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.

REPLY IN SUPPORT OF RESPONDENT'S MOTION TO STAY

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. Resp't's Mot. to Stay (Dkt. No. 242); Memo. of Points & Authorities in Supp. of Resp't's Mot. to Stay (Dkt. No. 242-1) ("Resp't's Memo. of Law"). Petitioner opposes a stay, but his arguments fail to overcome the government's showing that it has a strong probability of success on at least one argument that will require rejection of a judgment for Petitioner. Moreover, considerations of harm and the equities support a stay of Petitioner's release while Respondent seeks expedited appellate review of this Court's judgment. Pet'r's Opp'n to Resp't's Mot. for a Stay of Pet'r's Release Pending Appeal ("Pet'r's Opp'n").

Petitioner argues that the government misrepresented the standard for a stay and that it concedes that it does not have an even chance of prevailing on appeal. Both arguments fail. The government has invoked significant caselaw setting forth the governing standard. *See* Resp't's Memo. of Law at 6-7. As that caselaw shows, that standard is shaped by the government's vital interest in detaining a person with Petitioner's criminal and terrorism background. *See id.* at 21, 23-24. And the government has been clear that it has a substantial case on the merits and it set forth in its stay motion that it is likely to succeed on its appeal. *Id.* at 6-7. It has repeatedly emphasized that, in addition to meriting a stay on the other three factors, it is likely to prevail on at least one issue that will require rejection of a judgment releasing Petitioner. As the government has explained, Petitioner's detention is authorized both by regulation and statute.

Petitioner resists the view that his detention is authorized by regulation or statute. On the regulation, he variously claims that Supreme Court caselaw, the statute under which the regulation is promulgated, or the alleged lack of a neutral decision-maker render the regulation

of the statute invalid. As the government has explained, however, the relevant statute, 8 U.S.C. § 1231(a)(6), plainly permits preventive detention, the Supreme Court has recognized that such detention may be warranted for particularly dangerous terrorists, and the procedural protections afforded by the regulation satisfy due process.

Petitioner further argues that the government should bear the burden of establishing by clear and convincing proof that Petitioner's detention is warranted under 8 U.S.C. § 1226a. Supreme Court precedent speaks otherwise. The Supreme Court has consistently affirmed the constitutionality of detention incident to removal in circumstances where the alien—not the government—bears the burden to demonstrate by a preponderance of the evidence that release is warranted. Further, the applicable standard—if an evidentiary hearing were warranted at all and if the burden were placed on the government—would be the preponderance of the evidence. Once again, the Supreme Court has held that where the risk of civil confinement is not equally shared by all members of society, as herein where Petitioner was previously convicted of dire criminal charges, a heightened standard is not warranted. Finally, Petitioner misapplies the relevant inquiry regarding hearsay evidence in a habeas hearing.

Petitioner also claims that considerations of harm and the equities favor him. That is wrong. 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 Appellee and ensuring he cannot act on his threats to the national security. Petitioner's assertions that the conditions of his release mitigate such risk are

without merit. The conditions the government agreed to are not adequate substitutes for Petitioner's continued detention. Respondent explicitly stated that despite the agreed upon conditions, the government maintained "that it opposes Petitioner's release and requests these terms only upon the Court's order of release." Jt. Report Regarding Conditions of Release (Dkt. No. 240).

A stay is thus warranted for the reasons stated in Respondent's motion and this reply. In the alternative, a temporary stay until appellate courts have an opportunity to rule on Respondent's motions for stay pending appeal is requested.

II. BACKGROUND

The Court is already well aware of the facts underlying this litigation. However, Petitioner's opposition brief implies that the only events relevant to this case are those postdating his arrival at Batavia. That is incorrect; as Petitioner's three terrorism-related criminal convictions have informed—and supported—the government's decision making throughout.

Respondent came to the United States as a nonimmigrant visitor and subsequently changed his status to a nonimmigrant student. Decl. of Michael Bernacke ¶ 4 (Dkt. No. 17-1). Petitioner failed to remain in compliance with the requirements of his student visa, and in December 2002 was ordered removed from the United States. *Id.* ¶ 4-5.

Before removal, Petitioner was taken into custody on criminal charges, including Conspiracy to Murder, Kidnap, and Maim Persons in a Foreign County; Conspiracy to Provide Material Support for Terrorism; and Material Support to Terrorists. *Id.* ¶ 7; J. 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 alleged that "it was the purpose and object of the conspiracy to advance violent jihad, including supporting and participating in armed confrontations in specific locations outside

the United States, and committing acts of murder, kidnapping, and maiming for the purpose of opposing existing governments." *Jayyousi*, 657 F.3d at 1105.[1] 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. J. in a Criminal Case, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 22, 2008).

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. Pet'r's Opp'n at 11 (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. 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 poses a risk to national security upon his release. Because the sentencing judge's comments are inapposite, and were made over ten years ago and prior to Petitioner's more recent conduct while in immigration detention, they do not contradict or undermine the Acting Secretary's findings, much less establish that the findings are wholly unsupported.

