UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

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

Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION TO STAY

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I. INTRODUCTION

This Court should stay pending appeal the execution of its June 22, 2020 oral order ("Order") and prospective judgment ("Judgment") granting Petitioner's amended petition for a writ of habeas corpus. This Court's judgment rests on rulings that are likely to be reversed on appeal, and considerations of harm and the equities support a stay of Petitioner's release while Respondent seeks expedited appellate review of this Court's judgment. If the Court denies this motion, Respondent respectfully asks the Court to enter a temporary administrative stay of the judgment pending appellate resolution of Respondent's request for an emergency stay under Federal Rule of Appellate Procedure 8(a)(2).

A stay pending appeal is warranted for two core reasons.

First, Respondent is likely to prevail on appeal on at least one issue that would require rejection of this Court's prospective judgment. Respondent is detaining Petitioner under two similar but independent detention authorities: a regulation, 8 C.F.R. § 241.14(d); and a statute, 8 U.S.C. § 1226a. The Court has invalidated Petitioner's detention under the regulation, ruling that it is *ultra vires* and unconstitutionally fails to afford due process. But the regulation, 8 C.F.R. § 241.14(d), plainly permits preventive detention, and the Supreme Court has recognized that such detention may be warranted for particularly dangerous terrorists. The regulation here fits within those bounds, permitting continued detention where an alien "will likely engage in any other activity that endangers the national security" and the alien's "release presents a significant threat to the national security or a significant risk of terrorism." 8 C.F.R. § 241.14(d)(1). The government has made those showings here. And the regulation, which can apply only to certain national security threats, affords constitutionally appropriate process: the government must assemble a record, offer the alien the chance to submit evidence and sit for an interview, solicit the recommendations of two agency heads, and have a Cabinet Secretary

conclude that no conditions of release can reasonably be expected to avoid the threat or risk of the alien's release. These critical points justify Petitioner's detention and warrant a stay.

The Court has also ruled that Respondent has not satisfied the factual predicate needed to justify Petitioner's detention under 8 U.S.C. § 1226a, a decision reached after issuing several legal rulings ahead of the scheduled evidentiary hearing. Those rulings are flawed and depart from controlling precedent. In particular, the Court's decision to place the burden of proof on the government and to adopt a clear and convincing evidence standard were unsound, in light of the usual rules of habeas and the D.C. Circuit's Guantanamo burden-shifting rules. The Court's rulings regarding the statute do not account for the unusually strong deference that the Executive is owed in this context, departs from the traditional legal burden and standard that applies in the habeas context here, and excludes evidence that is reliable in the circumstances.

Second, considerations of irreparable harm strongly favor a stay. The government has concluded that Petitioner's release would threaten the national security of the United States or the safety of the community. *See* June 5, 2020 Federal Bureau of Investigation ("FBI") Memorandum (Dkt. No 223 (under seal)). Petitioner's release threatens public safety and places serious burdens on the Department of Homeland Security ("DHS"), FBI, and U.S. Immigration and Customs Enforcement ("ICE"), and other law enforcement agencies, which are tasked with monitoring Petitioner and ensuring he cannot act on his threats to the national security. Respondent will be irreparably harmed and the public interest will not be met if Petitioner—convicted for conspiracy to murder, kidnap, and maim persons in a foreign country, in violation of 18 U.S.C. § 956(a)(1); conspiracy to provide material support for terrorism, in violation of 18 U.S.C. § 371; and providing material support to terrorists, in violation of 18 U.S.C.

§ 2339A(a)—is released before the courts of appeals have resolved the important issues presented by this case.

Respondent has strong arguments that at least one of this Court's central rulings will be reversed on appeal. A Cabinet Secretary, the ICE Director, and the FBI Director have each found Petitioner to threaten the safety of the Nation or the community—an assessment squarely within their core areas of authority. This Court should grant a stay pending appeal.

II. BACKGROUND

Title 8 U.S.C. § 1231 authorizes the detention of an alien who "is ordered removed." 8 U.S.C. § 1231(a)(1)(A). Section 1231(a)(2) provides that the government "shall" detain the alien during an initial 90-day "removal period." *Id.* § 1231(a)(2). And § 1231(a)(6) provides that the alien "may be detained beyond the removal period" if the alien falls within a certain category, including aliens whom the Secretary of Homeland Security determines to be a risk to the community. *Id.* § 1231(a)(6). Consistent with those authorities, a regulation, 8 C.F.R. § 241.14(d), permits the detention of an alien if, among other conditions, the alien "will likely engage in any other activity that endangers the national security" and the alien's "release presents a significant threat to the national security or a significant risk of terrorism." 8 C.F.R. § 241.14(d)(1).

A separate statute, 8 U.S.C. § 1226a, provides independent detention authority. That statute authorizes the Secretary to detain any alien whom the Secretary certifies under § 1226a(a)(3)[1]. 8 U.S.C. § 1226a(a)(1). Section 1226a(a)(6) provides that "[a]n alien detained solely under [§ 1226a(a)(1)] who has not been removed under section 1231(a)(1)(A) of this title, and whose removal is unlikely in the reasonably foreseeable future, may be detained for

[1] The Court previously found no dispute that the factual predicate of Section 1226a(a)(3) is met. Order of Jan. 24, 2020 at 5 (Dkt. No. 55).

additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6).

