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 REPLY IN SUPPORT OF STAY PENDING APPEAL

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INTRODUCTION

This Court should stay pending appeal the district court's final judgment ordering the release of Adham Amin Hassoun. Hassoun's arguments to the contrary fail.

ARGUMENT

A. This Court Has Appellate Jurisdiction

At the outset, Hassoun contends that the government is not likely to succeed in this appeal because this Court "lacks jurisdiction" over the appeal. Opp. 11 (emphasis omitted); *see* Opp. 11-13.

Hassoun is wrong. The district court had jurisdiction over this case under two distinct authorities: the general federal habeas statute, 28 U.S.C. § 2241(c)(3), and a specialized habeas provision addressing the detention of terrorist aliens, 8 U.S.C. § 1226a(b). Dec. 13, 2019 Order 8 (Dkt. 55). An appeal from a proceeding under the general federal habeas statute is almost always taken to (and only to) "the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253(a). This case differs because part of the district court's adjudication involved "[j]udicial review of any action or decision relating to" § 1226a, which "is available exclusively in habeas

corpus proceedings consistent with" the specialized jurisdictional provisions of § 1226a(b). 8 U.S.C. § 1226a(b)(1). Section 1226a(b) provides a special rule for "action[s] or decision[s] relating to" § 1226a: "in habeas corpus proceedings described in" § 1226a(b)(1), "the final order shall be subject to review, on appeal, by" the D.C. Circuit, and "[t]here shall be no right of appeal in such proceedings to any other circuit court of appeals." *Id.* § 1226a(b)(3). That means that to the extent that a habeas case involves an "action or decision relating to" § 1226a, an appeal from that action or decision must be taken to the D.C. Circuit. That is what the government has done: it has appealed from rulings "relating to" § 1226a to the D.C. Circuit. But to the extent that the district court's decision does *not* involve an "action or decision relating to" § 1226a, the default rule of 28 U.S.C. § 2253(a) applies, and this Court has jurisdiction. The government's appeal in this Court concerns only rulings unrelated to § 1226a—the district court's rejection of the government's position that 8 C.F.R. § 241.14(d) authorizes Hassoun's detention and so release was not warranted under 28 U.S.C. § 2241.

Hassoun argues otherwise by reasoning that § 1226a(b)(3) channels appeals from a "final order" in "proceedings" under § 1226a(b)(1) to the D.C.

Circuit and only to the D.C. Circuit, *see* Opp. 11; that "the 'proceedings' here are a single habeas petition bringing claims for judicial review of detention under both the statute and regulation," Opp. 11-12; and, since "the statute does not limit the D.C. Circuit's exclusive jurisdiction to particular claims," the entire final order must be reviewed only by the D.C. Circuit, Opp. 12. This view fails to account for § 1226a(b)(1), which makes clear that § 1226a(b) speaks only to "[j]udicial review of any action or decision relating to this section"—that is, § 1226a. 8 U.S.C. § 1226a(b)(1). Section 1226(b)(1) reaffirms that it is speaking to "jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision" relating to § 1226a. *Id.* The statute thus creates an exclusive review scheme in the D.C. Circuit for § 1226a rulings, but leaves in place the normal review scheme for other rulings—which, in this case, is before this Court. That is sensible: this Court reviews habeas rulings all the time, so there is nothing unusual about this Court employing that customary review in the part of this case relating to § 2241. *Contra* Opp. 12.

Hassoun notably fails to mention that the district court understood that appellate review in this case would be bifurcated across this Circuit and

the D.C. Circuit. The district court looked to this Court's precedent in considering Hassoun's challenge to his 8 C.F.R. § 241.14(d) detention and to D.C. Circuit precedent in considering the § 1226a challenge. *See* Dec. 13, 2019 Order 8 n.2. Hassoun seeks support for his position in *United States v. Hohri*, 482 U.S. 64, 70 (1987), which held that a statutory provision that granted exclusive appellate jurisdiction to the Federal Circuit over nontax Little Tucker Act claims also conferred appellate jurisdiction on the Federal Circuit when a case involved both nontax Little Tucker Act and Federal Tort Claims Act claims. Opp. 13. But the statute at issue in *Hohri* divested regional courts of appeals of jurisdiction when district-court jurisdiction "was based, in whole *or in part*" on the Little Tucker Act. 28 U.S.C. § 1295(a)(2) (emphasis added). Section 1226a(b), as explained above, channels jurisdiction to the D.C. Circuit only for a set of "action[s] or decision[s]" by a district court—those relating to § 1226a.

B. The Government is Likely to Succeed on Appeal

A stay is warranted because the judgment rests on serious legal errors and the government is likely to prevail on appeal. Mot. 12-20. Hassoun does not contest that the requirements for continued detention under 8 C.F.R.