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

III. LEGAL STANDARD

An immediate stay is appropriate in this case because the government can show (1) a "substantial case on the merits" on appeal; (2) a likelihood that it will be irreparably harmed absent a stay; (3) a diminished prospect that petitioners will be substantially harmed if the Court grants a stay; and (4) a public interest in granting a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As the government shows below, the relevant factors weigh heavily in support of a stay in this case.

IV. ARGUMENT[2]

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

The government has a substantial case on the merits and is likely to succeed on its appeal. As a threshold matter, Petitioner fails to accurately portray the standard under this prong. The court must balance the four *Hilton* factors against each other. Resp't's Memo. of Law at 6-7. The government also discussed the need to balance all factors. *Id.* at 7, 23, 24.

However, relevant to that balancing is whether "[t]he issues presented are novel and weighty," such as "fundamental constitutional questions." *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 56 (D.D.C. 2009) (staying a habeas grant pending appeal). The Court should consider whether the appeal will raise "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)); *accord* Resp't's Memo. of Law at 7. In

[2] Petitioner raises several allegations related to his pending motion for sanctions. Dkt No. 164. Pet'r's Opp'n at 3-6, 12-16. The Court reserved ruling on that motion and indicated that further briefing may be ordered. *See* Dkt. No. 225 at 27; Dkt. No. 244 at 26:10–20. At that time, Respondent will address these allegations consistent with any Court order on the supplemental briefing.

such a situation, "to obtain an injunction pending appeal[,] the movant need not always show a probability of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *LaRouche v. Kezer*, 20 F.3d 68, 72-73 (2d Cir. 1994) (internal quotation marks omitted). Here, the Court has recognized the novelty of the issues in this case. *See, e.g.*, Order of Dec. 13, 2019 at 24-25 (Dkt. No. 55) ("[T]he record demonstrates that 8 C.F.R. § 241.14(d) is rarely invoked by the Government."); Tr. of Dec. 20, 2019 Hr'g at 11:16-25, 12:2-4 (Dkt. No. 68) (requesting briefing on the parameters of a § 1226a hearing). Petitioner, however, failed to acknowledge that these complex and novel legal issues favor Respondent's entitlement to a stay and lower the degree to which he must show success on the merits. *See generally* Pet'r's Opp'n at 19-24.

Petitioner also overstates the burden on the government for issuance of a stay. *See* Pet'r's Opp'n at 42-45. "The moving party is not required to show that it is assured of success on appeal. Rather, it can satisfy the first factor by raising in its appeal 'questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Al-Adahi v. Obama*, 672 F. Supp. 2d 81, 83 (D.D.C. 2009). An appeal is especially warranted here because it would raise "serious and difficult issues, including the proper application of the well-established evidentiary standard in habeas cases to the facts presented in this case." *Id.*

Petitioner argues that the government is claiming that it needs only a "mere possibility" of success on the merits, Pet'r's Opp'n at 23, but that is neither an accurate quote from the government's opening brief nor a reasonable portrayal of its argument. First, the government

explicitly argued that it has a "substantial case for appeal on the merits" and that it is "likely to succeed on the merits of its appeals." Resp't's Memo. of Law at 6.

Second, the government argued that it has a "strong chance" of prevailing on its challenge to four of the Court's rulings, any of which would require reversal of this Court's judgment. *See id*. at 7. Though likely to succeed on the merits, the government cited valid case law that holds that it could be entitled to a stay even if it were to show less than a fifty percent likelihood of success on the merits. *See id.* at 7 (quoting *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002)). Petitioner argues that the Second Circuit lowered the standard in *Mohammed* because of the severity of the injury that the petitioner faced—removal from the country. *See* Pet'r's Opp'n at 23. Herein, the government faces an equally significant potential injury—the release of a convicted terrorist who has been assessed to be a threat to national security—if the Court denies its application for a stay. Thus, while the government asserts that its chances of prevailing are greater than fifty percent, the reduced standard in *Mohammed* would be applicable herein because of the severity of the government's potential injury.

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

As Respondent has explained, Petitioner's detention under the regulation, 8 C.F.R. § 241.14(d), is lawful. Resp't's Memo. of Law at 8-16. Petitioner makes several arguments to the contrary. Pet'r's Opp'n at 33-41. None has merit.

First, the regulation is fully compatible with its authorizing statutes, 8 U.S.C. §§ 1103 and 1231(a)(6), and with *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005). At bare minimum, Respondent has the requisite "substantial case" on the regulation's validity, which is a "novel" issue deserving of a stay. *See* Resp't's Memo. of Law at 7. The Constitution permits detention of especially dangerous terrorists—the sole target of

§ 241.14(d). Such terrorists can provide evidence and participate in an interview before the decision to continue detention, and may present legal and constitutional claims to a 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. Respondent has a substantial case on the merits that § 241.14(d) authorizes Petitioner's continued detention.