In December 2019, the Court issued an order concluding that (1) Petitioner's continued detention is not lawfully authorized by 8 C.F.R. § 241.14(d) and (2) an evidentiary hearing would be necessary regarding whether his continued detention is lawfully authorized by 8 U.S.C. § 1226a(a)(6). Order of Dec. 13, 2019, at 1-2 (Dkt. No. 55). On the regulation, the Court held that Section 241.14(d) "is inconsistent with the Supreme Court's construction of" 8 U.S.C. § 1231(a)(6), the federal statute authorizing preventative detention of certain inadmissible aliens. *Id.* at 13. Regarding the statute, the Court rejected Respondent's contention that the administrative record, under a "properly deferential standard of review," demonstrated the lawfulness of Petitioner's detention. *Id.* at 32. Rather, the Court ruled that "the current record"—which included the Acting Secretary of Homeland Security's certification that Hassoun must be detained—is "insufficient" and ordered an evidentiary hearing. *Id.* at 27.

In January 2020, the Court issued an order addressing the parameters of the evidentiary hearing. Order of Jan. 24, 2020 (Dkt. No. 75). The Court clarified that the hearing would be limited to "whether the factual basis for continued potentially indefinite detention under § 1226a(a)(6) is satisfied—that is, whether [Hassoun's] release would threaten the national security of the United States or the safety of the community or any person." *Id.* at 5. On that issue, the Court rejected the government's contention that Hassoun should bear the burden of proving by a preponderance of the evidence that his release would not threaten national security or safety. Rather, the Court held that the government should bear the burden of proving by clear and convincing evidence that Petitioner's release would threaten national security or safety. *Id.* at 5-12. The Court also rejected the government's contention that, "[r]egardless of the burden

and the standard of proof, the Court should grant broad deference to the factual conclusions drawn by the Acting Secretary." *Id.* at 12 (citation omitted). The Court thought such deference inappropriate because the administrative record in Petitioner's case had not been developed after an adversarial proceeding. *Id.* at 13. The Court also concluded that such deference is inconsistent with § 1226a(b)(1)'s authorization of judicial review of the "merits." *Id.*

In February 2020, six months after the Acting Secretary's initial certification of Petitioner's detention, the Acting Secretary re-certified Hassoun's continued detention under both § 241.14(d) and § 1226a(a)(6). Dkt. No. 226-1. On June 18, 2020, the Court denied the government's request to rely on out-of-court (i.e., hearsay) statements from three witnesses—Ahmed Abdelraouf, Hector Rivas Merino, and Abbas Raza. Order of June 18, 2020 at 41 (Dkt. No. 255). The Court concluded that it would not "be unduly burdensome to present Abdelraouf's testimony by nonhearsay means," *id.* at 28, and that Rivas Merino's and Raza's statements were "insufficiently reliable to be given probative weight," *id.* at 29; *see id.* at 31. Later on June 18, 2020, the government moved to cancel the evidentiary hearing, which had been scheduled to begin on June 24. Dkt. No. 226. The government maintained that "under the law, [the government] has met [its] burden of justifying Petitioner's continued detention under [the relevant law] by establishing that Petitioner's release will threaten the national security of the United States and the safety of the community." But that in light of "th[e] Court's prior rulings," which the Government contests, the Government has not been left sufficient room to "meet the burden and standard of proof that th[e] Court has held to apply in this case" in tension with the relevant statute's terms and structure. *Id.* at 3. The government accordingly asked the Court to "resolve this case without a hearing and issue final judgment." *Id.* at 1.

On June 22, the Court stated during a teleconference that it would cancel the evidentiary hearing, grant Petitioner's habeas petition, issue a final judgment, and ordered the parties to submit a report on agreed upon conditions of release. The Court stated that if the government wishes to seek a stay of Petitioner's release, the government must file a stay motion by 5 pm today. Order of June 22, 2020 (Dkt. No. 237).

III. LEGAL STANDARD

A district court "has broad discretion to stay proceedings" in its own court. *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). When determining whether to stay a habeas grant pending appeal, the Court should consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the stay applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *accord Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). When the government is a party, the latter two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

IV. ARGUMENT

Here, all four stay factors favor a stay pending resolution of Respondent's appeal from this Court's final judgment granting Petitioner's habeas petition and directing his release.

A. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEALS

The United States presents a substantial case for appeal on the merits. Habeas release may be stayed when the Court determines that the government "can [at least] demonstrate a substantial case on the merits" of an appeal. *Hilton*, 481 U.S. at 778. To satisfy this first *Hilton* factor, "the moving party need not persuade the court that it is likely to be reversed on appeal." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). Rather, "the

movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Id.* Thus, the Court must err on the side of a stay if the issues are "novel" or "admittedly difficult legal question[s]." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). In the related "context of a stay of removal of an alien pending appeal of an adverse habeas decision," the standard of "substantial case on the merits" means "less than a likelihood of success," or "something less than 50 percent." *Mohammed*, 309 F.3d at 102; *see also Wash. Metro.*, 559 F.2d at 843-44 (rejecting "a wooden 'probability' requirement" in favor of "an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors").

