UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case # 1:19-cv-00370-EAW

v.

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

Respondent.

RESPONDENT'S MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO THE AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Petitioner Adham Amin Hassoun is an alien who has been ordered removed from the United States. In addition, he has been convicted of conspiracy to murder, kidnap, and maim persons in a foreign country; conspiracy to provide material support for terrorism; and providing material support to terrorists, for which he was sentenced to prison for 15 years, 8 months. While in immigration custody following his release from prison, Petitioner has continued to [redacted]. He is lawfully detained, in accordance with the United States Constitution, pursuant to 8 C.F.R. § 241.14(d) as an alien who presents a significant threat to the national security of the United States or a significant risk of terrorism for whom no conditions of release can reasonably be expected to avoid the threat or risk.

Petitioner suggests several theories for why his detention is unlawful, but none is meritorious. He claims 8 C.F.R. § 241.14(d), the authority under which he is now detained, is *ultra vires* and conflicts with the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). That argument, however, ignores that *Zadvydas* explicitly preserved the Executive's ability to promulgate a national security-based regulation like the one at issue here. Petitioner claims that the regulation violates the due process and equal protection components of the Fifth Amendment. The Constitution, however, permits detention of especially dangerous terrorists, who are the sole target of § 241.14(d), and affords to aliens ample procedures (of which, in any event, Petitioner did not avail himself) by providing an opportunity to present evidence and be interviewed prior to a decision to continue detention. The regulation's use of the terms "national security" and "terrorism" is clear, and not void for vagueness, as Petitioner argues. Finally, the Court should deny Petitioner's as-applied challenge to the regulation's application to him for lack of subject-matter jurisdiction, or in the alternative, deny that claim on the merits because

Respondent has more than sufficient evidence, given the deferential standard of review applicable here, that Petitioner plotted future terrorist attacks and is attempting to recruit terrorists. Therefore, the Court should deny all relief on the Amended Petition.

II. FACTUAL & PROCEDURAL HISTORY

A. Petitioner's criminal history and first habeas petition

Petitioner was born in Lebanon to Palestinian parents. He was admitted to the United States in September 1989 as a nonimmigrant visitor, but subsequently failed to remain in compliance with the requirements of his visa, and in December 2002 was ordered removed from the United States. Declaration of Michael Bernacke (Bernacke Decl.) (Dkt. No. 17-1) (Exhibit A to Respondent's Answer & Return, hereafter "Ex. A"), ¶ 4. His removal order became administratively final on June 27, 2003. Ex. A, ¶ 5.

Before he could be removed, the U.S. Marshals Service took custody of Petitioner, on January 12, 2004, on pending criminal charges, including Conspiracy to Murder, Kidnap, and Maim Persons in a Foreign County;[1] Conspiracy to Provide Material Support for Terrorism;[2] and Material Support to Terrorists.[3] Judgment in a Criminal Case, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008) (Dkt. No. 13-3) at 1. The indictment, filed in the U.S. District Court for the Southern District of Florida, alleged "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.*

[1] In violation of 18 U.S.C. § 956(a)(1).

[2] In violation of 18 U.S.C. § 371.

[3] In violation of 18 U.S.C. § 2339A(a).

Jayyousi, 657 F.3d 1085, 1105 (11th Cir. 2011).[4] To prevail, the government had to prove Petitioner knew he was "supporting mujahideen who engaged in murder, maiming, or kidnapping in order to establish Islamic states." *Id*. at 1105. As the Eleventh Circuit said on appeal, "the record shows that the government presented evidence that [Petitioner 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 [Petitioner and his co-defendants] guilty, the jury rejected the [] premise that they were only providing nonviolent aid to Muslim communities." *Id*. at 1115. Petitioner was ultimately convicted and sentenced to 188 months in prison. Judgment in a Criminal Case, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008) (Dkt. No. 13-3) at 2.

Upon Petitioner's release from prison on October 10, 2017, U.S. Immigration and Customs Enforcement (ICE) detained him pursuant to 8 U.S.C. § 1231(a)(2) as an alien subject to a final order of removal. He is currently detained at the Buffalo Federal Detention Facility in Batavia, New York. Bernacke Decl., ¶ 8. Beginning in October 2017, ICE, and later the U.S. State Department as well, have engaged with multiple foreign governments in seeking to remove Petitioner.

On May 22, 2018, Petitioner petitioned this Court for a writ of habeas corpus, alleging his immigration detention violated 8 U.S.C. § 1231(a)(6). Pet. for Writ of Habeas Corpus (Dkt. No. 1) & Amended Pet. (Dkt. No. 3), *Hassoun v. Sessions*, No. 1:18-cv-00586 (W.D.N.Y.). On January 2, 2019, the district court found that Petitioner's removal was not significantly likely in the reasonably foreseeable future, and ordered the government to release him by March 1, 2019,

[4] This case was the appeal in Petitioner's criminal case.

unless it had some other basis to detain him. Decision and Order (Dkt. No. 46), *id*. In ruling on the Petition, the Court said, "the record establishes that the government has undertaken substantial, good faith efforts to remove Petitioner. Immigration authorities have contacted a number of countries, engaged multiple government agencies, and undertaken high-level diplomatic efforts." Decision and Order, *Hassoun v. Sessions*, No. 1:18-cv-00586, 2019 WL 78984, at *5 (W.D.N.Y. Jan. 2, 2019) (Geraci, C.J.).

On February 22, 2019, the government notified the Court it intended to continue to detain Petitioner under a separate detention authority: 8 C.F.R. § 241.14(d). Respondents' Notice of Petitioner's Detention Pursuant to 8 C.F.R. § 241.14(d) (Dkt. No. 55), *id*. The Court then found that the government's notice "complie[d] with the Court's order. No further notice from [the government] is required, and this case remains closed." Text Order (Dkt. No. 58), *id*. Petitioner moved to reopen, to challenge his detention under 8 C.F.R. § 241.14(d), but the Court denied the motion, holding that issues concerning Petitioner's dangerousness were not part of the original controversy and were beyond the scope of the petition. Decision and Order (Dkt. No. 60), *id*.

B. Petitioner's detention authority: 8 C.F.R. § 241.14(d)

Respondent is detaining Petitioner under the authority of 8 C.F.R. § 241.14(d), which is a regulation implementing part of the general post-removal-order statute, 8 U.S.C. § 1231(a)(6). This regulation permits the continued detention of an alien who "has engaged or will likely engage in any other activity that endangers the national security," whose "release presents a significant threat to the national security or a significant risk of terrorism," and where "[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 continue detention under § 241.14(d), provide a description of the factual basis for the alien's continued detention, and afford the alien a reasonable opportunity to

examine the evidence, to submit a written statement, and to present evidence on his own behalf. *Id.* § 241.14(d)(2)(i)-(ii).[5] Where the legal basis for removal is not a statutory national security ground, an immigration officer must conduct a sworn interview of the alien, if possible, 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 on whether to continue detention to the Secretary of Homeland Security. *Id.* § 241.14(d)(4)-(5). The FBI Director also submits a recommendation. *Id.* § 241.14(d)(6). Before the Secretary makes a final detention decision, he has a broad mandate to offer the alien additional procedures: 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. *Id.* § 241.14(d)(7).

C. Petitioner's significant national security or terrorism threat and his second habeas petition

Respondent is detaining Petitioner under § 241.14(d) because since his detention by ICE, Petitioner [redacted]. FBI Letter to Secretary of Homeland Security (Feb. 21, 2019) (Tab B to Att. 1 to Ex. A). [redacted]

[5] The regulation at issue here was promulgated by the Attorney General in November 2001, at a time when the Attorney General supervised the Immigration and Naturalization Service, which was responsible for enforcement of the immigration laws and for the detention and removal of aliens. 66 Fed. Reg. 56967 (Nov. 14, 2001). The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002), transferred most immigration enforcement functions previously vested by statute in, or performed by, the Commissioner of Immigration and Naturalization, as well as the immigration detention and removal program, from the Attorney General to the newly created position of Secretary of Homeland Security. *Id*. §§ 402(3), 441, 116 Stat. 2178, 2192. ICE is a component of the Department of Homeland Security.

[redacted]. *Id.* [redacted] *Id.* [redacted]. *Id.* [redacted]. *Id.* at 4.

Relatedly, a[redacted] *Id.* at 3-4. [redacted]. *Id.* at 3.

Based on Petitioner's criminal history, his [redacted], the FBI Director concluded Petitioner is likely to continue his material support of ISIS and to recruit others to carry out attacks against the United States on behalf of ISIS. *Id.* at 4. Further, the FBI Director concluded,

> it would not be viable to fully mitigate the threat posed by [Petitioner], if he were to be released, based on the inherent limitations of lawfully available investigative techniques and resource requirements. Given his expected ability to travel within the United States if he were released from detention, the wide availability of communications facilities to which he would have access, and the inherent legal and practical limitations of surveillance, the FBI assesses there would be a substantial intelligence gap immediately present concerning what activities [Petitioner] is engaged in when he is no longer in custody.

Id. Consequently, the FBI Director concluded, in a letter to the Secretary of Homeland Security recommending that ICE continue to detain Petitioner pursuant to lawful authorities, that Petitioner 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 the national security or the risk of terrorism. *Id.*

On February 22, 2019, the Deputy Director of ICE served Petitioner with a Notice to Alien of Intent and Factual Basis to Continue Detention. Ex. A, ¶ 15. Subsequently, on March 11, 2019, ICE served Petitioner with the Administrative Record Concerning Continued Detention of Adham Hassoun Under 8 C.F.R. § 241.14(d). *Id.* On April 10, 2019, Petitioner served his response to the Notice of Intent and Factual Basis on ICE. *Id*. That response consisted of a seven-page letter from counsel arguing why Petitioner's continued detention was unlawful and unjustified on the record, and copies of prior filings from his criminal and habeas proceedings. Petitioner did not submit any new evidence to rebut the claims made by the FBI Director, and he declined to be interviewed by an immigration officer. Tab J to Att. 1 to Ex. A. On May 24, 2019, the ICE Director forwarded the record[6] to the Secretary of Homeland Security, recommending that the Secretary certify Petitioner's detention pursuant to both 8

[6] Petitioner raises the specter of being detained based on classified evidence he has not seen and to which he has not had an opportunity to respond. Pet'r's Memo. (Dkt. No. 14) at 8-9, 25, 30. In fact, the record relied upon by the ICE Director, and presented to the Secretary for decision, in this case contains nothing that was not previously provided to Petitioner for his review and response.