Petitioner argues that the regulation is *ultra vires* because it conflicts with the Supreme Court's rulings in *Zadvydas* and *Clark*. Pet'r's Opp'n at 34-35. He argues that § 1231(a)(6) must be applied equally to "the classes of aliens covered thereby," and that *Zadvydas* must be applying equally to "any alien that falls within" the provisions of § 1231(a)(6). *Id.* (quoting Order of Dec. 13, 2019 at 17).That argument misconstrues what *Clark* was deciding. Start with the statute, which covers a removable alien who is: (1) "inadmissible under section 1182 of this title;" (2) "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title;" or (3) "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). While *Zadvydas*, the predecessor case to *Clark*, authoritatively construed § 1231(a)(6) with respect to the *second* category of aliens covered by that provision, and while *Clark* authoritatively construed § 1231(a)(6) with respect to the *first* category of aliens covered by that provision, *Clark*, 543 U.S. at 378, neither decision should be read as authoritatively construing § 1231(a)(6) with respect to the *third* category of aliens covered by that provision. And it is the language of that third category—specifically, the phrase "risk to the community"—that § 241.14(d) implements. 66 Fed. Reg. at 56,972. Thus, § 241.14(d) reflects a permissible interpretation of when a "risk to the

community" justifies continued detention, and neither *Zadvydas* or *Clark* forecloses that interpretation.

To be sure, *Clark* stated that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject." 543 U.S. at 378 (emphasis added). What that means, however, is that the word "may," with respect to all three categories, cannot be read to confer "unlimited discretion." *Id.* at 377 (citation omitted; emphasis added).

Rather, the word "may," with respect to all three categories, must be read to permit only detention related to each category's "basic purpose." *Id.* (citation omitted). With respect to the first two categories—which are tied to the grounds for the alien's removal (i.e., the reason he or she is "inadmissible" or "removable")—detention is no longer related to the category's basic purpose when removal is no longer reasonably foreseeable, as *Zadvydas* and *Clark* have so held. *See id.* at 378-79. But with respect to the third category—which is tied not to the grounds for the alien's removal, but rather to the degree to which the Attorney General determines the alien to be "a risk to community"—detention continues to serve the category's basic purpose so long as the Attorney General determines such a "risk" to justify detention, regardless of whether removal is reasonably foreseeable. To the extent that certain statements in *Zadvydas* or *Clark* may be read to suggest otherwise, those statements are dicta, because neither decision involved the third category. *See also Zadvydas*, 533 U.S. at 696 (cautioning that the Court 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") (emphasis added); *id.* (re-emphasizing that "the statute before us applies *not only to terrorists* and criminals, but also to ordinary visa violators").

(emphasis added). Petitioner gives no nuanced reading of *Clark*. Pet'r's Opp'n at 33-35. Respondent respectfully suggests that he has a substantial case on appeal regarding this issue.

Second, the regulation facially comports with procedural due process. The question of procedural due process is answered by the *Mathews v. Eldridge* line of cases. 424 U.S. 319, 335 (1976). In assessing the *Mathews* factors in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). The *Mathews* factors demonstrate that the regulation is lawful. Resp't's Memo. of Law at 12-16.

Petitioner raises four primary arguments that the regulation is indeed facially unconstitutional, but none detracts from Respondent's odds of success on appeal. Petitioner argues that the regulation is invalid because it fails to provide for review by a neutral decision maker, because the Supreme Court has "noted" that "the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." Pet'r's Opp'n at 39 (citing Order of Dec. 13, 2019 at 21). Of course, the Supreme Court did not so hold, and indeed the Due Process Clause does not require a neutral decision maker in every context for every alien. *See, e.g., Dep't of Homeland Sec. v. Thuraissigiam*, — U.S. —, 2020 WL 3454809, at *18 (June 25, 2020). Here, Petitioner's special dangerousness, lack of legal status and pending order of removal, plus the fact that a neutral decision maker is available for legal challenges (a point ignored by Petitioner), satisfy procedural due process requirements. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1254 (10th Cir. 2008). Petitioner's citation to *Hamdi* for individuals captured on the battlefield is thus beside the point. *See* Pet'r's Opp'n at 39.

Petitioner claims that the regulation is void for failing to articulate a burden of proof. He, and the Court's order from December, cite no cases for that claim. *See id.* Indeed, neither § 1226a nor 28 U.S.C. § 2241 explicitly specifies a burden of proof, yet the Court was able to determine one for the statute. *See* Order of Jan. 24, 2020 at 10 (Dkt. No. 75). Respondent vigorously disagrees with the burden the Court selected for the statute, but that does not mean that no burden of proof *could* apply to the regulation.

Next, Petitioner argues that "providing a far more robust process to avoid [erroneous deprivation of liberty] would not be unduly burdensome or harm national security." Pet'r's Opp'n at 40 (citing Order of Dec. 13, 2019 at 18-19, 24-25 (Dkt. No. 55)). But neither Petitioner (who bears the burden of persuasion) nor the Court explain why that is so. Simply because more extensive procedures are available under § 241.14(f) does not necessarily mean that further procedures under § 241.14(d) are feasible—much less that subsection (d) should be *invalidated* on that basis.

Finally, Petitioner argues that "the government has no interest in improperly detaining individuals it erroneously believes pose a danger to the nation's security or safety of the public." Pet'r's Opp'n at 40. Petitioner is correct that the government has no interest in improperly detaining an individual. However, that is not the situation here. *See* 28 U.S.C. § 2241. The whole premise of this case is that the parties disagree over Petitioner's detention.

