefore prevent the threat that he poses. Aliens released from ICE custody can relocate without properly notifying the government, and significant government resources must then be expended in order to locate and apprehend an individual, especially a dangerous individual, for removal. If Hassoun absconds, the government could need to undertake a fugitive apprehension operation,

which creates a risk for the officers involved and for members of the public and any coordinating law enforcement officials involved in an arrest. And as the FBI Deputy Director explained, if Hassoun is released from detention pending removal, he presents a significant risk of terrorism which cannot be mitigated by any conditions of release. June 5, 2020 FBI Memo. 4 (describing the FBI's risk assessment, which the court permitted to be sealed in Dkt. 255).

Even with reporting conditions that would promote basic compliance with his physical reporting requirements, these would not mitigate the particular threat posed by Hassoun's background as someone known to recruit others to engage in terrorist activity and to provide material support for the commission of terrorist activity. As detailed in the underlying criminal record and the FBI Deputy Director's June 5, 2020 memorandum, Hassoun's release poses a unique threat to national security because of his documented ability to provide logistical guidance, financial support, and ideological motivation to individuals who plan to commit violent terrorist activities. The threat posed by this behavior cannot be wholly mitigated by any reporting requirements or additional conditions.

Second, the Executive has articulated Hassoun's detention to be in the public interest. The Acting Secretary, in consultation with the FBI Director

and the Acting ICE Director, has determined Hassoun to be a significant national security threat. For the Judiciary, moreover, a stay serves the public interest by promoting sound judicial administration and decision-making. The authorities and issues presented in this case are important. They warrant considered deliberation, rather than rushed consideration in an emergency-stay posture. By entering a stay, this Court can aid the sound resolution of important legal questions bearing on national security.

Hassoun's liberty interests do not overcome the public interests set forth above. *See Hilton*, 481 U.S. at 778-79 (due process does not prohibit "staying the release of a successful habeas petitioner pending appeal because of dangerousness"). The "Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987). That balance strongly favors staying release pending appeal.

CONCLUSION

This Court should stay the district court's final judgment pending appeal, expedite this appeal, and grant an immediate administrative stay while it considers this motion.

Dated: June 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that the foregoing motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Book Antiqua, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,013 words according to the count of Microsoft Word, excluding the materials permitted to be excluded by Rule 32(f).

/s/ Anthony D. Bianco

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Senior Counsel for National Security

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2020, I filed this motion through the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Anthony D. Bianco

ANTHONY D. BIANCO
Senior Counsel for National Security

STATUTORY ADDENDUM

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8 C.F.R. § 241.14

§ 241.14 Continued Detention of Removable Aliens on Account of Special Circumstances

(d) Aliens detained on account of security or terrorism concerns—

(1) Standard for continued detention. Subject to the review procedures under this paragraph (d), the Service shall continue to detain a removable alien based on a determination in writing that:

> (i) The alien is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) of (B) of the Act or the alien has engaged or will likely engage in any other activity that endangers the national security;
>
> (ii) The alien's release presents a significant threat to the national security or a significant risk of terrorism; and
>
> (iii) No conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be.

(2) Procedure. Prior to the Commissioner's recommendation to the Attorney General under paragraph (d)(5) of this section, the alien shall be notified of the Service's intention to continue the alien in detention and of the alien's right to submit a written statement and additional information for consideration by the Commissioner. The Service shall continue to detain the alien pending the decision of the Attorney General under this paragraph. To the greatest extent consistent with protection of the national security and classified information:

> (i) The Service shall provide a description of the factual basis for the alien's continued detention; and

(ii) The alien shall have a reasonable opportunity to examine evidence against him or her, and to present information on his or her own behalf.

(3) Aliens ordered removed on grounds other than national security or terrorism. If the alien's final order of removal was based on grounds of inadmissibility other than any of those stated in section 212(a)(3)(A)(i), (A)(iii), or (B) of the Act, or on grounds of deportability other than any of those stated in section 237(a)(4)(A) or (B) of the Act:

(i) An immigration officer shall, if possible, conduct an interview in person and take a sworn question-and-answer statement from the alien, and the Service shall provide an interpreter for such interview, if such assistance is determined to be appropriate; and

(ii) The alien may be accompanied at the interview by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government.