C.F.R. § 241.14(d) and 8 U.S.C. § 1226a.[7] Att. 2 to Ex. A. The Secretary has not yet acted on those recommendations.[8] Ex. A, ¶ 16. On May 14, 2019, Petitioner filed his Amended Petition for a writ of habeas corpus and a supporting brief. Dkt. Nos. 13, 14.

III. ARGUMENT

Petitioner challenges his detention pursuant to 8 C.F.R. § 241.14(d) on seven grounds, none of which is meritorious.

A. THE ATTORNEY GENERAL LAWFULLY PROMULGATED 8 C.F.R. § 241.14(d) IN THE EXERCISE OF HIS AUTHORITY UNDER 8 U.S.C. §§ 1103(a)(3) AND 1231(a)(6), AND THAT REGULATION IS CONSISTENT WITH SUPREME COURT PRECEDENT

In Count One, Petitioner argues that § 241.14(d) is invalid because it allegedly exceeds the scope of 8 U.S.C. § 1231(a)(6) as read by the Supreme Court in *Zadvydas v. Davis*. As explained below, the regulation is a lawful exercise of statutory authority under 8 U.S.C. § 1231(a)(6), and not contrary to Supreme Court precedent.

Once an alien has been ordered removed, the Secretary of Homeland Security shall attempt to remove the alien within the following 90 days (the "removal period"), and shall detain the alien during that period. 8 U.S.C. §§ 1231(a)(1)(A), (a)(2). Aliens who are not removed (or do not depart) during the removal period are generally granted supervised release. *Id.* § 1231(a)(3). Congress, however, gave the Secretary discretion to detain certain aliens beyond the removal period. *Id.* § 1231(a)(6). On its face, the statute puts no limit on how long ICE may

[7] The ICE Director asked the Secretary to authorize Petitioner's continued detention pursuant to 8 U.S.C. § 1226a, as well as pursuant to 8 C.F.R. § 241.14(d). Section 1226a authorizes the detention of aliens whom the Secretary has reasonable grounds to believe are inadmissible or removable on certain security or terrorism grounds, or are "engaged in any other activity that endangers the national security of the United States." The Secretary has not, as of the filing of Respondent's Answer and Return on the Amended Petition and this Memorandum of Points and Authorities, acted on that request. Should the Secretary certify Petitioner for detention under 8 U.S.C. § 1226a during the pendency of this case, Respondent will notify the Court will all due dispatch.

[8] The regulation authorizes an alien's detention pending the Secretary's decision once ICE serves the alien with notice of ICE's intent to seek the Secretary's certification pursuant to the regulation. 8 C.F.R. § 241.14(d)(2).

detain an alien beyond the removal period, and prior to November 14, 2001, no regulation governed the exercise of the statutory discretion to detain.

In *Zadvydas v. Davis*, two aliens who were removable as aggravated felons and who had been detained beyond their removal periods pursuant to 8 U.S.C. § 1231(a)(6) challenged their detention. 533 U.S. 678 (2001). Because reading the statute to confer unlimited Executive Branch discretion to determine how long to detain an alien beyond the removal period would have raised serious doubts about the statute's constitutionality, the Court construed the statute to limit an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal. *Id.* at 689.

The Court observed that "[t]here is no sufficiently strong special justification here for indefinite civil detention." *Id*. at 690. The Court noted that the risk of flight (one of the statute's two main purposes) was virtually nonexistent where removal was only "a remote possibility at best;" thus, detention could not bear a reasonable relation to that purpose. *Id.* And while recognizing that the statute's second main goal of protecting the community "does not necessarily diminish in force over time," the Court also noted it had "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections," *id*. at 690-91, and that "in cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness be accompanied by some other special circumstance, such as mental illness, that helps create the danger," *id*. at 691.

Examining the civil detention at issue in *Zadvydas*, the Court noted it was "potentially permanent," and that "the provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons . . . . [A]nd, once the flight risk justification

evaporates, the only special circumstance present is the alien's removable status itself, which bears no relation to a detainee's dangerousness." *Id*. at 691-92 (internal citation omitted). Further, the Court noted that the sole procedural protection available to the aliens there was an administrative proceeding in which the aliens bore the burden to prove they were not dangerous.

The Court was careful to say 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 (emphasis added). And the Court later re-emphasized that "the statute before us applies *not only to terrorists* and criminals, but also to ordinary visa violators." *Id*. (emphasis added). The Court's care in pointing out that terrorism was not an issue in the case is all the more notable when one recalls this decision was handed down over two months *before* the terror attacks of September 11, 2001. The Court also observed, in response to the government's argument that the petitioners, as aliens with removal orders, lacked the right to live at large in the United States, that the choice was "not between imprisonment and the alien 'living at large.' . . . It is between imprisonment and supervision under release conditions." *Id.*

In short, *Zadvydas* said that once removal was no longer reasonably foreseeable, detention would no longer bear a reasonable relationship to preventing flight. Further, where no special circumstances exist, such as involving detention of specially dangerous individuals, the statute, to avoid potential constitutional doubt, must be understood to permit detention only until removal is no longer reasonably foreseeable. *Id.* at 699-700.

In response to the *Zadvydas* decision, the Attorney General used his authority under 8 U.S.C. §§ 1103 and 1231 (2000) to promulgate the regulations now codified at 8 C.F.R. §§ 241.13 and 241.14, limiting the exercise of his discretion under 8 U.S.C. § 1231(a)(6). 66 Fed. Reg. 56967 (Nov. 14, 2001). The first of those regulations codified the *Zadvydas* holding

that, absent special circumstances, an alien may not be detained beyond the end of the removal period if there is no significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. § 241.13. The Attorney General also took up the Supreme Court's implicit invitation to narrow post-removal-period detention where removal is no longer reasonably foreseeable to only "a small segment of particularly dangerous individuals, . . . say, suspected terrorists." *Zadvydas*, 533 U.S at 691; 8 C.F.R. § 241.14. Under § 241.14, only four categories of particularly dangerous post-order aliens may be considered for detention where removal is no longer reasonably foreseeable: (1) the highly contagious; (2) those whose release would have serious adverse foreign policy consequences; (3) those who pose a threat to national security or a risk of terrorism; and (4) violent mentally ill people. 8 C.F.R. § 241.14(b)-(f).

Section 241.14 also addressed the Supreme Court's concerns that the statute could, in the absence of implementing regulations, authorize "potentially *indefinite*" detention, and that the burden was on the alien to show he was not a danger to the community. To avoid the specter of unjustified indefinite detention and to ensure more comprehensive procedural protection, the regulation requires the Secretary, or the Deputy Secretary, personally to recertify the need for continued detention every six months. In other words, any particular certification authorizes only six months of additional detention. *Id.* § 241.14(d)(7).

As well, rather than put the burden on the alien to show he is not dangerous, the regulation authorizes detention only if the government determines the alien's release presents a *significant threat* to national security or a *significant risk* of terrorism. *Id.* § 241.14(d)(1). Further, the regulation, unlike the situation the Supreme Court confronted in *Zadvydas*, *see* 533 U.S. at 696, permits continued detention of specially dangerous aliens *only if* the ICE Director, and then the Secretary, determines there are no conditions of release that can reasonably be

expected to avoid the threat to national security or risk of terrorism that the alien presents. 8 C.F.R. § 241.14(d)(1)(iii).

Detention of Petitioner under 8 C.F.R. § 241.14(d), therefore, presents a very different situation from the one the Court confronted in *Zadvydas*. *See Thai v. Ashcroft*, 389 F.3d 967, 970 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing *en banc*) (explaining why *Zadvydas* did not control where ICE detained an alien under § 241.14(f)). While the statutory language "'may be detained beyond the removal period' applies without differentiation to all three categories of aliens" covered by the statute, *Clark v. Martinez*, 543 U.S. 371 (2005), neither *Zadvydas* nor *Clark* suggest that the Secretary may not, under regulations promulgated to constrain the discretion to detain in accordance with the principles enunciated by the Supreme Court, continue to detain a specially dangerous alien who presents a significant threat to the national security or risk of terrorism, and for whom the Secretary determines no conditions of release can reasonably be expected to avoid the threat or risk. *See Thai*, 389 F.3d at 971 (Kozinski, J., dissenting) (in promulgating 8 C.F.R. § 241.14, Attorney General "scrupulously followed the Supreme Court's teachings").

The regulation does not attempt to *displace* the Supreme Court's interpretation with a different agency interpretation of ambiguous statutory language, as Petitioner argues. Dkt. No. 14 at 14-15. Rather, the Attorney General exercised his authority under 8 U.S.C. § 1103(a)(3) to promulgate immigration regulations to define how immigration authorities will implement the statutory grant of discretionary detention authority, setting strict limits *in accord 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*, 389 F.3d at 971

(Kozinski, J., dissenting) (internal citation omitted). Consequently, the regulation is neither *ultra vires* nor contrary to Supreme Court precedents.

Although *Zadvydas* repeatedly referenced how terrorism and national-security threats are justifiably exempt from the "significant likelihood of removal in the reasonably foreseeable future" standard, Petitioner argues that *Zadvydas* "was addressing what *Congress might authorize in a new statute*, not what the Executive branch could interpret § 1231(a)(6) to authorize." Dkt. No. 14 at 15 n.4. But Petitioner cites no authority for that curious distinction, and *Zadvydas* certainly did not say or suggest that *only* a new *statute* could authorize post-removal-period detention for terrorists or national security threats who do not face a significant likelihood of removal in the reasonably foreseeable future. To the contrary, the *Zadvydas* Court emphasized that its difficulty was with how § 1231(a)(6) was applied: "There is no sufficiently strong special justification *here* for indefinite civil detention—at least *as administered* under this statute." *Zadvydas*, 533 U.S. at 690 (emphasis added); *accord Hernandez-Carrera*, 547 F.3d at 1251 (upholding a *regulation* that fell within *Zadvydas*'s "special justification" carve out). Petitioner's claim that special-circumstance detention can be governed only under a new statute and not a narrow regulation is thus unavailing. The Court should deny relief on Count One.