Third, Petitioner argues that the Court does not have to consider the argument about the regulation at all, because any error would be "harmless." Pet'r's Opp'n at 41 n.21. Petitioner claims, "Plainly, even if the Court had not invalidated the regulation—a decision that, at that point, would have been ripe for an interlocutory appeal that, now, could well be over already—the government would have been playing by the same exact rules for the next six months leading

up to the evidentiary hearing." *Id.* Petitioner's unsupported characterization of these detention authorities is wrong. The regulation and the statute are *independent* detention authorities. The statute itself makes that clear, by referencing a situation in which an alien is "detained solely under paragraph (1)," 8 U.S.C. § 1226a(a)(6), with paragraph (1) being the "custody" provision of § 1226a, *id.* § 1226a(a)(1). This was exactly the situation in this case until the Court invalidated the regulation: Petitioner was not detained "solely" under § 1226a. Once the Court invalidated the regulation, the statute was the only detention authority remaining, and Petitioner was detained "solely under paragraph (1)." *See id.* § 1226a(a)(6).

Petitioner cites *no* authority for his argument that, had the Court upheld the detention under the regulation, the statutory component of the habeas petition would not have been moot and the Court could then proceed to adjudicate the statutory basis for detention. Thus, upholding the regulation is itself a basis to detain Petitioner, and there is no merit for Petitioner's naked claims that Respondent's arguments on the regulation "would have collapsed" into Respondent's arguments on the statute, or that "to enter a stay pending appeal on that basis [i.e., regarding the regulation] would be plainly unjust." Pet'r's Opp'n at 41 n.21. 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 has a substantial case on the merits that 8 U.S.C. § 1226a(a)(6) authorizes Petitioner's continued detention. As Respondent has explained, the Court's rulings regarding holding an evidentiary hearing at all, placing the burden on Respondent with a clear and

convincing standard, and excluding evidence to support its detention of Petitioner are in error and likely to be overruled on appeal. *See* Resp't's Memo. of Law at 16-21.

Petitioner argues that it should be uncontroversial that the government bears the burden of proof. Pet'r's Opp'n at 25-26. Petitioner is incorrect. "[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., Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) ("Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel."); *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").

Petitioner's appeal that "the Due Process Clause requires as much" to support a shift from the traditional rule, *id.* at 25, fails to account for the robust procedures section 1226a grants him. The statute grants an alien judicial review by a federal judge, who serves as a "factfinder" to be "impress[ed] upon." Order of Dec. 13, 2019 at 20. The availability of Article III evidentiary review here is a countervailing due process consideration that makes placing the burden on Petitioner constitutionally valid and forecloses any argument in favor of upending the traditional rule of habeas proceedings. Having factual habeas review is a significant procedural benefit for Petitioner. It provides "a mode for the redress of denials of due process of law." *Fay v. Noia*, 372 U.S. 391, 402 (1963); *see, e.g., Heikkila v. Barber*, 345 U.S. 229, 236 (1953) (explaining that habeas corpus is a form of procedural due process itself, as its use is "the enforcement of due process requirements"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting)

("[T]wo ideas central to Blackstone's understanding [are] due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned . . . .").

Petitioner is also incorrect that the clear and convincing standard is appropriate in this case. *See* Pet'r's Opp'n at 26-29. Petitioner's argument is a reflexive application of critically distinguishable case law that fail to account for the demands of this particular situation. *See Morrissey v. Brewer*, 408 U.S. 471, 481 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). In this case, 8 U.S.C. § 1226a provides sufficient process to render Petitioner's request for an elevated burden meritless. The Court should have held that the correct standard herein was preponderance of the evidence.

The Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). However, the fact that a private liberty interest is at issue does not, as Petitioner maintains, alone require a clear and convincing standard to justify confinement. *See* Pet'r's Opp'n at 27. In *Addington*, which Petitioner heavily relies on in his argument, the Supreme Court arrived at its determination that a burden greater than preponderance of the evidence was necessary only after articulating a significant risk of an erroneous deprivation. The Supreme Court held that a clear and convincing standard was required in a civil proceeding brought under state law to commit an individual involuntarily and indefinitely. *Addington*, 441 U.S. at 418. Specifically, the Court warned that the statute at issue, which permitted the state to involuntarily commit persons found to be mentally ill or who posed a danger, created the "possible risk" that a factfinder could commit someone "based solely on a few isolated instances of unusual conduct." *Id.* at 427. Because the Court determined "[a]t one time or another every

person exhibits some abnormal behavior which might be perceived" as the requisite behavior for confinement but is actually not a cause for treatment or confinement, it required a higher burden of proof to ensure that individuals would not be confined merely for "idiosyncratic behavior." *Id*.

There is no such risk of an inappropriate confinement in this case. Petitioner's conduct is not the "idiosyncratic behavior" exhibited by "every person" at some point that the Supreme Court cautioned in *Addington* might result in an erroneous confinement. Rather, Petitioner's confinement is, as certified by DHS, because he "engaged in terrorist activity and engaged in an activity that endangers the national security of the United States" under § 1226a, *see* Dkt. No. 55 at 7, *and* because 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. DHS's certification that Petitioner engaged in terrorist activity is supported by Petitioner's conviction for, *inter alia*, conspiracy to provide material support for terrorism and providing material support to terrorists. *See id.*; *Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 78984, at *1 (W.D.N.Y. Jan. 2, 2019). Most importantly, the FBI's threat assessment is supported by the very evidence that Petitioner has objected to providing the Court, *see* Pet'r's Obj. to Resp't's Pre-Hearing Memo. at 2-13, and the Court has ruled Respondent cannot present. *See* Resp't's Memo. of Law at 20-21.