Respondent has a strong chance of prevailing on its challenge to at least four of this Court's rulings, any of which would require reversal of this Court's final judgment: (1) the Court's conclusion that 8 C.F.R. § 241.14(d) is not a permissible interpretation of 8 U.S.C. § 1231(a)(6) and so does not authorize Petitioner's continued detention; (2) the Court's placement of the burden on the government to prove by clear and convincing evidence that Petitioner's release "will threaten the national security of the United States or the safety of the community or any person" under 8 U.S.C. § 1226a(a)(6); (3) the Court's declining to give deference to the Acting Secretary of Homeland Security's findings under § 1226a(a)(6) and in ordering an evidentiary hearing to go beyond the administrative record; and (4) the Court's ruling precluding the government from relying on out-of-court statements by various witnesses regarding whether Petitioner's release would threaten the national security or the safety of the community.

1. Respondent Has a Substantial Case for Continued Detention Under the Regulation.

Respondent has a substantial case on the merits regarding the validity of the regulation, 8 C.F.R. § 241.14(d). The Constitution permits detention of especially dangerous terrorists—the sole target of § 241.14(d). That regulation 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 alien is also able to present legal and constitutional challenges in federal district court. The Supreme Court has contemplated special procedures for terrorists, such as what the Executive promulgated in § 241.14(d), by repeatedly exempting such cases from its limitations on post-removal order detention. Under this procedure, the Secretary of Homeland Security and the ICE Director may detain an alien when they assess the threat level or the level of risk to be "significant." That is what the Acting Secretary and ICE Acting Director did here, and Petitioner's detention under the regulation is lawful. Respondent has a substantial case on the merits that 8 C.F.R. § 241.14(d) authorizes his continued detention.

First, the regulation plainly authorizes Petitioner's detention. The regulation provides for the detention of aliens: (1) who qualify under certain terrorism-related inadmissibility provisions or "has engaged or will likely engage in any other activity that endangers the national security;" (2) whose "release presents a significant threat to the national security or a significant risk of terrorism;" and (3) for whom "no conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be." 8 C.F.R. § 241.14(d)(1)(i)-(iii). Each element is satisfied. On the first element, this Court has already determined that Petitioner's conviction was for an act described by 8 U.S.C. § 1182(a)(3)(B), which sets forth the Immigration and Nationality Act's terrorism-related inadmissibility

activities. Order of Jan. 24, 2020 at 4-5. Petitioner was convicted on charges of "(1) conspiracy to murder, kidnap and maim persons in a foreign country (18 U.S.C. § 956(a)(1)); (2) conspiracy to provide material support for terrorism (18 U.S.C. § 371); and (3) providing material support to terrorists (18 U.S.C. § 2339A(a))." Order of Dec. 13, 2019 at 4. On the remaining elements, the FBI, based on information currently available to it, has concluded "the release of [Petitioner] poses a significant threat to national security and significant risk of terrorism that cannot be mitigated or avoided by conditions of release." June 5, 2020 FBI Memo. at 4. This establishes the remaining two elements of the regulation providing for Petitioner's continued detention.

The regulation effectuates executive branch authority granted by Congress in 8 U.S.C. § 1231(a)(6) and is consistent with Supreme Court precedent. Congress in 8 U.S.C. § 1231(a)(6) gave the Secretary discretion over whether to detain 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 v. Davis*, 533 U.S. 679, 699 (2001) (recognizing the discretionary aspect of the word "may" in § 1231(a)(6)). To deploy that discretion, the Executive Branch 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 of this chapter"—which includes § 1231). That regulation, 8 C.F.R. § 241.14(d), is well within the scope of the Secretary's § 1231(a)(6) discretion in all respects.

Indeed, the Supreme Court has interpreted § 1231(a)(6) to permit special rules when national security risks are at issue. *Zadvydas v. Davis* supports the view that the regulation is consistent with § 1231(a)(6). The Supreme Court in *Zadvydas* said that once removal was no longer reasonably foreseeable in the typical case, detention would no longer bear a reasonable relationship to preventing flight. *Id.* The Supreme Court emphasized, however, that it was not

considering "*terrorism* or other special circumstances *where special arguments might be made for forms of preventive detention* and for heightened deference to the judgments of the political branches with respect to matters of national security." *Id*. at 696 (emphases added). The Court further underscored that "the statute before us applies *not only to terrorists* and criminals, but also to ordinary visa violators." *Id*. (emphasis added). Thus, *Zadvydas* allowed for potential civil detention of a certain narrow set of persons if the danger their release poses is of a particularly serious nature—like the release of the Petitioner here, an alien who has been convicted of serious offenses related to the nation's security, including material support for terrorism and terrorists. In response to *Zadvydas*, the Attorney General used his authority under 8 U.S.C. §§ 1103 and 1231 (2000) to issue the regulations now codified at 8 C.F.R. §§ 241.13 and 241.14. 66 Fed. Reg. 56967 (Nov. 14, 2001).