B. THE REGULATION DOES NOT DEPRIVE PETITIONER OF SUBSTANTIVE DUE PROCESS

In Count Two, Petitioner claims that the regulation which authorizes his detention violates substantive due process rights under the Fifth Amendment. Although freedom from detention "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action, that liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (internal citations and quotations omitted). Even in the civil context, a person's "constitutionally protected interest in avoiding physical restraint may be overridden." *Id*. at 356. Indeed, "[t]here are manifold restraints to which every person is necessarily subject

for the common good. On any other basis organized society could not exist with safety to its members." *Id.* at 357 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)); *see also Jacobson*, 197 U.S. at 29 (a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense").

"[U]nder the appropriate circumstances, and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law." *Hendricks*, 521 U.S. at 365-66. There is no doubt that preventing danger to the community is a legitimate governmental interest that can, in appropriate circumstances, outweigh an individual's liberty interest. *United States v. Salerno*, 481 U.S. 739, 747, 750 (1987) (collecting cases); *see also Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding President's authority to detain enemy aliens in war time under Alien Enemy Act of 1798).

Although there is no one formulation that signals when civil detention is permissible, courts have found detention schemes to be constitutional when they typically apply narrowly to a small segment of particularly dangerous individuals and include meaningful procedural protections. *See generally Zadvydas*, 533 U.S. at 690-92; *Hernandez-Carrera*, 547 F.3d at 1251. "[A] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Hendricks*, 521 U.S. at 358. Rather, in cases in which preventative detention is of potentially indefinite duration, and where an individual is being detained because he is dangerous to himself or his community, due process demands the presence of "some other special circumstance . . . that helps to create the danger." *Zadvydas*, 533 U.S. at 691.

Another consideration is that while the Due Process Clause applies to all "persons," the nature of the protection an alien is due "may vary depending upon status and circumstances." *Zadvydas*, 533 U.S. at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) and *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)); *Hernandez-Carrera*, 547 F.3d at 1254 (citing *Zadvydas*). "[I]t is not at all clear," therefore, "that removable aliens benefit from precisely the same advantages of due process as do citizens or lawful permanent resident aliens." *Hernandez-Carrera*, 547 F.3d at 1254. Consequently, as the Supreme Court recognized in *Zadvydas*, in the case of alien "terrorism . . . special arguments might be made for forms of preventive detention . . . ." *Zadvydas*, 533 U.S. at 696. After all, "[w]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 554, 560 (1963). And "even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003); *see also Jayyousi*, 657 F.3d at 1117 (quoting *Meskini*).

All the provisions in § 241.14(d) comport with the Supreme Court's guidance in *Zadvydas* that preventative detention of potentially indefinite duration be accompanied by some other special circumstance and limited to "a small segment of particularly dangerous individuals, say terrorists." *Zadvydas*, 533 U.S. at 691 (internal quotations and citation omitted). First, the regulation applies narrowly to only a subset of post-removal-order aliens who have been determined, following a process permitting for the alien's participation, to present a *significant* threat to national security or a *significant* risk of terrorism, for whom no conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism. Detention pursuant to the narrow 8 C.F.R. § 241.14(d) avoids the constitutional concerns the *Zadvydas* Court found with a statute that facially permitted indefinite detention of any and all

aliens falling under 8 U.S.C. § 1231(a)(6). Bearing *Zadvydas* in mind, the Attorney General limited detention under § 1231(a)(6) once removal is no longer reasonably foreseeable to a narrow set of special circumstances. *See* 8 C.F.R. § 241.14(a) ("The Service may invoke the procedures of this section in order to continue detention of particular aliens *on account of special circumstances* . . . .") (emphasis added). As relevant here, detention beyond the removal period is authorized only where the alien's release presents a significant threat to national security or a significant risk of terrorism. 8 C.F.R. § 241.14(d)(1)(ii). In contrast to the expansive scope of detention authority advanced by the government in *Zadvydas*, detention under 8 C.F.R. § 241.14(d) is authorized only for a "small segment of . . . individuals" whose release would particularly endanger national security. *See Hendrick*s, 521 U.S. at 368.

Second, the Attorney General substantially enhanced the procedural protections for an alien before he can be detained as a significant threat to national security or a significant risk of terrorism. Unlike with more garden-variety § 1231(a)(6), the government provides substantial procedures to an alien detained under § 241.14(d). *See supra* section II.B. (describing in depth the process under the regulation). In brief, an alien detained under § 241.14(d) receives notice, the factual basis for the detention, and the right to examine the evidence. 8 C.F.R. § 241.14(d)(2). The alien has the right to submit a statement and additional evidence for consideration and, in certain circumstances, to appear for an interview with an attorney. *Id.* § 241.14(d)(2), (3). And the regulation requires semi-annual re-examination of the facts and re-certification in order to continue an alien's detention, putting the onus on the government to conduct those reviews and re-certify, if appropriate. *Id.* § 241.14(d)(6), (7).

Further, the regulation in no way relieves the government of the continuing obligation to work to execute the removal order. Indeed, the Immigration and Nationality Act directs the Secretary to remove aliens who have been ordered removed. 8 U.S.C. § 1231(a)(1)(A) ("when an

alien is ordered removed, the [Secretary of Homeland Security] shall remove the alien from the United States"). That obligation is especially pressing where, as here, the alien is particularly dangerous and cannot be safely released from detention in the United States. For that reason, as noted above, the government continues to work to remove Petitioner, as required by law.

Finally, contrary to Petitioner's concerns, Dkt. No. 14 at 20-21, the Secretary (or Deputy Secretary) must review the detention semi-annually to ensure the alien continues to qualify for detention. 8 C.F.R. § 241.14(d)(7). Requiring frequent re-certification satisfies substantive due process. *See United States v. Comstock*, 560 U.S. 126, 130-31 (2010) (providing review every six months after the initial hearing); *Hendricks*, 521 U.S. at 353 (providing review every year after the initial hearing).[9]

In the memorable words of Justice Goldberg, the constitution "is not a suicide pact." *Mendoza-Martinez*, 372 U.S. at 560. It is fully consistent with the demands of due process to detain, subject to regular, periodic review at the highest levels of government, an alien who has been ordered removed—and therefore has no lawful right to remain in the country—pending success in the government's continuing efforts to remove that alien, if the alien presents a significant threat to the national security or a significant risk of terrorism, *and there are no conditions of release that can reasonably be expected to avoid the threat to the national security or the risk of terrorism*. The Court should hold that § 241.14(d) does not violate substantive due process and deny relief on Count Two.

[9] Petitioner also claims that § 241.14(d) violates his substantive due process rights because his detention is "unconstitutionally substitut[ing] indefinite civil detention for criminal prosecution." Dkt. No. 14 at 21-22. Putting aside his shifting framing of his Amended Petition—whether it makes facial challenges or as-applied challenges—Respondent is detaining Petitioner because of the threat he currently poses, based on the totality of the currently known information, including [redacted]. Petitioner advances absolutely no evidence that his continued immigration detention is punitive rather than purely for the stated purpose, well supported by the factual record, of preventing the threat to national security and risk of terrorism that his release within the United States would present.

C. REGULATION SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

In Count Three, Petitioner argues § 241.14(d) facially violates his procedural due process rights. First, he has no standing to bring this claim because, by declining to avail himself of the process provide by the regulation, Petitioner cannot demonstrate he has been prejudiced. Second, the specific procedures by which Petitioner is detained do not deprive him of due process because he received notice of the extensive record supporting his detention, had a meaningful opportunity to respond, and his detention will receive mandatory periodic review by the Secretary or Deputy Secretary at least every six months.

1. Petitioner lacks standing to challenge procedures that he declined to invoke

The Court should deny relief on Count Three because Petitioner has failed to allege how § 241.14(d) has prejudiced him. To make a procedural due process claim in the immigration context, a petitioner must plead "some cognizable prejudice fairly attributable to the challenged process." *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008); *see also Miller v. Mukasey*, 539 F.3d 159, 164 (2d Cir. 2008) ("in the absence of prejudice, '[w]e ... need not determine the constitutional adequacy of the existing procedures."). Prejudice cannot be shown by a litigant who does not take advantage of the available detention-review procedures. *E.g.*, *Escalante-Calmo v. Clark*, No. 06-cv-1575, 2007 WL 1577868, at *5 (W.D. Wash. May 30, 2007) ("Because petitioner refused to avail himself of the written hearing procedure about which he complains, he does not have standing to assert such claim."); *Van Harken v. City of Chi.*, 906 F. Supp. 1182, 1187 n.5 (N.D. Ill. 1995) (dismissing claims by litigants who "cannot claim the inadequacy of the process that they made no effort to bring into play"); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996) (holding prisoners lacked standing to claim the insufficiency of the prison law library violated their constitutional rights unless they "demonstrate that the alleged shortcomings . . . hindered [their] efforts to pursue a legal claim").

Petitioner claims § 241.14(d) does not provide him sufficient procedures to contest his detention. But because he declined to take advantage of those procedures, Petitioner has not shown any prejudice stemming from § 241.14(d). Per the regulation, ICE gave Petitioner the opportunity to submit evidence and be interviewed, but Petitioner "declined to participate" in an interview, Dkt. No. 14 at 31 n.14, and has not submitted any evidence or statements to rebut the facts in the FBI Director's letter. He tries to excuse his abstention by claiming the government would have used the interview as "an investigatory tool," *id.*, but Petitioner ignores the fact that his attorney was permitted by regulation to attend the interview with him to assist him during that interview. He also declined to submit any new evidence of his own for the Secretary's consideration. Had he provided exculpatory information, it might have affected the ICE Director's decision to recommend that the Secretary certify continued detention. In short, his claim is unfounded speculation. Thus, the source of any injury was his own pre-judgment of the procedures, as opposed to the procedures themselves. He cannot now complain those procedures are inadequate, and the Court should deny relief on Count Three. *See Garcia-Villeda*, 531 F.3d at 149 ("Our role is 'to provide relief to claimants . . . who have suffered . . . actual harm.'" (ellipses in original)); *Escalante-Calmo*, 2007 WL 1577868, at *5.