In *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court expressly cautioned against equating all civil commitment candidates where the risk was not equally borne by all members of society. The Court adopted a preponderance of the evidence standard where an

individual's civil commitment was supported by proof that the petitioner has committed a criminal act as a result of his mental illness. *Id.* at 367. Because a criminal act was "not within a range of conduct that is generally acceptable," the Court concluded that the risk of commitment for "mere idiosyncratic behavior"—the reason *Addington* adopted the heightened standard"—was eliminated. *Id*. (internal quotations omitted). Petitioner's argument for a clear and convincing standard because that was the standard in *Addington* fails to recognize the crucial distinction in *Jones*.

Petitioner's attempt to equate this case with immigration detention cases to justify a clear and convincing standard, *see* Pet'r's Opp'n at 26-29, also fails to consider the narrow application and stringent requirements of 8 U.S.C. § 1226a. This statute is not akin to the statute authorizing post-removal-period immigration detention, which the Supreme Court found applies "broadly to aliens ordered removed for many and various reasons, including tourist visa violations" and thus is not sufficient alone to warrant indefinite civil detention on a justification of dangerousness. *Zadvydas*, 533 U.S. at 690-91 (requiring additional procedure when detainee bore burden of proving that he was not dangerous). Petitioner already benefits from additional robust procedural protections not directly afforded to post-removal-period immigration detainees: certification by the Secretary of Homeland Security based on Petitioner's criminal convictions, a determination of Petitioner's threat, and direct judicial review. *See* 8 U.S.C. § 1226a.

The Supreme Court did *not* require proof beyond a reasonable doubt to authorize civil detention when it validated the Kansas statutory scheme that permitted civil detention following a determination where the standard was beyond a reasonable doubt. *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997). More instructive is the *Addington* Court's discussion of employing the reasonable-doubt standard in cases where "the factual aspects represent only the beginning of the

inquiry." *Addington*, 441 U.S. at 429. Where the inquiry is one of whether an individual is mentally ill and dangerous, the Supreme Court recognized that the answer "turns on the *meaning* of the facts" and requires interpretation of experts. *Id*. "Given the lack of certainty and the fallibility" of such expert diagnosis, the *Addington* Court expresses a serious concern of whether the government could ever prove mental illness and dangerousness beyond a reasonable doubt, a standard that may "completely undercut its efforts to further" its legitimate interests. *Id.* at 429-30.

Section 1226a's condition that detention is warranted "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) (emphasis added), raises similar concerns as expressed in *Addington* regarding employing a beyond a reasonable doubt standard. This inquiry requires an assessment of facts not simply to conclude a straightforward factual question, but rather whether such facts can be interpreted to reach a conclusion regarding a future risk. *Id*. This type of inquiry, assessing national security threats to determine and then act to frustrate those that pose a real danger, must be given proper deference precisely because the attempt to define future actions is an "inexact science at best" and relies on an expert to make an "affirmative prediction." *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *see also Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

The deference due to the Executive in matters of national security assessments does not foreclose regular and meaningful review of the government's threat determination. Indeed, the statute permits continued detention for *additional* periods "*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) (emphasis added). This type of "dangerousness" is explicitly subject to

such re-evaluation. Furthermore, Petitioner's argument that once a finding of Petitioner's threat warranting detention is made, the government will rely on such a finding to justify an indefinite detention (Pet'r's Opp'n at 24-28), is also controverted by the explicit requirements of 8 U.S.C. § 1226a(a)(6), which requires a six-month limitation and threat determination, as well as judicial review of the merits of such a determination. 8 U.S.C. § 1226a(b)(1).

Petitioner also argues that Respondent's appeal of the Court's exclusion of hearsay evidence will fail because the Court "has wide latitude to admit or exclude evidence." *See* Pet'r's Opp'n at 29. Petitioner's argument is misplaced because it fails to consider that in a habeas proceeding, hearsay "is always admissible." *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010). The question instead is "what probative weight to ascribe to whatever indicia of reliability it exhibits." *Id*. Indeed, the reliability of the Hector Rivas Merino statement, documented in an FBI Form FD-302, *see* Memo. of Law Regarding Evidentiary Hearing Ex. H (Dkt. No. 169-8), is the type of field document detailing the interview, including date and time, location, approach, and evaluation of the interviewee as well as the information gathered that the district court in *Bostan* noted could establish the reliability of hearsay evidence. *Bostan v. Obama*, 674 F. Supp. 2d 9, 20 (D.D.C. 2009).