As relevant here, the Attorney General narrowed post-removal-period detention where removal is no longer reasonably foreseeable to allow precisely the type of permissible extended detention that the Supreme Court had contemplated in its decision: prolonged detention for "a small segment of particularly dangerous individuals"—such as "suspected terrorists." *Zadvydas*, 533 U.S at 691. The regulation provides for the detention of an alien: (1) who has qualified under certain terrorism-related inadmissibility provisions or "has engaged or will likely engage in any other activity that endangers the national security;" (2) whose "release presents a significant threat to the national security or a significant risk of terrorism;" and (3) for whom "no conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism, as the case may be." 8 C.F.R. § 241.14(d)(1)(i)-(iii). That regulation thus addresses situations "where the risk to the public is particularly strong, and where no conditions of release can avoid danger to the public." 66 Fed. Reg. at 56972. 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, through its unusual and stringent procedures. *Id.*

It is true that in *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court stated that, concerning 8 U.S.C. § 1231(a)(6), it was "not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 380; Order of Dec. 13, 2019 at 17. But *Clark* does not show that the regulation is unlawful or show that the *Zadvydas* national-security carve out no longer exists. *Zadvydas* and *Clark* dealt with the first two categories of aliens that § 1231(a)(6) says can be detained past the initial 90-day removal period, which turn on the ground on which the alien was ordered removed. This case, in contrast, involves the third category in § 1231(a)(6), which turns on the alien's future conduct—a "danger to the community." Further, the basic statutory holding in *Zadvydas* was that § 1231(a)(6) should be construed to contain an implicit limitation that an alien can be detained only for a "reasonable" time, which the Court held to be presumptively six months for the permanent resident aliens in that case. *Zadvydas*, 533 U.S. at 701. But what is "reasonable" turns on the circumstances, and therefore *Zadvydas*'s six month rule does not necessarily govern in cases involving community-danger aliens like Petitioner. Neither *Zadvydas* nor *Clark* thus prohibits the Secretary, under regulations promulgated to constrain the discretion to detain in accordance with the principles enunciated by the Supreme Court, from continuing 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.

Therefore, 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 accordance with* Supreme Court guidance on the use of post-removal-period detention for all categories of covered aliens. "Given the plenary authority of the political branches in the field of immigration, the judiciary must be particularly careful not to cut off the Attorney General's earnest effort to fulfill the function entrusted to him by Congress within constitutional limits." *Thai v. Ashcroft*, 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (citation omitted). Consequently, the regulation is neither *ultra vires* nor contrary to Supreme Court precedents, and Respondent respectfully suggests that he has a "substantial case" on appeal against that ruling.

Second, the regulation is constitutional. The regulation, again, authorizes the continued detention of aliens who are significant threats, after ICE gives notice and a factual description of the basis for detention, after the alien has an opportunity to respond, and after two agency heads weigh in and a Cabinet Secretary approves the detention. 8 C.F.R. § 241.14(d). The government has compelling arguments that the regulation does not raise constitutional due-process concerns. The regulation provides ample process, as shown by considering the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Even assuming that the first *Mathews* factor, Petitioner's interest in avoiding the possible indefinite curtailment of his liberty, favors Petitioner, the second and third factors weigh strongly in favor of the government. The second *Mathews* factor, the risk of an erroneous deprivation of Petitioner's liberty, is minimized here. The process provided to

Petitioner under the regulation and the statute satisfies the Due Process Clause. Those authorities offer Petitioner sufficient safeguards, including:

- Before the Secretary certifies an alien for continued detention on account of security or terrorism concerns, ICE must notify the alien that it intends to continue detention under 8 C.F.R. § 241.14(d), describe 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 behalf. *Id.* § 241.14(d)(2)(i)-(ii).
- Where the legal basis for removal is not a statutory national-security ground, as here, an immigration officer must conduct a sworn interview of the alien, as was offered here, and, if requested, allow for an interpreter and the presence of the alien's attorney. *Id.* § 241.14(d)(3)(i)-(ii).
- ICE makes the record available to the Secretary of Homeland Security for him or her to review. *Id.* § 241.14(d)(5), (6).
- Before the Secretary makes a final detention decision, he has a broad mandate to offer Petitioner additional procedures as needed: 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).[2]

[2] Notably, Petitioner did not ask that the Secretary provide any additional procedures. Instead, Petitioner's counsel filed a letter objecting to the process as a whole and declining to participate even in the process he was offered. Tab J to Att. 1 to Ex. A (Dkt. No. 17-2).

- 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); *see also* 8 U.S.C. § 1226a(a)(7).
- Legal challenges to the regulation are reviewed by Article III judges in habeas. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1254 (10th Cir. 2008) (ruling that 8 C.F.R. § 241.14(f), another special-case detention provision in the same regulation as § 241.14(d), is lawful on this basis.

It merits noting, moreover, that Petitioner failed to take advantage of all the process offered to him. Under the regulation, ICE gave Petitioner the opportunity to submit evidence and be interviewed, but Petitioner "declined to participate" in an interview, Pet'r's Br. in Supp. of Am. Habeas Pet. 31 n.14 (Dkt. No. 14). Petitioner cannot plausibly complain of a lack of process when he has refused to take advantage of the existing procedures.

The Court should also recognize that Petitioner is already subject to supervision conditions due to his criminal conviction. J. in a Criminal Case, Att. 5 to Ex. A (Dkt. No. 17-2). Even absent detention under the regulation (or even the statute), Petitioner, with his multiple criminal convictions, has had his liberty constrained. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (in facial challenge, challenger must establish that no set of circumstances exist under which the Act would be valid).

Finally, on the third *Mathews* factor, the government's interest, the government has a compelling public safety interest in not having especially dangerous individuals who pose serious national security risks released into society. *See* Resp.'s Opp. at 25-26; *see also infra* section IV.B (demonstrating irreparable harm to the government absent a stay). 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. The government's interest here is paramount.