2. The regulation provides adequate procedural protections, in accord with other detention authorities that the Second Circuit has sanctioned

Alternatively, the Court should reject Petitioner's procedural due process contention on the merits, Dkt. No. 14 at 26, because the regulation does provide aliens with sufficient procedural due process. As noted in sections III.A. and III.B. above, civil detention schemes that apply narrowly to a small segment of particularly dangerous individuals and include meaningful procedural protections are constitutional. *See generally Zadvydas*, 533 U.S. at 690-92. What procedural protections are required, though, depends on the context. *Mathews v. Eldridge*, 424

U.S. 319, 334 (1976) ("*Mathews*") (Due Process Clause "calls for such procedural protections as the particular situation demands."); *Landon*, 459 U.S. at 34 ("The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.").

Although the Due Process Clause applies to aliens such as Petitioner in the United States, the exact nature of the protection an alien is due "may vary depending upon status and circumstance." *Zadvydas*, 533 U.S. at 694. And, as noted above, it is "not at all clear that removable aliens benefit from precisely the same advantages of due process as do citizens and lawful permanent residents." *Hernandez-Carrera*, 547 F.3d at 1254. Thus, contrary to Petitioner's protestation, Dkt. No. 14 at 26 n.12, "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does *not* lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("*Diaz*") (emphasis added).

Against that backdrop, the Court must weigh the exact procedures afforded here. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. To determine whether a process is constitutionally sufficient, a court must consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probative value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 335.

Private Interest. An alien's liberty interest is undoubtedly weighty, but it is lessened by the fact that a § 241.14(d) alien has been ordered removed and consequently enjoys no lawful right to be in the United States. *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 380 (W.D.N.Y.

2009) (citing *Ly v. Hansen*, 351 F.3d 263, 269 (6th Cir. 2003)). Further, were the alien to be released from detention, he would not be completely at liberty, as the risk he presents would undoubtedly justify strict conditions of supervision. *See infra* section III.G.2 (describing how Petitioner is subject to conditions of release and remains subject to supervised release from penal confinement related to his earlier conviction for terrorism-related offenses). Consequently, a § 241.14(d) alien's liberty interest is somewhat tempered. *See Diaz*, 4266 U.S. at 78.

Risk of Erroneous Deprivation. Under the second *Mathews* factor, the regulation's procedures are sufficiently robust to minimize the risk of erroneous detention. As discussed *supra* section II.B. (discussing procedures), prior to the Secretary certifying an alien for continued detention on account of security or terrorism concerns, ICE must notify the alien that it intends to continue detention under § 241.14(d), provide a description of the factual basis for the alien's continued detention, and afford the alien a reasonable opportunity to examine the evidence, to submit a written statement, and to present evidence on his own 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, if possible, and, if requested, allow for an interpreter and the presence of the alien's attorney. *Id.* § 241.14(d)(3)(i)-(ii). Finally, before the Secretary makes a final detention decision, he has a broad mandate to offer Petitioner additional procedures: 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.* § 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).

The Second Circuit and Supreme Court have frequently upheld parts of the process offered by § 241.14(d) against procedural due process challenges. Chiefly, the Second Circuit held the Fifth Amendment permitted a detention process where habeas petitioners "were represented by an attorney of their own choosing, were allowed to offer documentary evidence, and had witnesses testify on their behalf." *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 238 (2d Cir. 1967). The court also found an excludable Mariel Cuban being indefinitely detained was given sufficient procedural due process where he had "regularly been given an opportunity to plead his case" for release on parole, including via "a personal interview." *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997). Other features of civil detention upheld by the Supreme Court include periodic review periods after the initial detention decision. *See Comstock*, 560 U.S. at 130-31 (providing review every six months after the initial hearing); *Hendricks*, 521 U.S. at 353 (providing review every year after the initial hearing).

The procedures provided in § 241.14(d) are far more generous to Petitioner than the procedures found permissible in cases like *Kordic* and *Guzman*—i.e., merely allowing an attorney to be present and allowing the alien to present testimonial and documentary evidence—and are consistent with *Comstock* and *Hendricks*. Although § 214.14(d) does not explicitly permit witnesses to testify on Petitioner's behalf, as was deemed sufficient in *Kordic*, the regulation permits documentary evidence, which could encompass a written, sworn statement from a witness. Similarly, the regulation directs the Secretary to order "any further procedures or reviews as may be necessary under the circumstances," 8 C.F.R. § 241.14(d)(6), which enables a petitioner to request the Secretary to permit a witness to testify before an immigration officer. Thus, § 241.14(d) is on all fours with the lawful detention scheme in *Kordic*. Further, consistent with § 241.14(d)(2)-(6), Petitioner here was notified of the government's intention to continue his detention and of the factual basis for that determination, and was provided an opportunity to

be heard "at a meaningful time and in a meaningful manner." *Id.* at 535. Petitioner's complaint that he was never given a "meaningful opportunity to review and challenge the evidence against him," Dkt. No. 14 at 30, thus rings hollow.

Petitioner's brief resists the flexibility that the Due Process Clause—and binding precedent—gives the Secretary to craft national-security detention procedures. Petitioner advocates for a bright-line rule requiring a judge, not agency heads, to review detention decisions. Dkt. No. 14 at 27. However, he does not support this proposed rule with citations to any immigration habeas cases. Indeed, this rule is contradicted by *Kordic*. There, the Second Circuit rejected the argument that the detention decision necessarily must be made by a judge. *Kordic*, 386 F.2d at 238. Rather, *Kordic* approved a process where the employees who conducted the interview and made the detention decision were a supervisory immigrant inspector and district director, respectively. *Id.* at 234, 238. Further, Petitioner's proposed standard is inconsistent with *Mathews*, which eschewed categorical rules and emphasized that due process is a "flexible" concept. *Mathews*, 424 U.S. at 334.

In any event, Petitioner *does* have an opportunity for a neutral judge—indeed an Article III judge—to review the legality of his detention by petitioning for a writ of habeas corpus. *Hernandez-Carrera*, 547 F.3d at 1255; *see* 28 U.S.C. § 2241. "The writ of habeas corpus has always been available to review the legality of Executive detention," including by aliens challenging immigration detention. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001). "Thus, it has long been the case that 'when the record shows that a commissioner of immigration is exceeding his power, [an] alien may demand his release upon habeas corpus.'" *Hernandez-Carrera*, 547 F.3d at 1255 (quoting *St. Cyr*, 533 U.S. at 306 and *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915)). The availability of the habeas writ satisfies due process in this regard as well. *Id.* (for this reason,

finding procedural due process was satisfied through a different subsection of § 241.14, the mental disability provision in § 241.14(f)).

Petitioner also argues that § 241.14(d) procedures are inadequate because the "regulation places no burden of proof on the government." Dkt. No. 14 at 28. But that is just incorrect. As a threshold matter, Respondent concedes here that § 241.14(d) places the burden on the government to prove the various facts necessary to justify detention.

Petitioner also argues that the standard of proof for the facts on which the government bears the burden must be "clear and convincing evidence." *Id.* at 29. But the standard here should be the default "preponderance" quantum of proof. *See Sea Island Broad. Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) ("The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings."). The existing procedures for special § 241.14(d) detention provide adequate due process protections. Consistent with Congress's plenary authority over immigration detention, and the special circumstance of a national security threat, the agency may fairly demonstrate that an alien is subject to § 241.14(d) by a "more likely than not" standard. After all, that is the standard that the government has to meet in a *Zadvydas* detention case. *Beckford v. Lynch*, 168 F. Supp. 3d 533, 539 (W.D.N.Y. 2016) (describing how under *Zadyvdas*, once the alien makes his or her initial showing, the government carries the minimal burden of "respond[ing] with evidence sufficient to rebut that showing").

By contrast, "clear and convincing evidence" is used in cases inapposite to the situation here. *Cf., e.g., Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding that the State of Texas had to meet *some* evidentiary threshold higher than "preponderance of the evidence" in order to constitutionally commit an individual *indefinitely* to a mental institution with no possibility of release, unlike here, where release will occur upon removal); *Salerno*, 481 U.S. at 752

(upholding a statute that places an evidentiary burden on the government to detain arrestees pending *criminal* trial). Simply put, procedural due process jurisdiction does not require the "clear and convincing" standard that Petitioner desires.

The robust procedures offered in § 241.14(d) ensure a minimal risk that an alien will be erroneously deprived of his liberty. The second *Mathews* factor thus weighs very heavily in favor of Respondent here.

Government Interest. The third *Mathews* factor, the government's interest, is exceedingly weighty, given the importance of protecting national security and preventing terrorism. Courts routinely recognize that "the 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."). Accordingly, "[t]he Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." *Humanitarian Law Project*, 561 U.S. at 13. Courts, therefore, accord the Executive Branch substantial deference in the area of national security. *Id.*; *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018). The government's interest here is paramount.

Further, given that the regulation is only applicable where the Secretary has determined there are no conditions of release that can reasonably be expected to avoid the threat to national security or risk of terrorism presented by the alien's release, this prong of the *Mathews* analysis

must take into consideration whether the procedures for which Petitioner advocates would advance the government's weighty interest at least as well as those in the regulation.

In this context, the Secretary of Homeland Security, with the advice of the FBI Director, is best situated to make the delicate judgment about threats posed to national security or the risk of terrorism in any given case, particularly in light of the Secretary's position atop a vast agency dedicated to protecting homeland security, with significantly greater situational awareness than any other possible decision-maker. Similarly, the preponderance standard of proof for determining whether an alien presents a *significant* threat or risk properly balances a post-removal-order alien's liberty interest with the government's substantial interest in national security and public safety. In *Addington v. Texas*, the Supreme Court said the standard of proof "serves to allocate the risk of error," and that "the function of legal process is to minimize the risk of erroneous decisions." 441 U.S. at 423, 425. The standard of proof under § 241.14(d) appropriately allocates and minimizes the risk of error with respect to *both* the alien's interest and the government's interest. The regulation therefore satisfies the third *Mathews* factor.