(4) Factors for consideration. In making a recommendation to the Attorney General that an alien should not be released from custody on account of security or terrorism concerns, the Commissioner shall take into account all relevant information, including but not limited to:

(i) The recommendations of appropriate enforcement officials of the Service, including the director of the Headquarters Post-order Detention Unit (HQPDU), and of the Federal Bureau of Investigation or other federal law enforcement or national security agencies;

(ii) The statements and information submitted by the alien, if any;

(iii) The extent to which the alien's previous conduct (including but not limited to the commission of national security or terrorism-related offenses, engaging in terrorist activity or other activity that poses a danger to the national security and any prior convictions in a federal, state or foreign court) indicates a likelihood that the alien's

release would present a significant threat to the national security or a significant risk of terrorism; and

(iv) Other special circumstances of the alien's case indicating that release from detention would present a significant threat to the national security or a significant risk of terrorism.

(5) Recommendation to the Attorney General. The Commissioner shall submit a written recommendation and make the record available to the Attorney General. If the continued detention is based on a significant risk of terrorism, the recommendation shall state in as much detail as practicable the factual basis for this determination.

(6) Attorney General certification. Based on the record developed by the Service, and upon this recommendation of the Commissioner and the Director of the Federal Bureau of Investigation, the Attorney General may certify that an alien should continue to be detained on account of security or terrorism grounds as provided in this paragraph (d). Before making such a certification, the Attorney General shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national security and classified information and to comply with the requirements of due process.

(7) Ongoing review. The detention decision under this paragraph (d) is subject to ongoing review on a semi-annual basis as provided in this paragraph (d), but is not subject to further administrative review. After the initial certification by the Attorney General, further certifications under paragraph (d)(6) of this section may be made by the Deputy Attorney General.

8 U.S.C. § 1226a

§ 1226a Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review

(a) Detention of terrorist aliens

(1) Custody
The Attorney General shall take into custody any alien who is certified under paragraph (3).

(2) Release
Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) Certification
The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

(A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or

(B) is engaged in any other activity that endangers the national security of the United States.

(4) Nondelegation

The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) Commencement of proceedings

The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) Limitation on indefinite detention

An alien detained solely under paragraph (1) who has not been removed under section 1231(a)(1)(A) of this title, and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(7) Review of certification

The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

(b) Habeas corpus and judicial review

(1) In general

Judicial 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)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction

to review, by habeas corpus petition or otherwise, any such action or decision.

(2) Application

(A) In general

Notwithstanding any other provision of law, including section 2241(a) of Title 28, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with--

(i) the Supreme Court;

(ii) any justice of the Supreme Court;

(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

(iv) any district court otherwise having jurisdiction to entertain it.

(B) Application transfer

Section 2241(b) of Title 28 shall apply to an application for a writ of habeas corpus described in subparagraph (A).

(3) Appeals

Notwithstanding any other provision of law, including section 2253 of Title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

(4) Rule of decision

The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as

the rule of decision in habeas corpus proceedings described in paragraph (1).

(c) Statutory construction
The provisions of this section shall not be applicable to any other provision of this chapter.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: Stay Pending Appeal and Administrative Stay

Set forth below precise, complete statement of relief sought:

Immediate administrative stay of district court order of release and stay pending appeal

Hassoun v. Searls

MOVING PARTY: Jeffrey A. Searls **OPPOSING PARTY:** Adham Amin Hassoun

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: _____ **OPPOSING ATTORNEY:** A. Nicole Hallett et al.

[name of attorney, with firm, address, phone number and e-mail]

U.S. Department of Justice
P.O. Box 868, Washington, DC 20044

Mandel Legal Aid Clinic University of Chicago Law School
6020 S. University Avenue Chicago, IL 60637
(773) 702-9611 / nhallett@uchicago.edu

Court- Judge/ Agency appealed from: W.D.N.Y., Judge Wolford

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): _____

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this court? ☐ Yes ☑ No
Requested return date and explanation of emergency: 7/2/2020

The District Court has ordered Appellee Adham Hassoun to be released from custody on July 2, 2020 at 12:00 pm. A stay is requested prior to his ordered release. The parties have agreed to an administrative stay through July 15, 2020, to allow briefing on the stay.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Anthony D. Bianco **Date:** 6/30/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]