§ 241.14 are satisfied here. Mot. 13-14. The arguments that he does make, Opp. 13-19, fail.

Due Process. Hassoun makes several arguments for why the regulation fails to provide sufficient process under *Matthews v. Eldridge*, 424 U.S. 319 (1976). Opp. 13-16.

Hassoun maintains that the regulation "fail[s] to establish basic procedural safeguards" and thereby "creates an immense risk of erroneous deprivation." Opp. 14; *see* Opp. 14-15. This argument fails to recognize that "the nature of [procedural] protection may vary depending upon status and circumstance." *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001). Thus, Hassoun continues to err in attempting to import to this terrorist-detention context the procedures that apply in other civil-detention schemes, such as those ordered in *Addington v. Texas*, 441 U.S. 418 (1979). Opp. 14. In *Addington*, the Supreme Court adopted additional procedural protections to prevent involuntary civil confinement for perceived mental and emotional disorders based on mere "idiosyncratic behavior" that is "within a range of conduct that is generally acceptable." 441 U.S. at 426-27. Hassoun's conduct, including a conviction for conspiring to murder, kidnap, and maim persons

in a foreign country, Mot. 7-9, his order of removal, Mot. 7, and the conclusions of the Acting Secretary of DHS, the FBI Director, and the Acting ICE Director that Hassoun poses a threat to the nation, Mot. 20-21, make clear that the basis of Hassoun's detention is not generally acceptable conduct.

Hassoun also makes several particular attacks on the regulation's procedural safeguards. Opp. 14-15. Each fails. First, Hassoun faults the regulation for failing to provide review by a neutral decisionmaker. Opp. 14. This case belies that argument, as Hassoun brought this habeas challenge to his detention under 8 C.F.R. § 241.14 in district court. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008) (due process satisfied for aliens who sought writs of habeas corpus to challenge their continued detention under 8 C.F.R. § 241.14(f)). Second, Hassoun faults the regulation for not articulating a burden or standard of proof. Opp. 14. But that just means that traditional burdens and standards apply. *See* Opp. to Am. Pet. 24 (Dkt. 17-4) (citing *Sea Island Broad. Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) ("the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings")). Third, Hassoun

contends that the regulation fails to provide "the opportunity to meaningfully confront or examine the evidence and witnesses against them." Opp. 14. But that ignores the regulation's robust procedures. Mot. 16-19. Among other things, the regulation requires that ICE notify the alien of an intention to detain under the regulation, describe the factual basis for the detention, and afford the alien a reasonable opportunity to examine the evidence and present information on his behalf. 8 C.F.R. § 241.14(d)(2)(i)-(ii).

Next, Hassoun attempts to minimize the government's interests. Opp. 15-16. He argues that "the government has *no* legitimate interest in detaining individuals based on mistakes." Opp. 15-16. But that straw-man proposition does not overcome the government's overwhelming interest in detaining dangerous alien terrorists who threaten the national security and have no right to remain in the United States. Mot. 19. Hassoun's remaining argument on this point parrots his claim that the procedures here are inadequate, but those arguments fail for the above reasons and those in the government's stay motion. Mot. 16-19. And even if Hassoun's interest in

liberty favored him, the remaining *Mathews* factors strongly favor the government and show that the district court erred here. *Id.*

Ultra Vires. Hassoun also contends that the regulation is ultra vires because it conflicts with *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005). Opp. 16-19.

Hassoun argues that the regulation exceeds its authorizing statute, 8 U.S.C. § 1231(a)(6), because the regulation permits indefinite detention yet *Zadvydas* and *Clark* hold that the statute "does not permit indefinite detention." Opp. 16. But as the government has explained (Mot. 14-15), the Supreme Court in *Zadvydas* emphasized 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." 533 U.S. at 696. *Zadvydas* thus allowed for potential detention for a narrow set of particular dangerous persons, like terrorist aliens. Mot. 15.

Hassoun minimizes this passage as "a line of dicta," Opp. 16, but the Court's statement was a limitation on its *holding*—it made clear that the Court was not invalidating across the board the length of preventive

detention. Hassoun contends that "*Clark* rejects that interpretation of" *Zadvydas*. Opp. 17. But Hassoun misconstrues *Clark*. *Clark* recognized that it was "not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." 543 U.S. at 380. *Clark* does not show that the regulation is unlawful or reject the *Zadvydas* national-security carve-out. Section 1231(a)(6) defines three classes of removable aliens: (1) aliens who are "inadmissible under [8 U.S.C. § 1182]"; (2) aliens who are "removable under [8 U.S.C. §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)]"; and (3) aliens "who [have] been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). *Zadvydas* construed § 1231(a)(6) as to the second category of aliens, *Zadvydas*, 533 U.S. at 691; *Clark* construed § 1231(a)(6) as to the first category, *Clark*, 543 U.S. at 378. Neither decision conclusively construed § 1231(a)(6) as to the third category. The regulation here addresses that third category—in particular, aliens who are determined to be "a risk to the community." 66 Fed. Reg. 56,972 (Nov. 14, 2001). Section 241.14(d) reflects

a permissible interpretation of when a "risk to the community" justifies continued detention. Mot. 15-16.