Section 241.14(d) provides for the detention of aliens who pose significant national security or terrorism threats, both of which are permissible grounds for detention under *Zadvydas*. Further, § 241.14(d)'s procedures satisfy the *Mathews* balancing test under existing Second Circuit precedent, such as *Kordic* and *Guzman*, and are consistent with *Diaz*, by which the Supreme Court recognized lessened due process protections for certain aliens as compared to others. The regulation therefore provides sufficient process to satisfy the Fifth Amendment, and the Court should deny relief on Count Three.

D. REGULATION IS NOT UNCONSTITUTIONALLY VAGUE

In Count Four, Petitioner claims that 8 C.F.R. § 241.14(d) is unconstitutionally vague. He argues that the terms "significant threat to national security" and "significant risk of terrorism"

fail to give "clear notice of what activity might subject individuals to indefinite detention on that basis." Dkt No. 14 at 1-2. Because these terms are sufficiently circumscribed, under controlling case law, to provide adequate notice, Petitioner was not denied due process when the ICE Director determined he qualified for detention under § 241.14(d)(1)(ii).[10]

A law (or regulation) must give "ordinary people . . . 'fair notice' of the conduct [it] proscribes," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018), so "that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Golb v. Att'y Gen. of the State of N.Y.*, 870 F.3d 89, 102 (2d Cir. 2017). A law violates the Due Process Clause "if it is so vague that it gives no warning to the challenger that his conduct is prohibited." *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984). The petitioner bears the burden of showing that a law is void for vagueness. *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018).

To meet his burden, Petitioner must show that (1) an ordinary person has no notice what conduct is proscribed by § 241.14(d), or that (2) the government can use the regulation's language for arbitrary or discriminatory enforcement. *Id.* at 114. Although Petitioner makes no effort to cast his challenge into this standard Second Circuit framework, Dkt. No. 14 at 34-35,[11] Respondent presumes that Petitioner's complaint about the purported indeterminacy of "terrorism" and "national security" goes to the first *Copeland* prong, and his complaint about the "significant threat to" and "significant risk of" modifiers goes to the second *Copeland* prong.[12]

[10] The Amended Petition alleges that both 8 U.S.C. § 1231(a)(6) and 8 C.F.R. § 241.14(d) are unconstitutionally vague. Dkt. No. 13 ¶¶ 94-96. Petitioner's brief, however, attacks only the latter. *See, e.g.*, Dkt. No. 14 at 1 ("Fourth, the regulation is unconstitutionally vague . . . ."). Therefore, Petitioner has waived any challenge to the statute, and Respondent will not address that claim here.

[11] Petitioner's brief cites only *Dimaya*. However, *Copeland*, which relies on decades of Second Circuit law undisturbed by *Dimaya*, postdates that decision. *See Copeland*, 893 F.2d at 111, 113 nn.2-3. *Copeland* therefore provides the governing standard.

[12] Petitioner also claims that he is entitled to a more favorable burden because his conduct allegedly implicates the First Amendment. Dkt. No. 14 at 35 n.16. Not so. First, as the ICE Director indicated, Petitioner poses a risk

1. The terms "terrorism" and "national security" carry ordinary meanings that gave Petitioner notice of what conduct is proscribed

First, Petitioner must demonstrate that an "ordinary person" lacks the ability to understand what conduct is prohibited or proscribed. *Copeland*, 893 F.3d at 114. A regulation's terms need not have "meticulous specificity." *Arriaga v. Mukasey*, 521 F.3d 219, 224 (2d Cir. 2008). A regulation may have some "flexibility and reasonable breadth," *id.*, and a regulation will not necessarily be vague just because there might be some plausible arguments in favor of competing interpretations, *Chapman v. United States*, 500 U.S. 453, 467 (1991). To determine what the "ordinary person" would understand, courts look to a number of sources: the language of the regulation; "common understanding and practices;" interpretive tools such as dictionaries; and judicial constructions of the disputed language. *Arriaga*, 521 F.3d at 224, 226; *Copeland*, 893 F.3d at 115-16.

"Terrorism." Petitioner fails to show that "terrorism" is vague because he does not develop any argument to that effect. *See* Dkt. No. 14 at 33-35; Fed. R. Civ. P. 7(b)(1)(B). Petitioner does not point to a single manner in which the term "terrorism" would be difficult to interpret or so open-ended that an ordinary person could not divine the term's meaning. Petitioner's failing on this front means he has not carried his burden and the Court should deny relief on Count Four as to the purported vagueness of "significant risk of terrorism."

Even if Petitioner had satisfied his burden to make an argument that "terrorism" as used in § 241.14(d)(1)(ii) is vague, such argument would fail. The meaning of "terrorism" is

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because he [redacted]. Petitioner's danger is posed by [redacted], not his words, and Respondent is detaining him only on the basis of the former. *See Arriaga v. Mukasey*, 521 F.3d 219, 223-24 (2d Cir. 2008). Second, Petitioner is not clear about what a First Amendment claim would even do for him. He states that "a more stringent vagueness test applies," without specifying what that is. Dkt. No. 14 at 35 n.16. To the contrary, the only door a First Amendment claim unlocks is the ability to challenge a law facially instead of merely as applied. *Arriaga*, 521 F.3d at 223. This brief assumes that Petitioner is making a facial challenge, so this point would be moot even if Petitioner's claim did implicate the First Amendment.

straightforward and common in this context: the systematic use of violence to intimidate, especially for political ends. *Black's Law Dictionary* 1484 (7th ed. 1999); *Merriam-Webster's Collegiate Dictionary* 1217 (10th ed. 1998) (era-specific); *see Arriaga*, 521 F.3d at 226 (in rejecting a vagueness challenge, accepting a "working definition" for the challenged phrase even though that definition did not appear verbatim in a statute). Since at least September 11, 2001, ordinary Americans have had a reasonable grasp of the meaning of "terrorism" consistent with that meaning. Indeed, the Second Circuit has found that the average person is knowledgeable of al Qaeda, which is but one particular practitioner of terrorism. *United States v. Farhane*, 634 F.3d 127, 140 (2d Cir. 2011). "Terrorism" is also like other nouns in the common understanding, such as "training," "personnel," "expert assistance and advice," *Farhane*, 634 F.3d at 140, "stalking," *Arriaga*, 521 F.3d at 226, and "bribery," *Perrin v. United States*, 444 U.S. 37, 42 (1979)—all of which courts have upheld against void-for-vagueness challenges. All of those terms, plus "terrorism," are much broader than the impermissibly vague term struck down in *Dimaya*: the "idealized ordinary case of the crime." *Dimaya*, 138 S. Ct. at 1213-14.

Finally, to the extent the Court may consider the specific conduct Petitioner was found to have committed[13]—essentially, conspiracy to provide material support for terrorism, and destroy a port with explosives—Petitioner absolutely should have known that his actions create a risk of terrorism. As someone convicted of providing material support to terrorists, Petitioner should know the meaning of that term. *See Copeland*, 893 F.3d at 118 ("As a seller of knives, Native Leather was responsible for ensuring that its merchandise was legal, and it possessed more

[13] Ordinarily, "under a long line of decisions that *Dimaya* did not disturb," a petitioner making a facial challenge must first demonstrate that the specific application of the law against him was invalid. *Copeland*, 893 F.3d at 113 n.3, 117. However, in "certain exceptional circumstances," this rule does not apply. *Id.* at 111 n.2. Because the Second Circuit has not defined what those circumstances are, *see id.*, for present purposes Respondent generally assumes without conceding that Petitioner is excused from first showing that § 241.14(d) was vague as applied to his own specific conduct.

resources and sophistication to make that judgment than someone who uses a knife in her trade."). Petitioner therefore had sufficient notice of what terrorism means. The Court should find that the meaning of "terrorism" is adequately clear for constitutional purposes.

"National Security." Next, Petitioner claims the term "national security" is vague because it "may cover a multitude of sins." Dkt. No. 14 at 34 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). But the Second Circuit has already held that the term "national security"—when defined broadly to mean "the national defense and foreign relations of the United States"—is not unconstitutionally vague. *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984), *aff'g* 571 F. Supp. 1422, 1426-27 (S.D.N.Y. 1983) ("The term 'national security' . . . convey[s] a reasonable degree of certainty to a defendant of what is required.").

The court in *Wilson* was interpreting the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980), *codified at* 18 U.S.C. app. 3, § 1. The Immigration and Nationality Act (in a non-detention context) uses a similar definition of "national security": "the national defense, foreign relations, or economic interests of the United States." 8 U.S.C. § 1189(d)(2). The added term "economic interests" in § 1189(d)(2) is no less capacious than the acceptably broad terms "national defense" and "foreign relations" in the Classified Information Procedures Act. In fact, even broader than § 1189(d)(2) is a regulation permitting the Secretary of State to revoke a U.S. passport upon determining that its holder's activities abroad are causing or may cause "serious damage to the national security," without further elaboration. *Agee*, 453 U.S. at 299-300 (citing what is now 22 C.F.R. § 51.60(c)(4)). The Supreme Court upheld that use of "national security" against an as-applied vagueness challenge. *Id.* at 309 n.61.

The meaning of "national security" in § 241.14(d)(1)(ii) could not conceivably be broader than it is in the Classified Information Procedures Act or the Department of State regulation at issue in *Wilson* and *Agee*, respectively. Section 241.14(d)(1)(ii) fits within those

cases' holdings. Binding precedent, therefore, squarely forecloses Petitioner's argument that "national security" is void for vagueness. *See also Golb*, 870 F.3d at 102 (upholding the abstract concept of "reputation" against a vagueness challenge); *Jordan v. De George*, 341 U.S. 223, 231 (1951) (upholding the abstract concept of "moral turpitude" against a vagueness challenge); *cf. United States v. Rybicki*, 354 F.3d 124, 153 (2d Cir. 2003) (en banc) ("Where the plain meaning of a statute thus serves adequate notice of the conduct proscribed, the propriety of its broad sweep is a matter for policy debate.").

Therefore, a person of ordinary intelligence should know the meanings of "terrorism" and "national security." *See Copeland*, 893 F.3d at 114.

2. The terms "terrorism" and "national security" are not susceptible to arbitrary or discriminatory enforcement

Alternatively, Petitioner must show that § 241.14(d) permits arbitrary or discriminatory enforcement. Section 241.14(d)(1)(ii), again, permits the detention of an alien whose "release presents a significant threat to the national security or a significant risk of terrorism." For this prong, Petitioner complains that ICE and the Secretary lack standards for "determining how much of a 'threat' or 'risk' one must pose to satisfy the criteria." Dkt. No. 14 at 34.