Petitioner dismisses Respondent's position as a "gripe[]," Pet'r's Opp'n at 30, but the government's position in fact underscores an inherent flaw following the Court's erroneous rulings in the ability of the evidentiary hearing to answer the one question before the Court in a habeas case: is detention lawful? *See Al-Bihani*, 590 F.3d at 880. Simply put, the procedures set by the Court inhibit it from assessing the relevant facts to make this decision. First, excluding the hearsay evidence precluded the Court from reviewing the evidence with sufficient contextual information about the evidence to allow the Court to fairly assess and determine the weight to

give it and other pieces of evidence, including evidence that it has not excluded. *Id*. A habeas court cannot ignore relevant evidence, "for a court cannot view collectively evidence that it has not even considered." *See Latif v. Obama*, 677 F.3d 1175, 1193 (D.C. Cir. 2011). Moreover, by considering and excluding the evidence in isolation, the Court's decision prevented the government from presenting an accurate, holistic threat assessment for Petitioner. *Cf. United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1946) (L. Hand, J.) ("most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person. All that is necessary, and all that is possible, is that each bit may have enough rational connection with the issue to be considered a factor contributing to an answer.").

Second, by excluding the evidence, the Court has foreclosed Petitioner the opportunity to rebut the evidence and to attack its credibility. *See Al-Bihani*, 590 F.3d at 880. Indeed, Petitioner's argument notes the incompleteness of the current record at several points in its opposition. *See* Pet'r's Opp'n at 2 ("[T]hese two letters [the FBI letterhead memoranda] are the only documents that contain any allegations against [Petitioner]."); *Id.* at 6 ("Like the original FBI letter, this latest letter [the June 5, 2020 FBI memorandum] is unsworn, does not identify a single source by name, omits any underlying evidence, and simply makes assertions and assessments with no means for the reader to assess their reliability."). Petitioner cannot argue the government's basis for detention is inadequate while also objecting to the introduction of evidence that supports the FBI's assessments justifying the detention.

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

Next, the Court should grant a stay of release pending appeal due to the irreparable harm Respondent faces. Denial of a stay threatens significant and irreparable harm to the United

States and the general public, as determined by the Acting Secretary of Homeland Security, the Deputy Director of the FBI, and the Acting Director of ICE.

Denial of a stay here would harm the interests of the United States as expressed by Congress. Specifically, Congress has made a legislative judgment in the immigration laws that individuals who seek to commit terrorist acts against a sovereign Government or endorse or espouse support for terrorists are not to be admitted into the United States. See 8 U.S.C. § 1182(a)(3)(B). Congress has also authorized the Government to detain aliens for extended periods if there are "reasonable grounds" to believe that those aliens are inadmissible under 8 U.S.C. § 1226a(a)(1), (3). And Congress enacted this statute in response to *Zadvydas*, in which the Supreme Court expressly recognized that, in cases of "terrorism or other special circumstances . . . special argument might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. Thus, denial of a stay—Petitioner's release—would run contrary to the Government's express powers. *See In re Flynn*, — F.3d —, 2020 WL 3442704, at *2 (D.C. Cir. June 24, 2020) ("[W]e have found the requisite harm as a matter of course when a party alleges the district court's action usurps a specific executive power.").

Moreover, decisions relating to detention and removal of a stateless convicted terrorist implicate sensitive matters of foreign relations and national security, where judicial intrusion could have serious adverse consequences. *See Munaf v. Geren*, 553 U.S. 674, 702 (2008); *cf. Jama v. ICE*, 543 U.S. 335, 348 (2005) (recognizing that, even in run-of-the-mill removal proceedings, "selection of a removed alien's destination[] may implicate our relations with foreign powers").

This interference with Executive authority, expressly conferred by Congress, constitutes irreparable harm because "no governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981), and "the Government's interest in combating terrorism is an urgent objective of the highest order," *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1, 28 (2010). In addition, requiring an alien with a terrorism conviction to be released into the United States "would have national security and diplomatic implications beyond the competence or the authority" of a district court. *Qassim v. Bush*, 407 F. Supp. 2d 198, 203 (D.D.C. 2005).

As the Chief Justice Roberts recently reiterated in staying an order pending further review, even a single State "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). *A fortiori*, release of the Petitioner here imposes irreparable injury on the Executive and the public given the "singular importance" of the Executive's actions taken in the national security context with congressional authorization. *See Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982); *see also INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (staying injunction because it likely was "not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government").

The Supreme Court has made clear that potential dangerousness of a habeas petitioner is relevant to determining whether to grant a stay pending appeal. *See Hilton*, 481 U.S. at 779. This Court has agreed. *See Jackson v. Conway*, 2011 U.S. Dist. LEXIS 145386, at *7 (W.D.N.Y. Dec. 19, 2011). While Petitioner insists that continued detention would be

unconstitutional and unlawful, the Supreme Court has already rejected these arguments in *Hilton*. 481 U.S. 779 ("[W]e do not agree that the Due Process Clause prohibits a court from considering, along with the other factors that we previously described, the dangerousness of a habeas petitioner as part of its decision whether to release the petitioner pending appeal.").