Hassoun argues that *Zadvydas*'s limit on indefinite detention applies to "terrorism or other special circumstances." Opp. 16-17. *Clark* does say that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject." 543 U.S. at 378 (emphasis added). What that means, however, is that the word "may," for all three categories, cannot be read to confer "unlimited discretion." *Id.* at 377 (citation omitted). Rather, the word "may" must be read to permit only detention related to each category's "basic purpose." *Id.* (citation omitted). For the first two categories—which are tied to grounds for the alien's removal (i.e., the reason the alien is "inadmissible" or "removable")—detention is no longer related to the category's basic purpose when removal is no longer reasonably foreseeable, as *Zadvydas* and *Clark* held. *See id.* at 378-79. But for the third category—which is tied *not* to the grounds for the alien's removal, but rather to the Executive's determination that the alien is "a risk to community"—continued detention serves the category's purpose so long as the Executive

determines such a "risk" justifies detention, regardless of whether removal is reasonably foreseeable. Hassoun's contrary view of *Clark* relies on dicta. *E.g.*, Opp. 17. The regulation is consistent with the statute.

C. All Remaining Considerations Strongly Support a Stay

Considerations of harm and the equities favor a stay. Mot. 20-25. Hassoun's contrary arguments , Opp. 19-23, fail.

Hassoun insists that the government "will suffer no harm" if he is released. Opp. 19. But Hassoun is a convicted terrorist, and the Acting Secretary of Homeland Security, the FBI Director, and the Acting ICE Director all concluded that he poses a threat. Mot. 20-21. Hassoun counts it in his favor that he was convicted almost 20 years ago and that the sentencing judge thought unnecessary a 30-years-to-life sentence. Opp. 20. The reality, however, is that Hassoun served a substantial sentence for conspiring to murder, kidnap, and maim persons in a foreign country, conspiring to provide material support to terrorists, and providing material support to terrorists, Mot. 20, and he presents an unacceptably high likelihood of reoffending, Mot. 21-22. Hassoun also dismisses the FBI's assessments as doing no more than showing "'the danger of conditioning an

individual's liberty on unreviewable administrative factfinding.'" Opp. 19 (quoting June 29, 2020 Order 34 (Dkt. 256)). That is not a credible way to describe the FBI Director's considered assessment of the danger that Hassoun's release would pose to the national security of the United States or the safety of the community. *See* June 5, 2020 FBI Memorandum (Dkt. 223 (under seal)). It also disregards the agency heads' considered assessments. Mot. 20-21. Hassoun responds that conditions of release would ameliorate any threat. Opp. 19-20. The government has demonstrated that that is not so. Mot. 23-24.

Hassoun's liberty interests do not overcome the public interest in preventing the release of a terrorist whom multiple agencies have assessed to be a threat. *Contra* Opp. 21. His detention under 8 C.F.R. § 241.14(d) is not the result of "fantastical plots," Opp. 21, but of the government's assessment that he is profoundly dangerous. He was convicted of a terrorist act, Mot. 20, and the FBI concluded that he "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).

Hassoun contends that the public interest supports his release. Opp. 21-23. He does not contest that releasing him would massively burden ICE, the FBI, and others in the federal government—which could not even mitigate the particular threat that he poses. Mot. 23-24. He just again relies on his view—in conflict with the assessments of multiple agency heads—that his detention is unnecessary. Opp. 22-23. And he discounts the well-expressed public interest in detention articulated by the Executive Branch here. Mot. 24-25. Hassoun contends that "the government admitted that it could not win" at an evidentiary hearing, Opp. 21, or that the government conceded the case, Opp. 22. Both claims are wrong. The government maintained that it had carried its burden and that judgment should be entered in its favor, and sought to cancel the hearing because, in light of "th[e] [district] [c]ourt's prior rulings"—including setting a clear and convincing burden and excluding significant portions of the government's evidence—the government could not "meet the burden and standard of proof that th[e] [c]ourt ha[d] held to apply in this case." Dkt. 226 at 1, 3.

CONCLUSION

This Court should stay the district court's final judgment pending appeal and expedite this appeal.

Dated: July 13, 2020

Respectfully submitted,

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

I hereby certify that the foregoing reply 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 reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,600 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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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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.

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