To succeed here, the challenger must show that the terms "significant risk" and "significant threat" are "so ill-defined that every fair-minded jurist would find that it allows prosecutors to arbitrarily determine whether or not individuals have committed" such conduct. *Golb*, 870 F.3d at 102. Phrased differently, here Petitioner must show that the standards in § 241.14(d)(1) reach "a substantial amount of innocent conduct," such "that it confers an impermissible degree of discretion on law enforcement authorities to determine who is subject to the law." *Arriaga*, 521 F.3d at 228. It is not enough for the challenger to claim (or even show) that the regulation is being inappropriately applied in some isolated instances. *Rybicki*, 354 F.3d

at 143-44 ("We doubt that such occasional prosecution in error is much evidence that a statute is too vague.").

Petitioner asserts, in conclusory fashion, that the terms "significant threat to" and "significant risk of" are so vague that the ICE Director and the Secretary have unfettered discretion to decide what level of risk of terrorism or threat to the national security qualifies an alien for § 241.14(d) detention. The Supreme Court has rejected this exact argument. In *Johnson v. United States*, the Court pointed out "that dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk.'" 135 S. Ct. 2551, 2561 (2015) ("[T]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree . . . ."). But the void-for-vagueness doctrine does not hold those provisions "in constitutional doubt"—"[n]ot at all." *Id.* To the contrary, the Due Process Clause tolerates "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.*; *see also United States v. Davis*, 588 U.S. ___, 2019 WL 2570623, at *6 (June 24, 2019) ("[T]here would be no vagueness problem with asking a jury to decide whether a defendant's 'real-world' conduct created a substantial risk of physical violence.").

The Court in *Johnson* and *Dimaya* found certain laws unconstitutionally vague not solely because they contained "imprecise terms like 'serious potential risk'" and "'substantial risk.'" *Dimaya*, 138 S. Ct. at 1214. The Supreme Court found those laws unconstitutional because they *combined* "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Id.* (quoting *Johnson*, 135 S. Ct. at 2558). The risk modifiers "alone would not have violated the void-for-vagueness doctrine." *Id.*

Here, § 241.14(d) permits the ICE Director and the Secretary of Homeland Security to detain an alien when they assess the threat level or the level of risk to be "significant." This is

indistinguishable from the risk levels at issue in *Johnson* and *Dimaya*, which those decisions held was independently acceptable. But unlike the laws struck down in those cases, the regulation here is perfectly clear about what the risk level is being applied to: the clear terms "terrorism" and "national security." *See supra* section III.D.1. Per the express terms of both *Johnson* and *Dimaya*, then, this case is clearly distinguishable from the laws struck down there, which applied the risk level to the vague "idealized ordinary case" of a particular offense. *Dimaya*, 138 S. Ct. at 1215-16. Section 241.14(d) does not pose a risk of arbitrary or discriminatory enforcement by ICE or the Secretary. Petitioner's attack on this ground must fail. The distinctive features of 8 C.F.R. § 241.14(d)(1) render it consistent with due process; it is not unconstitutionally vague. The Court should deny relief on Count Four.

E. PETITIONER'S CLAIM THAT HIS DETENTION VIOLATES HIS FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY IS WITHOUT MERIT

In Count Five, Petitioner claims that § 241.14(d) violates his Fifth Amendment right against double jeopardy. Putting aside the fact that he does not develop this argument, *see* Dkt. No. 14 at 22 n.9, Petitioner is mistaken. The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997). Immigration detention, it is well settled, is neither criminal nor punitive. *Zadvydas*, 533 U.S. at 690; *see, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (deportation has been "consistently classified as a civil rather than a criminal procedure"); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (because deportation is not criminal punishment, the procedural protections of criminal trial do not attach).

There can be no serious claim that the regulation, on its face, authorizes continued immigration detention for punitive purposes, not least because there is no requirement for an alien have been previously convicted of a crime, or even to have committed a crime, to be

eligible for detention under the regulation. Rather, the criteria for detention are squarely focused on the *threat* to national security or *risk* of terrorism the alien presents. Nor has Petitioner produced any evidence that *his* detention is meant as punishment, given the legitimate civil purposes of the regulation and the substantial evidence that he properly qualifies for detention under the regulatory criteria. While Petitioner's criminal history is relevant to evaluating his likely future dangerousness if released, *see Jayyousi*, 657 F.3d at 1117-18, the relevance of that history to the civil detention decision at issue here does not render his civil detention punitive. Finally, Petitioner's continuing immigration detention is not based solely on his prior conduct, but also on [redacted]. Ex. B at 2-4. Accordingly, the Court should deny relief on Count Five.

F. THE REGULATION DOES NOT VIOLATE PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAW

In Count Six, Plaintiff contends 8 C.F.R. § 241.14(d) violates his right to equal protection of the law because it "singles out a subclass of removable noncitizens for discriminatory treatment." Dkt. No. 14 at 36. Petitioner argues that, "[u]nlike citizens—or even removable noncitizens—this removable-but-unlikely-to-be-removed subclass is subjected to the indefinite detention provisions in § 241.14." *Id*.

Petitioner appears to take issue with two separate forms of disparate treatment: (1) aliens who pose national security or terrorism threats versus citizens who pose such threats, and (2) aliens who pose national security or terrorism threats versus aliens who do not pose such threats. Petitioner argues these purported classifications trigger heightened scrutiny. *Id*. Petitioner is wrong that heightened scrutiny is appropriate here, and his equal protection argument fails.

Where an equal protection challenge is made to an immigration law, rational basis review applies. *See, e.g.*, *Diaz,* 426 U.S. at 83; *United States v. Lue*, 134 F.3d 79, 86 (2d Cir. 1998).

Rational basis review applies even when the federal government distinguishes on the basis of alienage. *Romero v. INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Diaz*, 426 U.S. at 83 (drawing distinction between alienage classifications imposed by the federal government and those created by state and local governments). "[I]mmigration regulation differs fundamentally from [other legal contexts] because classifications on the basis of nationality are frequently unavoidable in immigration matters." *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008). "Given the importance to immigration law of, *inter alia*, national citizenship, passports, treaties, and relations between nations, the use of such classifications is commonplace and almost inevitable." *Id*.

There is no reason why the regulation at issue here should be judged under greater or heightened scrutiny than other laws distinguishing among groups of aliens. *See Demore v. Kim*, 538 U.S. 510, 527-28 (2003). "When the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least restrictive means to accomplish its goal." *Id*.; *Reno v. Flores*, 507 U.S. 292, 306 (1993). Thus, the regulation here is within the political branches' "broad power over immigration" and therefore permissible under the Constitution, even if such detention of a United States citizen would be impermissible under similar circumstances. *See Flores*, 507 U.S. at 305-06 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

Government action will withstand rational basis review unless it is "arbitrary and/or unreasonable, and not rationally related to a legitimate government interest." *Tanov v. INS*, 443 F.3d 195, 202 (2d Cir. 2006). Rational basis review does not require courts to identify the actual rationale for a distinction; moreover, a "sufficient reason need not be one actually considered." *Yuen Jin v. Mukasey*, 538 F.3d 143, 158 (2d Cir. 2008); *see Rojas-Reyes v. INS*, 235 F.3d 115, 122 (2d Cir. 2000) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived

reason for the challenged [law] actually motivated the legislature." (second alteration in original)). Instead, a law reviewed under this lens "is accorded a strong presumption of validity," and the court must uphold the law if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Jankowski-Burczyk v. INS*, 291 F.3d 172, 178 (2d Cir. 2002). This means that a law cannot be invalidated merely because it is overbroad or under-inclusive. *See, e.g., N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592-93 (1979) (ruling over-inclusiveness as acceptable under rational basis review, considering the circumstances of the case); *Romero*, 399 F.3d at 112 (rejecting the argument that a legislative act was unconstitutionally underbroad, noting the law's virtue of creating "extremely identifiable groups" (quoting *Pinho v. INS*, 249 F.3d 183, 190 (3d Cir. 2001))).

These principles explain why § 241.14(d) does not violate the equal protection guarantee of the Fifth Amendment. Specifically, public safety and national security are the bases for § 241.14(d). This is demonstrated by the text of § 241.14(d)(1), which permits the Executive Branch to detain only where there is a "significant" threat to national security or risk of terrorism. It is also demonstrated by the regulation's drafting history and historical context. After September 11, 2001, the Attorney General responded to *Zadvydas* with both public safety and national security concerns in promulgating § 214.14(d) (and Congress enacted a very similar provision, now codified at 8 U.S.C. § 1226a, as part of the USA PATRIOT Act). Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) (Interim Rule promulgating regulation codified at 8 C.F.R. § 241.14); *Thai*, 366 F.3d at 796 n.4 ("just months after *Zadvydas* was handed down, Congress passed legislation providing for the mandatory detention of suspected terrorists").

The regulation seeks to address a legitimate and serious governmental interest, *viz.* how to protect the country and the public from aliens who have been ordered removed from the

country—and therefore have no lawful right to remain in the United States—but who cannot be removed in the reasonably *foreseeable* future, and whose release from detention would pose a significant risk to national security or a significant threat of terrorism that cannot reasonably be avoided by conditions on release.

Each form of disparate treatment of which Petitioner complains is undergirded by a rational basis. Public safety and national security are rational bases sufficient to survive constitutional scrutiny, as the Supreme Court has found in *Berman v. Parker* and *Trump v. Hawaii*, respectively. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); *Hawaii*, 138 S. Ct. at 2420-21 (finding national security to be a conceivable permissible purpose under rational basis review). Under *Parker* and *Hawaii*, the Secretary has a wholly valid reason to treat aliens who have been ordered removed and who pose national security or terrorism threats differently than he treats aliens who do *not* pose such risks. *See Parker*, 348 U.S. at 32 (1954); *accord Hawaii*, 138 S. Ct. at 2420-21. Further, the law governing civil detention *requires* the government to narrowly distinguish the category of people potentially subject to extended civil detention in these circumstances. And *Flores* and *Rajah* establish that the government is free to treat alien national security threats (as determined by the regulation) differently from U.S. citizens who might pose the same threat.[14] *See Flores*, 507 U.S. at 305-06; *see also Rajah*, 544 F.3d at 435.