Additionally, Petitioner's objections that the government failed to present its case at trial is disingenuous. Petitioner is well aware of the mass of evidence supporting allegations of his dangerousness, including, but not limited to the following:

- Statements from a detainee that Hassoun supported ISIS (Government proposed Exhibit 410);

- Statements from a detainee that Hassoun sought to radicalize young Muslims and make violent actions toward non-Muslims (Government proposed Exhibit 411);

- Statement from a detainee "that Hassoun didn't care about killing innocent people" and said it is "good to kill someone not of the same ideology." (Government proposed Exhibit 412) (Dkt. No. 169-4);

- FBI report (Form FD-302) of detainee interview stating "that Hassoun talked about how to make explosives and to plan attacks." (Government proposed Exhibit 413), and letter submitted by same detainee anonymously reporting that Hassoun had "been talking about explosives and how to make them and detonate them at our services." (Government proposed Exhibit 418A), both of which were excluded from evidence by the Court. Order of June 18, 2020 at 28-30 (Dkt. No. 225);

- FBI interview of detainee stating that "he asked Hassoun if killing women and children was good for you and he stated that HASSOUN said yes—our religion says that." (Government proposed Exhibit 414), along with Declaration from same former detainee that he "would be fearful to testify against Mr. Hassoun in person." (Government proposed Exhibit 415), both of which were excluded from evidence by the Court. *See id.* at 28;

- E-mail from DHS agent summarizing that a detainee disclosed that Hassoun discussed making explosives and terrorism, claimed to be a terrorist, and tried to recruit others Government proposed Exhibit 419) excluded from evidence by the Court. *See id.* at 31-33;

- E-mails from DHS agent summarizing discussion with a detainee in which "HASSOUN was talking about 9/11. He claimed the civilian deaths are just a casualty of war and that 9/11 made the Muslim religion famous around the world," along with e-mail stating that

"HASSOUN pledged support for ISIS." (Government proposed Exhibit 420) excluded from evidence by the Court. *See id*.;

- FBI Interview of detainee who stated that "HASSOUN tells people not to talk to investigators," and that "he doesn't want HASSOUN's powerful buddies to come after him." (Government proposed Exhibit (Dkt. No. 219-1)) excluded from evidence by the Court. *See id.* 38-40; and

- FBI Interview of detainee who stated that he "had heard HASSOUN repeatedly telling detainees not to talk to investigators about Hassoun or other detainees." (Government proposed Exhibit (Dkt No. 219-2)) excluded from evidence by the Court. *See id*..

The fact that the Court excluded much of this evidence in the scope of this novel case—for which there is no controlling authority on the evidentiary standards or burden of proof—is precisely why this case is appropriate for appeal.

Moreover, the government's declination to proceed to the evidentiary hearing is hardly novel. In *Kiyemba v. Bush*, the D.C. Circuit granted a stay pending appeal to a district court decision ordering release into the United States of foreign detainees believed to have trained with the Taliban, but who the United States had not declared foreign combatants. *Kiyemba v. Bush*, Nos. 08-5424 etc., 2008 WL 4898963 (D.C. Cir. Oct. 20, 2008). One judge objected in dissent that "[a]though expressly offered the opportunity by the district court, the government presented no evidence that the petitioners pose a threat to the national safety of the United States or the safety of the community or any person." *Id.* at *7 (Rogers, J., dissenting); *see also* at *13 ("Having failed to file returns for many of the petitioners or to proffer evidence to the district court, the government can point to no evidence of dangerous, and regarding such record as exists in this court the government has not pointed to evidence of such risk.").[3] Here, in contrast, the

[3] The government also declined to provide any evidence in *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), as recognized in *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 37 (D.D.C. 2008) ("The government would not disclose to the courts the evidence by which it considered the petitioner to be a threat to the public interest."); *rev'd by Kiyemba*, 2008 WL 4898963.

government *did* identify evidence showing the threats posed by Petitioner, albeit much of it was stricken through evidentiary rulings that will be taken up in appeal. Thus, the government has done more here than in *Kiyemba*, where the stay was granted.

Petitioner repeatedly points to *Boumediene v. Bush*, 553 U.S. 723 (2008), as supposedly supporting his release. But the Court in *Boumediene* did not hold that an alien is entitled in every instance to an order of release, much less to release to the very same locale of an alien's prior terrorism conviction. Even as to an order of release into another country, *Boumediene* recognized that release "need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Id.* at 779. And in *Munaf v. Geren*, the Court admonished courts exercising habeas jurisdiction to be "reluctant to intrude upon the authority of the Executive in . . . national security affairs." 553 U.S. at 689.

Moreover, just this past Thursday, the Supreme Court warned against giving *Boumediene* an expansive interpretation. *See Thuraissigiam*, 2020 WL 3454809. Specifically, the Court recognized that "*Boumediene* . . . is not about immigration at all." *Id.* at *43. Instead, the aliens seeking release were seeking release from Guantanamo, not to enter this country." *Id.*

Petitioner's arguments are unavailing. The specter of irreparable injury favors a stay pending appeal.

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

The remaining factors also favor the government. Although Petitioner of course has an interest in avoiding any unlawful restraint, here the public interest outweighs his concerns. *Cf.* Pet'r's Opp'n at 46-49. "The court must consider 'where the public interest lies.' As part of that analysis, the court can consider whether [Petitioner] poses a danger to the community and whether he is a flight risk." *Taylor v. Crowther*, No. 07-cv-194, 2020 WL 1677078 at *4 (D.

Utah Apr. 6, 2020) (granting a stay pending appeal where the government did not show a strong likelihood of success because of the petitioner's dangerousness).

Here, the government has already explained why Hassoun's release into the United States, even on conditions, presents an undue risk. *See* Declaration of Michael Glasheen, Resp't's Mot. to Stay Ex. A. Simply put, the government faces an intelligence gap in trying to monitor someone like Hassoun.

The government's ability to monitor Hassoun's phone calls and e-mails is also of limited value. When Hassoun previously suspected the government was monitoring his calls, he used code words and double talk to hide his plans to encourage terrorist acts. *Jayyousi*, 657 F.3d at 1095. For example, when Hassoun wanted to discuss weapons with other terrorists during his calls, he would mask his statements with references to sports equipment. *Id.* at 1097. The government produced calls showing Hassoun's discussions with co-conspirators about their meeting with Osama Bin Laden. *Id.* at 1097. In the calls, Hassoun used a nickname for Bin Laden known only to his supporters. *Id.* at 1099, 1108. In light of Hassoun's past history of using code words, double talk, and nicknames to mask his wrongdoing, the government's ability to rely on monitoring anything Hassoun says on the phone or in e-mail has little value.

Petitioner also would be released precisely into the locale where he committed his prior terrorist acts. Specifically, at his criminal trial, the government presented evidence that Hassoun would meet with his co-conspirator, Jose Padilla, at a mosque in South Florida where Hassoun would invite people to be mujahideen fighters. *Jayyousi*, 657 F.3d at 1094.

In addition, the conditions of confinement do nothing to prevent Hassoun from engaging in wrongdoing outside of the government's limited monitoring capabilities. For example, if he were to possess a firearm, the government's ability to monitor his phones and internet use would

do nothing to reduce the public risk. *See United States v. Hassoun*, 477 F. Supp. 2d 1210, 1213 (S.D. Fla. Mar. 12, 2007) (noting Hassoun's previous charge for unlawful possession of a firearm).

Moreover, Petitioner's pledge that this time he will not continue to commit further terrorist acts rings particularly hollow in light of his past history. Petitioner already has multiple terrorism convictions, including a conviction based on proof "that [he] agreed with at least one person to commit acts constituting murder, kidnapping, and maiming." *United States v. Hassoun*, 476 F.3d 1181 (11th Cir. 2007). The government showed that Hassoun and his co-conspirators "formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that the[y] knew used violence in their efforts to establish Islamic states." *Jayyousi*, 657 F.3d at 1104. Hassoun would even discuss "attendance at al-Qaeda camps" with his co-conspirators. *Id.* at 1105.

Hassoun's continued insistence that he was arrested and convicted based on nothing more than an overzealous government going after him for making the wrong charitable donations is simply not based in reality. Indeed, it was already rejected by a jury:

> [T]here is within the jury verdict a finding that the defendants' actions were intended to bring about the downfall of governments that were not Islamic or not Islamic enough. There was also ample evidence introduced at trial that defendants Jayyousi and Hassoun wished to impose Sharia throughout the Middle East and remove governments in the process. . . . Hassoun railed against secular governments in the Middle East and pledged allegiance to individuals and organizations who sought to eliminate the secular governments or non-Islamic governments in the Middle East. . . . Howevever, in finding the defendants guilty, the jury rejected the defendants' premise that they were only providing nonviolent aid to Muslim communities.

Jayyousi, 657 F.3d at 1115. Moreover—and contrary to Hassoun's attempts to minimize his crimes—in affirming the jury verdict, the Eleventh Circuit also affirmed the district court's application of the terrorism sentencing enhancement. *Id.* at 1114-15.

The reality is that Hassoun—a man who spoke with affinity toward Osama Bin Laden, Al Qaeda, and attacking secular governments—poses a serious risk. And because of his crimes, Hassoun is particularly prone to recidivism. *Id.* at 1117 ("although recidivism ordinarily decreases with age, we have rejected this reasoning . . . for certain classes of criminals . . . . We also reject this reasoning here. '[T]errorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficult of rehabilitee, and the need for incapacitation." *Id.* at 1117.

Finally, a stay to allow the Courts of Appeals to address issues as to the proper evidentiary standards and burden of proof under the PATRIOT Act and the regulation is appropriate. *See Landis v. N. American Co.*, 299 U.S. 248, 256 (1936) (noting propriety of stay in cases "of extraordinary public moment"). Moreover, a stay pending appeal is warranted where, as here, an "appeal raises serious and difficult issues, including the proper application of the well-established evidentiary standard in habeas cases to the facts presented in this case." *Al-Adahi*, 672 F. Supp. 2d at 83. Here, the parties are litigating on novel grounds—with no controlling authorities—explaining the evidentiary standards or burdens of proof. A stay pending appeal would allow the appellate courts to provide such certainty. *See id.* at 84 ("[T]he Court must assess whether the public interest would be serve by the issuance of a stay. There is, as the Government argues, significant benefit in having the Court of Appeals clarify the evidentiary issues it raises.").

Therefore, issuance of the stay will not substantially injure Petitioner, and the public interest favors a stay.

IV. CONCLUSION

For the foregoing reasons and for the reasons set forth in the government's memorandum of points and authorities in support of its motion to stay (Dkt. No. 242-1), the United States respectfully

requests that the Court stay the execution of its June 22, 2020 Oral Order and any forthcoming judgment adverse to Respondent pending 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.

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Respectfully submitted,

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