Accordingly, courts regularly recognize that national security concerns are so weighty that they commonly warrant granting a stay pending appeal. *See, e.g.*, *Klayman v. Obama*, 957 F. Supp. 2d 1, 10 (D.D.C. 2013) ("[I]n view of the significant national security interests at stake in this case and the novelty of the constitutional issues, I will STAY my order pending appeal."), *decision rev'd and resolved in the government's favor*, 800 F.3d 559 (D.C. Cir. 2015); *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1081 (N.D. Cal. 2013) ("[G]iven the significant constitutional and national security issues at stake, enforcement of the Court's judgment will be stayed pending appeal . . . ."); *Judicial Watch, Inc. v. U.S. Secret Serv.*, No. 09-cv-2312, 2011 WL 13377578, at *2 (D.D.C. Nov. 14, 2011) (granting stay on the government's arguments that "national security interests that may be implicated").

For these reasons, Respondent has demonstrated that he has a "substantial possibility" of a successful appeal. *Mohammed*, 309 F.3d at 102 (standard requires "something less than 50 percent"). Although the Court invoked the canon of constitutional avoidance, Order of Dec. 13, 2019 at 26, neither the regulation nor the statute presents the type of ambiguity that makes that canon appropriate. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (the canon of constitutional avoidance applies only when "statutory language is susceptible of multiple

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

2. Respondent Has a Substantial Case for Continued Detention Under the Statute

Respondent also has a substantial case on the merits that 8 U.S.C. § 1226a(a)(6) authorizes his continued detention. Three rulings in particular warrant a stay pending appeal.

First, the Court erred in ordering an evidentiary hearing at all, because the administrative record—including the Acting Secretary's certification—conclusively justifies Petitioner's detention under the statute. If the Court were to review the Secretary's decision, it should uphold that decision as adequately supported by the evidence before the Secretary on record. The Court should not have ordered *de novo* review at an evidentiary hearing. Order of Dec. 13, 2019 (Dkt. No. 55). The standard of review of an administrative immigration decision in a habeas case—as here—is generally limited. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) (discussing the heavy deference to administrative factfinding in immigration habeas cases, subject to "the enforcement of due process requirements"). The Supreme Court has been "clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers." *Id.* at 233-34; *see INS v. St. Cyr*, 533 U.S. 289, 311-13 (2001) (stating that immigration habeas review is narrower than judicial review, which are historically distinct forms of review). Unlike a purely legal challenge, "review of the merits of [the alien's] petition would involve . . . reassessment of the evidence." *Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001). "This sort of fact-intensive review is vastly different from what the habeas statute provides: review for statutory or constitutional errors." *Id.*; *see Terlinden v. Ames*, 184 U.S. 270, 278 (1902) ("The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error . . . .").

The national security implications of this case support the conclusion that this case should have turned and rested on the administrative record. "[T]he Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 35 (2010). Where national-security, foreign-relations, and immigration matters converge—as they do in this case—a court owes deference to the factfinding and decisionmaking of the Executive Branch. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations."). *Zadvydas* itself suggests that a substantial degree of deference is warranted. That deference should extend to § 1226a determinations because the statute's authorization of judicial review does not displace the principles of deference to expert agencies "in matters that invoke their expertise." *Zadvydas*, 533 U.S. at 700.

Nor does anything in 8 U.S.C. § 1226a suggest *de novo* review at an evidentiary hearing is appropriate. In *Zadvydas*, the Supreme Court recognized "special circumstances where special arguments might be made . . . for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. In those situations, the Court emphasized that "[o]rdinary principles of judicial review in this area recognize primary Executive Branch responsibility" and "counsel judges to give expert agencies decision-making leeway in matters that invoke their expertise." *Id.* at 700. Section 1226a(b)(1)'s authorization of judicial review does not displace those ordinary principles. Congress enacted § 1226a, just four months after *Zadvydas*, against the backdrop of those principles. *See Clark*, 543 U.S. at 386 n.8 (citing § 1226a as Congress' reaction to *Zadvydas*); *Kiyemba v. Obama*, 555 F.3d 1022, 1035-36 (D.C. Cir. 2009) (Rogers, J., concurring).

Under these principles, the administrative record justified Petitioner's continued detention under § 1226a(a)(6). That statute provides for continued detention "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). That statute is satisfied here: the FBI, based on information currently available to it, has concluded that "the release of [Petitioner] poses a significant threat to national security and significant risk of terrorism" and that "his release would threaten the national security of the United States and the safety of the community." June 5, 2020 FBI Memo. at 4. The FBI's assessment is supported by detailed factual summaries provided in the memorandum. *Id.* at 2-3. With respect, the Court erred in ordering an evidentiary hearing. *See* Order of Dec. 13, 2019 (Dkt. No. 55). A stay is warranted.

Second, independently of whether the Court agrees on the first statutory argument set forth above, this Court erred in its rulings on the placement of the burden of proof and the standard of proof. Respondent has argued and maintains that Petitioner bears the burden of proving his detention is unlawful, but that if Respondent bears the burden, the Court should apply a preponderance standard. *See* Resp't's Br. Regarding Parameters of Evidentiary Hr'g at 1-5. Respondent has a substantial case on the merits of this issue.

Petitioner bears the burden of proving by a preponderance of the evidence that his detention is unlawful. "[T]he traditional rule in habeas corpus proceedings is that the petitioner must prove, by the preponderance of the evidence, that his detention is illegal." *Bolton v. Harris*, 395 F.2d 642, 653 (D.C. Cir. 1968); *see, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (holding "constitutionally adequate," in the Guantanamo context, a "'burden-shifting scheme' in which the government need only present 'credible evidence that the habeas petitioner meets the enemy-combatant criteria' before 'the onus could shift to the petitioner to rebut that

evidence'"); *Liuksila v. Turner*, 351 F. Supp. 3d 166, 174 (D.D.C. 2018) (in an extradition-based habeas proceeding, "the petitioner[] must prove by a preponderance of the evidence that he is being unlawfully held"). Section 1226a should operate no differently than the standard in habeas proceedings.

Nothing in § 1226a(a)(6) shows an intent to depart from the traditional rule. Employing this standard provides a robust procedure not available with the regulation: judicial review by a federal judge, who then may review legal conclusions. *See* 8 U.S.C. § 1226a(b)(1). Contrary to the Court's ruling, Petitioner carries the burden of demonstrating that the government erred in ordering his detention under § 1226a.

At the least, even if the burden did lie with Respondent, then the *Hamdi* burden-shifting framework would apply. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Hamdi* does involve a different context: detention of *U.S. citizens*, not removable terrorist aliens such as Petitioner, *see* Resp't's Memo. in Opp'n to the Am. Pet. at 15-16 (ECF No. 17-4) (explaining why Due Process permits different treatment for removable aliens and for terrorists). But *Hamdi* is instructive in establishing an evidentiary process that balances the "risk of an erroneous deprivation" of a detainee's liberty interest with undue procedural burdens on the government. *Hamdi*, 542 U.S. at 534 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under that scheme, "once the Government puts forth credible evidence that the habeas petitioner meets" the relevant criteria (there, the "enemy-combatant criteria"), the Supreme Court held, "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id.* The government's administrative record supporting the Acting Secretary's detention decisions makes a prima facie *Hamdi* case, *see* Resp't's Br. Regarding Evidentiary Hearing at 4

(Dkt. No. 61), and the burden has now shifted to Petitioner "to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Hamdi*, 542 U.S. at 534.

Notably, another part of § 1226a, subsection (a)(3), authorizes DHS to certify an alien for detention only upon having "*reasonable grounds* to believe that the alien . . . is engaged in . . . activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1) (emphasis added). There is no sound basis for concluding that the statute imposed a dramatically higher standard of proof in subsection (a)(6) and that Congress would have done so silently. A preponderance standard for subsection (a)(6) is consistent with the low threshold for subsection (a)(3). Therefore, "although the Court ultimately did not agree with [Respondent's] position on the merits, it is evident that [he has] made out a 'substantial case on the merits.'" *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (quoting *Holiday Tours, Inc.*, 559 F.2d at 843); *see Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 83 (D.D.C. 2009) (granting a stay where an issue on appeal was "the proper application of the well-established evidentiary standard in habeas cases to the facts presented in this case").

Third, the Court has issued pre-evidentiary-hearing rulings under which Respondent cannot present all evidence that it believes that it should be permitted to present to support its continued detention of Petitioner, and those rulings are likely to be rejected on appeal. *See* Memo. Regarding Evidentiary Hr'g at 5-8 (requesting admission of prior statements by Raza and Rivas Merino, former detainees who have since been removed from the United States); Tr. of June 12, 2020 Hr'g at 38:12-18, 39:9-13 (Dkt. No. 218) (excluding from the evidentiary hearing, as inadmissible hearsay, statements from Raza and Rivas Merino); Mot. to Amend Witness & Exhibit Lists (Dkt. No. 219) (moving for leave to amend Respondent's witness and exhibit lists to include evidence relied on in the FBI's June 5, 2020 memorandum assessing Petitioner's

release poses a significant threat to national security); Order of June 18, 2020 (Dkt. No. 225) (denying Respondent's motion to amend witness and exhibit lists). The Court's orders do not account adequately for the "extensive efforts" the FBI engaged in to locate Raza and Rivas Merino and the challenges that the COVID-19 quarantine restrictions placed on those witnesses being available to testify live. Memo. Regarding Evidentiary Hr'g at 7. The Court also did not soundly account for the high degree to which former detainees were personally familiar with Petitioner and how their hearsay statements were based on those experiences. *Id.* at 6. There is a substantial possibility that the court of appeals will reject these rulings on appeal.

Respondent has a substantial case on at least one novel legal ground that would require rejection of this Court's judgment. Thus, the Court should stay its judgment pending appeal.

B. THE UNITED STATES WILL FACE IRREPARABLE INJURY WITHOUT A STAY OF PETITIONER'S RELEASE PENDING APPEAL

Considerations of irreparable harm also favor a stay of Petitioner's release pending appeal. "Although the dangerousness of an alien pending removal still may not justify indefinite detention, it may be considered when determining whether immediate release is the appropriate remedy." *Singh v. Whitaker*, 362 F. Supp. 3d 93, 104 (W.D.N.Y. 2019) (Vilardo, J.) (citations omitted, citing *Zadvydas*, 533 U.S. at 685, and *Hilton*, 481 U.S. at 779).

Here, denial of a stay threatens significant and irreparable harm to the United States and the general public. The Acting Secretary of Homeland Security, the Director of the FBI, and the Acting Director of ICE concluded that Petitioner poses a threat to the nation, findings which have been previously chronicled in the parties' briefs and in the administrative record. *See, e.g.*, Resp.'s Opp. at 5-8 (listing, in a sealed document, the present and grave threat that Petitioner, and his release, pose to national security). The Deputy Director of the FBI reiterated this conclusion less than three weeks ago. June 5, 2020 FBI Memorandum at 1 ("The FBI assesses

that his release would threaten the national security of the United States and the safety of the community."). Release would allow the very irreparable harms that the Executive Branch has sought to prevent.

Other features confirm the likely harm upon release. Petitioner, if released, intends on residing at his sister's house in Florida, *see* Pet'r's Resp. to Resp't's Mot. to Cancel Evidentiary Hearing at 3 (Dkt. No. 232), thereby returning to the very setting of his prior criminal activity in southern Florida. There, 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. *United States v. Hassoun*, 476 F.3d 1181, 1183 (11th Cir. 2007). Given his past conduct—including repeated offenses while in immigration detention—Petitioner's likelihood of reoffending upon release is high. *See United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) ("[E]ven terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation."); *see also United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (Petitioner's direct appeal; quoting *Meskini*). The potential harm that Petitioner could inflict on the community upon release is a significant public concern. These threats are not mitigated simply because Petitioner will be released under conditions of supervision.[3]

[3] ICE also reserves its right to re-detain Petitioner under 8 U.S.C. § 1231(a)(6), should there again become a significant likelihood of his removal in the reasonably foreseeable future. Respondent has been continuously working throughout this litigation on securing Petitioner's removal to another country, including during the COVID-19 pandemic. Although the issue is not germane to this motion, Respondent makes this point simply to reassure the Court that removal attempts are continuing. *See also* Resp't's Reply Memo. of Law in Supp. of Resp't's Mot. to Adjourn the Evidentiary Hr'g and Memo. of Law in Opp. to Pet'r's Emergency Mot. for an Order Transferring Him to Home Incarceration at 23 n.5 (Dkt. No. 140).

Petitioner's recent conduct supports the view that he continues to refuse to conform his conduct to the law. While detained at the Buffalo Federal Detention Facility ("BFDF") and during this litigation, Petitioner violated the protective order by intentionally revealing the identity of a confidential informant against him. *See* June 18, 2020 Order at 18 (Dkt. No. 225). The Court did not find convincing Petitioner's explanation that he lacked knowledge of his conduct. *See id.* at 19-20 ("[T]he Court does not find it plausible that he did not understand that the names of confidential informants, revealed pursuant to a protective order, could not be disseminated.").

Considerations of harm strongly favor a stay of Petitioner's release pending appeal.

C. PETITIONER'S LIBERTY INTEREST DOES NOT OUTWEIGH OTHER FACTORS FAVORING A STAY OF HIS RELEASE PENDING APPEAL

"Once [the stay] applicant satisfies the first two factors, the . . . stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435; *Hilton*, 481 U.S. at 776. Here, the Court must consider Petitioner's liberty interests. A detainee's liberty interests do not mandate release. *See Hilton*, 481 U.S. at 777 (explaining that the stay factors "contemplate individualized judgments in each case"); *id.* at 778-79 (explaining that due process principles do not prohibit "staying the release of a successful habeas petitioner pending appeal because of dangerousness"). A court must balance those liberty interests against the other factors. *Id.* at 777-78. In particular, a court must consider the extent to which a detainee's dangerousness militates against his release. As the Supreme Court articulated, the "Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987). That balance strongly favors staying Petitioner's release pending appeal in this case.

As explained above, the United States presents a substantial case for appeal that the Court erred in granting Petitioner's amended petition for a writ of habeas corpus. Thus, "continued custody is permissible if the second and fourth factors in the . . . stay analysis militate against release." *Hilton*, 481 U.S. at 778 (collecting cases). Here, both do. Society has a substantial interest in Petitioner's continued detention, and the government faces irreparable harm if he is released. Petitioner's liberty interests do not outweigh the other *Hilton* factors.

Against Petitioner's liberty interest, the Court must consider "where the public interest lies." *Hilton*, 481 U.S. at 776. This interest is especially weighty when a stay would vindicate the considered judgment of an agency, as here. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996) (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Thus, when considering whether to stay an administrative order, "courts give significant weight to the public interest served by the proper operation of the regulatory scheme." *Id.*

Here, the public interest weighs in favor of a stay pending appeal for two reasons: the great burdens on the agencies charged with protecting the United States against threats like those Petitioner poses, and the institutional interests that all three branches of government have expressed in favor of detention authorities like the regulation and statute.

Releasing Petitioner from ICE custody during appeal would place a significant burden on ICE, the FBI, and the rest of the U.S. Government. *See* Ex. A, Decl. of Michael H. Glasheen; Ex. B, Decl. of Michael W. Meade. If released, the local ICE Enforcement and Removal Operations ("ERO") Field Office will delegate responsibilities outside ICE's authorities to, and

coordinate with, other law enforcement agencies as appropriate (e.g., the FBI or Petitioner's probation office), which will be responsible for ensuring that Petitioner complies with any terms of release ordered by the Court until Petitioner's final order of removal is executed. The U.S. Government will not be able to assure Petitioner's reporting and compliance with any terms of release ordered and therefore prevent the threat that Petitioner poses. Generally, individuals released from ICE custody might relocate without properly notifying the U.S. government, and significant government resources must then be expended in order to locate and apprehend an individual, especially a dangerous individual, for removal. If Petitioner fails to report voluntarily pursuant to the terms of an ERO order of supervised release meant to effectuate his removal, ERO will be required to locate and apprehend the Petitioner. Every such fugitive operation creates a risk not only for the officers involved, but for members of the public and any coordinating law enforcement officials involved in an arrest. And as the FBI Deputy Director explained, if Petitioner is released from detention while awaiting removal, based on the inherent limitations of lawfully available investigative techniques and resource requirements, the FBI will face an intelligence gap concerning his activities. FBI Deputy Director's June 5, 2020 Recommendation to the Secretary of Homeland Security. Dkt. No. 223. Thus, proceeding in non-custodial conditions places a significantly heavy burden on the Government, both in its ability to ensure the smooth operation of any future removal efforts and its ability to mitigate the danger that Petitioner poses to national security and public safety.

Even if the U.S. Government were to set reporting conditions for Petitioner that would ensure basic compliance with his physical reporting requirements, these would not mitigate the particular threat posed by his background as an individual known to recruit others to engage in terrorist activity and to provide material support for the commission of terrorist activity. As

detailed in the underlying criminal record and the FBI Director's letterhead memorandum dated June 5, 2020 (Dkt. No. 223), which document Petitioner's continuing effort to recruit or encourage others to engage in terrorist activity, Petitioner poses a unique threat to national security because of his documented ability to provide logistical guidance, financial support, and ideological motivation to individuals who plan to commit violent terrorist activities. The threat posed by this behavior cannot be completely mitigated by any reporting requirements or additional conditions.

On top of the burdens noted above, all three branches of government have articulated an important public interest in keeping alien terrorist threats in custody.

Congress has made clear its interest in permitting the detention of a certain narrow set of dangerous national security threats. Congress articulated its interpretation of the public interest with respect to aliens who endanger the national security by enacting the civil detention provision of the USA PATRIOT Act, 8 U.S.C. § 1226a. Just as the Bail Reform Act was "the National Legislature's considered response to numerous perceived deficiencies in the federal bail process," *Salerno*, 481 U.S. at 742, so too Congress overwhelmingly passed PATRIOT Act as a considered response to the serious threat of terrorism. The Act aimed to "provide law enforcement and intelligence agencies additional tools that are needed to address the threat of terrorism and to find and prosecute terrorist criminals." 147 Cong. Rec. H7196 (Oct. 23, 2001) (Rep. Sensenbrenner); *see also* 147 Cong. Rec. S11017 (Oct. 25, 2001) (Sen. Brownback) ("[This legislation] is an intelligent and thorough response to the immediate security needs of our Nation. I commend in particular the immigration provisions of this legislation, which will strengthen our immigration laws to better combat terrorism."). Congress determined that the

public interest favors continued custody of significant national security threats like Petitioner, and that public interest favors a stay of Petitioner's release pending appeal.

Second, the Executive has also articulated this to be in the public interest. On October 26, 2001, while signing the PATRIOT Act into law, President George W. Bush explained, "The changes, effective today, will help counter a threat like no other our nation has ever faced. We've seen the enemy and the murder of thousands of innocent unsuspecting people. They recognize no barrier of morality. They have no conscience. The terrorists cannot be reasoned with." George W. Bush, Remarks by the President at the Signing of the PATRIOT Act, Anti-Terrorism Legislation, 2 Pub. Papers 1306 (Oct. 26, 2001). Those statements underscore the public's interest in continued confinement for national-security threats whose dangerousness cannot be mitigated with conditions of release. And, of course, the Acting Secretary, in consultation with the FBI Director and the ICE Director, issued an order certifying Petitioner for detention under the regulation and under the statute as a significant national security threat. These administrative directives merit deference on the "public interest" prong.

Third, a stay promotes sound judicial administration and decision-making. The authorities and issues presented in this case are important. They warrant considered deliberation from the courts of appeals, rather than rushed consideration in an emergency-stay posture. By entering a stay, this Court can aid the sound resolution of important legal questions bearing on national security.

The public interest favors a stay pending appeal.

D. ALTERNATIVELY, THE COURT SHOULD STAY PETITIONER'S RELEASE TO ALLOW TIME TO SEEK AN APPELLATE STAY

If this Court were to deny Respondent's motion for a stay pending appeal, the United States respectfully requests a temporary stay, to allow the United States to seek emergency relief

in the Second Circuit and/or in the D.C. Circuit, and to allow those courts adequate time to consider motions for stay pending appeal. Such an administrative stay would allow this Court and both courts of appeals to consider a stay pending appeal on a non-emergency basis, with full briefing.

Respondent respectfully requests a temporary administrative stay lasting until each Circuit where Respondent has filed a motion to stay pending appeal has ruled on such motion or until this Court itself grants a stay pending appeal.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court stay the execution of its June 22, 2020 Oral Order and any forthcoming judgment adverse to Respondentpending appeal to the United States Courts of Appeals for the Second Circuit and/or D.C. Circuit. In the alternative, Respondent respectfully requests that the Court enter a temporary stay to last until the Second Circuit and/or the D.C. Circuit each have had the occasion to rule on Respondent's motions for stay pending appeal presented to those courts.

Date: June 24, 2020

Respectfully submitted,

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