[14] At times, Petitioner casts the issue as § 241.14(d) discriminating against aliens as a whole. *See* Dkt. No. 14 at 37 (castigating the regulatory history for "failing to explain why a noncitizen would pose a greater security risk"). But by its terms, § 241.14(d) does *not* apply to all aliens or to mine-run removal cases. It necessarily applies only to those aliens whose release "presents a significant threat to the national security or a significant risk of terrorism." 8 C.F.R. § 241.14(d)(1)(ii).

Removable aliens who pose national security or terrorism threats, like Petitioner, are properly subject to detention under § 241.14(d). This distinction is based solely on the grave threat such aliens pose, which the Supreme Court and Second Circuit have upheld as a valid reason to treat these aliens differently than non-dangerous aliens or U.S. citizens. *See Diaz*, 426 U.S. at 79-80 (distinguishing between the different constitutional protections afforded citizens, aliens, and different classes of aliens); *see also Jankowski-Burczyk*, 291 F.3d at 178 (finding "little difficulty" upholding distinction between two classes of deportable aliens). There being no equal protection violation, the Court should deny relief Count Six.

G. THE COURT LACKS JURISDICTION TO ENTERTAIN PETITIONER'S CLAIM THAT HE DOES NOT PROPERLY FALL WITHIN THE AMBIT OF § 241.14(D), OR IN THE ALTERNATIVE, PETITIONER FAILS TO CARRY HIS BURDEN TO SHOW THAT THE GOVERNMENT'S FINDINGS WERE "WHOLLY UNSUPPORTED"

Finally, in Count Seven, Petitioner makes an as-applied challenge to § 241.41(d). Petitioner attacks the § 241.14(d) certification in this case, arguing that "the government lacks evidence against him to fulfill the three elements." Dkt. No. 14 at 38. This challenge fails, however, because the Court lacks jurisdiction to entertain it. Further, even if the Court did have jurisdiction, the evidence supports the ICE Director's discretionary determination.

1. The Court lacks jurisdiction to review the ICE Director's, and Secretary's, weighing of the evidence and discretionary determination to continue detention.

Notwithstanding "section 2241 of title 28, or any other habeas corpus provision," the Immigration and Nationality Act prohibits a court from reviewing "any . . . decision or action" the authority for which is "specified under this subchapter" to be in the "discretion" of the Secretary. 8 U.S.C. § 1252(a)(2)(B)(ii). "[R]ead naturally, the word 'any' has an expansive meaning." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted).

By referencing discretionary "decision[s] or action[s]," § 1252(a)(2)(B)(ii) prohibits challenges to the agency's "determination of 'what evidence is credible and the weight to be given that evidence.'" *Contreras-Salinas v. Holder*, 585 F.3d 710, 713-14 (2d Cir. 2009) (citing *Cho v. Gonzales*, 404 F.3d 96, 101 (1st Cir. 2005)). The statute also prohibits habeas claims that the agency decision "lacked adequate support in the record." *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001). Therefore, the agency's bottom-line factual conclusion—for example, a finding that the petitioner's claim was "lacking in credibility or outweighed by evidence suggesting petitioner's marriage was a sham"—is untouchable. *Id*.

The agency of course has a legal obligation to "consider[] all of petitioner's evidence." *Contreras-Salinas*, 585 F.3d at 714. And courts retain the authority to determine questions of law. *See id.* But what courts cannot do is to reweigh the facts to which the law is applied. *See id*.

The discretionary authority at issue here derives from 8 U.S.C. § 1231(a)(6), which is part of the same subchapter as § 1252(a)(2)(B). Section 1231(a)(6) gives the Secretary discretion over whether to detain those post-removal-order, post-removal-period aliens described in that subsection. 8 U.S.C. § 1231(a)(6) (Secretary "may" detain aliens beyond the removal period); *Zadvydas*, 533 U.S. at 699 (recognizing the discretionary aspect of the word "may" in § 1231(a)(6)). To discharge that discretion, the Attorney General promulgated the regulation at issue here. *See* 8 U.S.C. § 1103(a)(3) (permitting the adoption of regulations to "carry out [the] authority under the provisions [that include § 1231]").

That regulation, 8 C.F.R. § 241.14(d), is consistent with the Secretary's § 1231(a)(6) discretion in both of its detention-decision points. As an initial matter, an alien is subject to interim detention if the ICE Director determines the three criteria in § 241.14(d)(1) are met. 8 C.F.R. § 214.14(d)(2). The regulation does not bind or limit the Director's discretion in making those findings. Subsequently, the Secretary, after considering the record of proceedings and the

recommendations of the Directors of ICE and the FBI, separately makes the three findings in § 241.14(d)(1). *Id.* § 241.14(d)(6). This decision is also discretionary, as Petitioner concedes: "the regulation leaves it within the Secretary's sole discretion to make the ultimate determination" regarding continued detention. Dkt. No. 14 at 9. His view is correct, as § 241.14(d) states that the Secretary "may" certify the alien for continued detention. 8 C.F.R. § 241.14(d)(6). Consequently, 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of the government's discretionary decisions.

Nor can Petitioner circumvent this straightforward application of § 1252(a)(2)(B)(ii) and § 241.14(d) with his suggestions that his case is particularly sympathetic or that he is particularly inculpable. *See* Dkt. No. 14 at 38-39. His suggestion that the Court should review the judgments undergirding the Secretary's detention decision cannot be squared with well-established principles of equity: "courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *INS v. Pangilinan*, 486 U.S. 875, 883 (1988). This means that a court of equity, such as a habeas court, is bound by statutory constraints no less than a law court. In particular, equity does not permit a court to override such a clear statutory mandate. *See Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 863 (2d Cir. 1985) ("The plain mandate of the law cannot be set aside because of considerations which may appeal to referee or judge as falling within general principles of equity jurisprudence."). That reasoning forecloses Petitioner's appeal to equity here. The Court lacks any discretion to avoid the statutory bar to judicial review in § 1252(a)(2)(B)(ii).

The § 1252 case of *Kucana v. Holder* does not change the result here. *Kucana* held that § 1252(a)(2)(B) did not apply to allegations that an agency violated a discretionary regulation. *Kucana* held that an agency cannot render its authority discretionary (and therefore unreviewable) solely through regulations, because § 1252(a)(2)(B) depends on statutory

provisions—not agency interpretations—to define its scope. 558 U.S. 233, 245-47 (2010). In *Kucana*, the agency's "discretionary authority [was specified] only in the Attorney General's regulation." *Id*. at 243 (emphasis added). Fatally for the government in that case, "the statute d[id] not codify that prescription." *Id*. at 242-43.

Here, in contrast, a statute *is* the source of the government's discretionary authority: 8 U.S.C. § 1231(a)(6). Thus, *Kucana* does not permit the Court to circumvent § 1252 to entertain Count Seven. The fact that the Secretary has hemmed in his statutory discretion via a regulation—i.e., by erecting substantive regulatory hurdles for himself in § 241.14(d)—does not change the fact that the government derives its discretion from statute, a key fact missing from *Kucana*. The Court should deny relief on Count Seven.

2. Even if the Court were to review the Secretary's decision, it should uphold that decision as adequately supported by the evidence of record.

Even if the Court were to entertain Petitioner's as-applied challenge to the regulation, it should deny relief on Count Seven on the merits. During the time provided by the Court's January 2, 2019 Order, the ICE Deputy Director initiated the procedures required to assemble a record for the ICE Director to consider in deciding whether to seek the Secretary's certification for continued detention under the regulation. The ICE Deputy Director's decision to initiate the process took into account Petitioner's prior conduct and the FBI Director's recommendation, which formed the basis for his conclusion that Petitioner was likely to engage in activity that endangers the national security, that his release in the United States presents a significant threat to national security and a significant risk of terrorism, and that no conditions of release can reasonably be expected to avoid that threat or risk. *See* 8 C.F.R. § 241.14(d)(4). Upon making this determination, ICE continued to detain Petitioner pending a final decision by the Secretary. *See id*. § 241.14(d)(2). On May 24, 2019, having reviewed all the evidence of record, including

the material submitted by Petitioner, the ICE Director forwarded the administrative record to the Secretary, recommending that the Secretary certify Petitioner's continued detention under the regulation. The evidence of record demonstrates that the ICE Director's determination was reasonable.

Petitioner essentially asks the Court to review the facts undergirding the government's detention decision *de novo*. *See* Dkt. No. 14 at 38-40. That is not the proper standard. The standard of review of an administrative immigration decision in a habeas case is "generally more limited than on direct review." *Wang v. Ashcroft*, 320 F.3d 130, 143 (2d Cir. 2003). Unlike a purely legal challenge (as Petitioner makes in Counts One through Six), "review of the merits of [the alien's] petition would involve . . . reassessment of the evidence." *Sol*, 274 F.3d at 651. "This sort of fact-intensive review is vastly different from what the habeas statute provides: review for statutory or constitutional errors." *Id.*

Assuming § 1252(a)(2)(B)(ii) does not bar judicial review, a habeas court reviewing an administrative immigration decision must accept the agency's facts unless, at most, "some essential finding of fact is unsupported by the evidence." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) ("[I]f the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of habeas corpus."). Further, Petitioner, not the government, bears the burden of showing that it is more likely than not that the government's factual determinations fail to meet the *Bilokumsky* standard. *See Skaftouros v. United States*, 667 F.3d 144, 158-59 (2d Cir. 2011).

In reviewing the evidence to determine whether Petitioner has met his burden, the Court should bear in mind the unique context in which this case arises. As chronicled *supra* pp. 25-26, the Supreme Court has repeatedly and recently reminded that "the Government's interest in combating terrorism is an urgent objective of the highest order." *Humanitarian Law Project*, 561

U.S. at 28, 35. That deference should extend to § 241.14(d)(1) determinations. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967, 56973-74 (Nov. 14, 2001) (in the preamble accompanying § 241.14(d), explaining that "[i]n these circumstances, it is the [Secretary] who is best situated . . . to weigh those interests against the national security and public safety concerns presented in the case [and] to assess the nature and quality of the information that triggered those concerns").

As a regulation crafted to govern continued detention on account of terrorism or other national security concerns, detention under 8 C.F.R. § 241.14(d) is particularly justified. The *Zadvydas* Court, in analyzing post-removal-period immigration detention, left open the possibility of extended detention in cases involving "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." *Zadvydas*, 533 U.S. at 696. The regulation promulgated in response to *Zadvydas*, § 241.14(d), applies to those aliens whose "release presents a significant threat to the national security or a significant risk of terrorism." 8 C.F.R. § 241.14(d)(1)(ii).

Against that background, Petitioner has failed to carry his burden to show it is more likely than not that the essential facts found by the ICE Director, and submitted to the Secretary for his consideration as he evaluates the recommendation for continued detention, are wholly unsupported by the evidence. *See Bilokumsky*, 263 U.S. at 153-54; *Skaftouros*, 667 F.3d at 158-59. In fact, faced with this evidence, Petitioner submitted no new evidence of his own to ICE for consideration in the § 241.14(d) process. Rather, in protest, Petitioner's attorney informed ICE that Petitioner declined to be interviewed and to offer his own account of the threat he poses. He thus "made no effort" to affirmatively "rebut any portion" of the administrative record. *Goncalves-Rosa v. Shaughnessy*, 151 F. Supp. 906, 910 (S.D.N.Y. 1957). Having forgone that

opportunity, Petitioner cannot now cast aspersions on the government's evidence. Essentially, Petitioner "has chosen to remain mute rather than attempt to sustain []his burden." *Id*. at 911.

His claim fails even if the Court were to consider the untimely arguments he now presents in this Court. First, the ICE Director fairly concluded that Petitioner has engaged in an activity that endangers the national security. *See* 8 C.F.R. 241.14(d)(1)(i). Petitioner 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. *Hassoun*, 476 F.3d at 1183. The basis for this conviction, as both the ICE Director and the FBI Director found, was Hassoun's recruiting, fundraising, and otherwise materially supporting terrorist groups overseas in three continents over a seven-year period. *Jayyousi*, 657 F.3d at 1092-1101; Tab B to Att. 1 to Ex. A. at ICE000010. In so doing, he became "one of the primary radicalizing influences in south Florida during that time." Tab B to Att. 1 to Ex. A. at ICE000010. He was sentenced to 188 months of imprisonment, and is now on a 20-year period of supervised release. Tab D to Att. 1 to Ex. A at ICE000031-37. Further, his conviction qualifies under the alternative prong of § 241.14(d)(1)(i): Petitioner engaged in terrorist activity as described in 8 U.S.C. § 1182(a)(3)(B)(i)(I).

In response, Petitioner points to his criminal sentencing hearing and the judge's comments that he did not personally maim, kill, or kidnap anyone, and that he had no victims in the United States. Dkt. No. 14 at 39 (citing Sentencing Tr., *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008)). But those comments are simply an alternative conclusion drawn from the facts, and in any event, do not completely answer the question of whether Petitioner engaged in activity that endangered the national security. In the Second Circuit—as other courts have consistently held—"'endangerment' means a threatened or potential harm and does not

require proof of actual harm." *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2d Cir. 2009). To "endanger[]" someone is simply to expose them to peril or harm, or to create a dangerous situation. *Black's Law Dictionary* 547 (7th ed. 1999); *Merriam-Webster's Collegiate Dictionary* 381 (10th ed. 1998) (era-specific).

Here, Petitioner was convicted, *inter alia*, of conspiring to murder, main, or kidnap a U.S. person in a foreign country. To be found guilty of conspiracy, he necessarily knew the unlawful purpose of the plan and intended the object of the conspiracy. *See United States v. Duenas*, 891 F.3d 1330, 1335 (11th Cir. 2018) (jurisdiction of Petitioner's conviction). His intent thus constitutes "threatened or potential harm"—i.e., endangerment. *See Simsbury-Avon Pres. Club*, 575 F.3d at 211. The fact that Petitioner was arrested and convicted before he himself could murder, maim, or kidnap someone—as the sentencing judge seized on—is therefore irrelevant to whether he nonetheless "endanger[ed]" the national security. Because the sentencing judge's comments are inapposite, and were made over ten years and prior to Petitioner's more recent conduct while in immigration detention, they do not contradict or undermine the ICE Director's findings, much less establish that the findings are wholly unsupported. *See Bilokumsky*, 263 U.S. at 153-54. The Court should defer to these findings. *See Zadvydas*, 533 U.S. at 696.

Second, nothing in the record invalidates the ICE Director's finding that Petitioner's "release presents a significant threat to the national security or a significant risk of terrorism." *See* 8 C.F.R. § 241.14(d)(1)(ii). Since entering ICE custody in October 2017, Petitioner has [redacted]. Tab B of Att. 1 to Ex. A (at ICE000011-13). [redacted]. *Id.* [redacted]. *Id.* He refuses to admit his past criminal activity of which he was convicted, suggesting he could continue such activity in the future. *Id.* He refuses to cooperate with law

enforcement in their investigation, and refused to participate in the § 241.14(d) process whereby he could submit contrary evidence and be interviewed. *Id*.

Further, the fact that Petitioner was convicted of serious national security crimes also suggests his release presents a significant threat to the national security or a significant risk of terrorism. As the Eleventh Circuit noted in *Jayyousi* (the appeal in Petitioner's criminal case), "terrorists, even those with no prior criminal behavior, are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." 657 F.3d at 1117 (cleaned up) (citing *Meskini*, 319 F.3d at 92).

In response, Petitioner simply discounts the source of the government's new allegations, because [redacted]. Dkt. No. 14 at 39. Without any citation to legal authority, Petitioner asserts such evidence is "insufficient to justify an assessment" that Petitioner's release poses a significant threat or risk. *Id*. Petitioner wholly fails to meet his burden here. As the Second Circuit has said in the summary judgment context, "[b]road, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact." *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005); *see also Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (requiring a plaintiff opposing summary judgment to still "identify affirmative evidence"). Or, put more bluntly: "You can't beat something with nothing." *Cripe v. Henkel Corp.*, 858 F.3d 1110, 1113 (7th Cir. 2017).

That is precisely what Petitioner is trying to do here. His categorical attack on [redacted] is not enough to demonstrate that the government's threat assessment is flawed. Again, the government should be afforded "heightened deference" in evaluating the future threat Petitioner's release poses. *See Zadvydas*, 533 U.S. at 696. Petitioner's complaint about [redacted] wholly ignores the other

evidence considered and described above, as well as the evidence that he [redacted].

Third, the government found that "[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism." *See* 8 C.F.R. § 241.14(d)(1)(iii). The FBI Director relied on the "inherent limitations of lawfully available investigate techniques" and on "resource requirements," given Petitioner's expected ability to travel within the United States upon release. Once again, this decision deserves deference. *See Humanitarian Law Project*, 561 U.S. at 13; *supra* pp. 25-26.

In response, Petitioner offers the fact that he is 57 years old and "suffers from multiple chronic illnesses." Dkt. No. 14 at 39. The fact that he is in his 50s is, by itself, meaningless. As for his alleged impairments, again, Petitioner refused to attend an interview and thus deprived the government of an opportunity to inquire, and himself of an opportunity to show, whether these impairments "can reasonably be expected" to mitigate the risk he poses. Thus, he can hardly say that the facts that the government had before it in assessing possible conditions of release were "wholly unsupported."

Petitioner then argues that upon release, he could be subject to "stringent conditions of supervision including, but not limited to, monitoring his communications, movements, and financial transactions." Dkt. No. 14 at 39. But the Department of Homeland Security's authority is limited to such mechanisms as monitoring the individual's physical location, i.e., through electronic monitoring, limiting his or her travel, and including a condition that the respondent refrain from committing any crimes. *See* 8 U.S.C. § 1231(a)(3) ("the alien, pending removal, shall be subject to supervision under the regulations prescribed by the [Secretary]"); 8 C.F.R § 241.5 (order of supervision requirements may include periodic reporting, advance approval for

travel, compliance with travel document efforts, and notice of change of address). Should the court order Petitioner's release, the government would impose reasonable conditions of release to the best of its abilities, but these conditions are not "reasonabl[e]" guards against Petitioner's threat to the national security and a risk of terrorism. After all, it was only because Petitioner was in immigration detention and sufficiently alarmed some other detainees that the government was able to ascertain that he was planning a terrorist attack and that he was trying to recruit others to join his terrorist organizations.

Petitioner has failed to carry his burden of demonstrating that the ICE Director/Secretary improperly found that no conditions of release would reasonably avoid Petitioner's threat to national security. Because Petitioner has failed to carry his burden on any part of the government's detention assessment, the Court should deny relief on Count Seven

IV. CONCLUSION

For the foregoing reasons, Petitioner's detention under 8 C.F.R. § 241.14(d) is lawful and constitutional, and the regulation has been properly applied to the facts in Petitioner's case. Consequently, this Court should deny Petitioner any relief on the Amended Petition.

Date: June 28, 2019

Respectfully submitted,

JAMES P. KENNEDY, JR
United States Attorney
Western District of New York

/s/ *Daniel B. Moar*
DANIEL B. MOAR
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 843-5833
Email: daniel.moar@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

TIMOTHY M. BELSAN
Chief, National Security & Affirmative Litigation Unit
District Court Section

/s/ *Edward S. White*

EDWARD S. WHITE (N.Y. Bar Reg. # 2088979)
Senior Counsel for National Security
STEVEN A. PLATT
Counsel for National Security
National Security & Affirmative Litigation Unit
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Bo 868, Ben Franklin Station
Washington, D.C. 20044-0868
Tel: (202) 616-9131
Email: edward.s.white@usdoj.gov
Email: steven.a.platt@usdoj.gov

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically filed the foregoing **RESPONDENT'S MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO THE AMENDED PETITION FOR WRIT OF HABEAS CORPUS**, with the Clerk of the District Court using its CM/ECF system, which will provide a copy to Counsel for Petitioner.

/s/ *Edward S. White*
EDWARD S. WHITE
Senior Counsel for National Security
National Security & Affirmative Litigation Unit
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice