UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case # 1:19-cv-00370-EAW

v.

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

Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM OF POINTS & AUTHORITIES CONCERNING PETITIONER'S DETENTION UNDER 8 U.S.C. § 1226a

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

I. INTRODUCTION

The U.S. Department of Homeland Security has detained Petitioner Adham Amin Hassoun, a convicted terrorist, under a regulation reserved for serious security or terrorism concerns, 8 C.F.R. § 241.14(d). The legality of that regulation and its application to Petitioner have been the subject of previous briefing before this Court.

Reflecting the seriousness of the threat Petitioner's release poses to the national security of the United States, the Acting Secretary of Homeland Security ("Secretary") has now invoked a second, independent source of law for Petitioner's detention: 8 U.S.C. § 1226a. The Court can, and should, find that 8 C.F.R. § 241.14(d) is a lawful basis for Petitioner's detention, in which case it does not need to reach the issue of 8 U.S.C. § 1226a. But should the Court reach § 1226a, as explained below, it should conclude that the statute applies to Petitioner, comports with the U.S. Constitution, and does not justify holding an evidentiary hearing.

II. PROCEDURAL HISTORY

On February 22, 2019, U.S. Immigration and Customs Enforcement ("ICE") notified Petitioner he was being considered for continued immigration detention pursuant to 8 C.F.R. § 241.14(d) on the grounds his release would present a significant threat to the national security or a significant risk of terrorism, and there were no conditions of release that could reasonably be expected to avoid those threats. Further, the notice advised him of the factual basis underlying ICE's evaluation of those grounds for continued detention. On April 10, 2019, Petitioner submitted a response to the Notice.[1]

[1] The parties previously briefed the legality of Petitioner's detention under 8 C.F.R. § 241.14(d). *See* Dkt. Nos. 14, 17-4, 25, 28.

On August 9, 2019, the Secretary certified Petitioner for continued immigration detention under the authority of both 8 C.F.R. § 241.14(d) ("the Regulation"), and 8 U.S.C. § 1226a, a provision of the USA PATRIOT Act.[2] *See* Dkt. Nos. 26-1, 26-2 (certification orders); Ex. C (notice of decision to certify continued detention under the Regulation which was served on Respondent); Ex. D (notice of decision to certify continued detention under § 1226a which was served on Respondent). In certifying Petitioner for continued immigration detention under the USA PATRIOT Act, the Secretary considered the same administrative record he relied on to certify Petitioner's detention under the Regulation. Ex. D; *see also* Dkt. No. 17-4 at 5-8 (chronicling the present threat that Petitioner poses to national security, as found by the Secretary in certifying Petitioner for detention under the Regulation).

Section 1226a is an independent statutory authority for the temporary immigration detention of certain aliens whom the Secretary has reasonable grounds to believe are either inadmissible or removable from the United States for certain national security reasons, or are engaged in other activities that endanger national security. The statute permits the Secretary to certify an alien if the Secretary has "reasonable grounds to believe that the alien" is described in any of several different paragraphs of the Immigration and Nationality Act related to terrorist activities, espionage, sabotage, violation or evasion of U.S. export laws, and activities aimed at the violent or unlawful overthrow of the Government of the United States. 8 U.S.C. § 1226a(a)(3)(A). The Secretary then must detain the alien until removal if, among other bases, "the release of the alien will threaten the national security of the United States or the safety of the

[2] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (codified in scattered titles and sections of the United States Code).

community or any person." *Id.* § 1226a(a)(1), (2), (6). The Secretary must review his certification every six months. *Id.* § 1226a(a)(7).

III. ARGUMENT

Petitioner challenges his detention pursuant to 8 U.S.C. § 1226a on four grounds, none of which are meritorious. Section 1226a undoubtedly applies to Petitioner, does not deprive him of equal protection of the law, and, on the record in this case, denies Petitioner neither substantive nor procedural due process. The Court should, therefore, hold Petitioner is lawfully detained pursuant to 8 U.S.C. § 1226a.

A. THE STATUTE AUTHORIZES PETITIONER'S DETENTION

1. Petitioner Falls Within the Statute's Coverage

As an initial matter, there can be no dispute Petitioner is an alien of the type eligible for detention under § 1226a(a)(3)—the subsection that describes whom the Secretary of Homeland Security may certify for continued immigration detention.[3] That paragraph covers aliens "described in" 8 U.S.C. § 1227(a)(4)(B) and § 1182(a)(3)(B). 8 U.S.C. § 1226a(a)(3)(A). At a minimum, Petitioner is an alien described in § 1227(a)(4)(B) and § 1182(a)(3)(B) by virtue of his criminal convictions for: conspiracy to murder, kidnap, and maim persons in a foreign country; conspiracy to provide material support for terrorism; and providing material support to terrorists. *See* Dkt. Nos. 17-2 at 33, 17-4 at 44. Those convictions render him removable from the United

[3] Subsection (a)(3) provides:

> The [Secretary of Homeland Security] may certify an alien under this paragraph if the [Secretary] has reasonable grounds to believe that the alien—(A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) this title [i.e. title 8, United States Code], or (B) is engaged in any other activity that endangers the national security of the United States.

8 U.S.C. § 1226a(a)(3). As noted in Petitioner's Supplemental brief, Dkt. No. 28, at 3 n.1, the Homeland Security Act of 2002 transferred this authority from the Attorney General, to whom the actual statutory language refers, to the Secretary of Homeland Security.

States pursuant to § 1227(a)(4)(B) and inadmissible pursuant to § 1182(a)(3)(B)—conclusions that Petitioner does not contest. He is thus eligible for certification under § 1226a(a)(3).

Rather than argue that he does not fall within the class of aliens described in § 1226a(a)(3), Petitioner advances a strained reading of the statute to argue that it only applies to a narrow class of aliens certified under subsection (a)(3) *before* they are initially apprehended detained by immigration authorities. That reading is contrary to the statute's plain language, as well as its purpose and legislative history.

First, the statutory language does not limit application of the authority it grants only to aliens who are certified under subsection (a)(3) before they are first detained. Subsection (a)(1), which affirmatively authorizes the Secretary to take into custody any alien who is certified under subsection (a)(3), contains no language purporting to limit the scope of the entire statute only to such aliens. Rather, subsection (a)(1) is properly understood simply as a grant of authority—indeed, a mandate—to the Secretary to detain aliens who are certified, if they are not already in immigration custody. More importantly, nothing in subsection (a)(3), the subsection that identifies the categories of aliens who may be certified, limits the Secretary's authority to certify only to aliens who are not then already in immigration custody. Had Congress intended to limit the statute's reach as narrowly as Petitioner proposes, it would have placed such a limit in the subsection setting out the scope of the Secretary's certification authority. Rather, subsection (a)(3) authorizes the Secretary to certify any alien who meets the criteria described in that subsection, without any further limitation. 8 U.S.C. § 1226a(a)(3).

Distinct from subsection (a)(1)'s authorization for the Secretary to take certified aliens into custody, subsection (a)(2)—the subsection most directly at play in this case—explicitly directs the Secretary to maintain custody of "such an alien" until the alien is removed (except as

provided in paragraphs (5) and (6)). *Id.* § 1226a(a)(2). Petitioner would have the Court read "such an alien" as limiting the command to maintain custody of certified aliens to just those aliens certified prior to being taken into custody under the authority provided in subsection (a)(1). While "such an alien" certainly refers to the aliens mentioned in subsection (a)(1), those aliens are, properly understood, not aliens taken into custody pursuant to the mandate of subsection (a)(1), but rather "any alien who is certified under paragraph (a)(3)," without reference to when they were taken into custody. 8 U.S.C. § 1226a(a)(1), (a)(2); *see Nielsen v. Preap*, 139 S. Ct. 954, 964-65 (2019).

In *Preap*, the Supreme Court confronted a similar question of statutory construction under 8 U.S.C. § 1226(c). That provision has two paragraphs. The first directed that the Secretary "shall take" into custody "any alien who" fits within one of four subparagraphs "when the alien is released" from criminal custody. The second paragraph mandates that the Secretary may release "an alien described in paragraph (1)" only in certain limited circumstances. The question before the Court was whether an alien qualified as an "alien described in paragraph (1)" if the alien met the criteria in one of the four subparagraphs under paragraph (1), but had not been detained "when released." *Preap*, 139 S. Ct. at 964. Parsing the "plain text" of § 1226(c), the Supreme Court held that the words "when released" were an adverbial clause modifying the verb "shall take," telling the Secretary when to take certain aliens into custody, whereas the descriptions in the four subparagraphs of paragraph (1) were adjectival clauses describing the noun "alien" in that subsection. *Id.* at 964-65. Consequently, when paragraph (2) of § 1226(c) referred back to "an alien described in paragraph (1)," it meant those aliens falling within one of the four descriptive subparagraphs of paragraph (1), but not including any limit based on when the detention occurred. *Id.*; *see also id.* at 965 (in interpreting the term "described," which is

similar to the term "such as" in § 1226a, concluding that "[t]he preliminary point about grammar merely complements what is critical, and indeed conclusive in these cases: the particular meaning of the term 'described' as it appears in § 1226(c)(2)").

Similarly, here, the words "such an alien" in § 1226a(a)(2) refer back to the noun "any alien" in subsection (a)(1), which is modified by the adjectival clause "who is certified under paragraph (3)." As in *Preap*, the plain text of subsection (a)(2) authorizes—indeed, requires—the Secretary to maintain custody of "any alien who is certified under paragraph (3)" until the alien is removed. 8 U.S.C. § 1226a(a)(1), (2). And as previously noted, subsection (a)(3) places no temporal limit on when the Secretary may certify an alien under the statute.

Nor does subsection (a)(6), which limits circumstances of indefinite detention, dictate that the statute's authority to detain a certified alien until removal applies only to an alien certified prior to his initial detention. Subsection (a)(6) provides that "[a]n alien detained solely under paragraph (1) who has not been removed . . . and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6).

First, this subsection refers to "an alien detained . . . under paragraph (1)," rather than repeating the words "take[n] into custody" that are actually used in subsection (a)(1). This formulation in subsection (a)(6) reinforces the reading of subsection (a)(1) as simply an authorization or mandate to detain, rather than a temporal limit on the exercise of the statute's grant of authority.

Second, Petitioner is mistaken in arguing that use of the word "solely" in subsection (a)(6) is evidence the statute is not properly applied to him, since ICE claims authority to detain

him pursuant to 8 C.F.R. § 241.14(d), as well as 8 U.S.C. § 1226a. Petitioner misunderstands the work that the word "solely" does in this subsection. Subsection (a)(6) limits the Secretary's authority to continue to detain someone indefinitely under the authority previously conferred in earlier subsections; it does not limit the Secretary's authority to detain an alien on the basis of any other available authority, e.g., 8 U.S.C. § 1231 or 8 C.F.R. § 241.14(d). By inserting the word "solely" in subsection (a)(6), Congress was careful to apply the *limit* on the statute's detention authority to situations where § 1226a was the *only* authority for the detention. *See* 8 U.S.C. § 1226a(a)(6) ("*may be detained* for additional periods of up to six months *only if* . . ." (emphasis added)). Otherwise, § 1226a(a)(6)'s limit on detention authority might be read to override and invalidate or call into question any other coincidental detention authority. Properly understood, the *limits* on continued detention established by subsection (a)(6) only apply when § 1226a is the sole basis for detention.[4]

For these reasons, the plain text of the statute authorizes the Secretary to certify Petitioner, and having been certified by the Secretary, the statute authorizes his continued detention, subject to the limits in subsection (a)(6).

Second, in addition to the statute's plain text, the statute's purpose and legislative history support the conclusion that the statute is properly applied to Petitioner. The USA PATRIOT Act, enacted seven weeks after the terrorist attacks of September 11, 2001, "was born of adversity and violent attack" 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.

[4] Further, if the Court were to hold that 8 C.F.R. § 241.14(d) were *ultra vires*, as Petitioner has argued, then § 1226a would be the "sole" authority for Petitioner's continued immigration detention.

Rec. H7196 (Oct. 23, 2001) (Rep. Sensenbrenner[5]). *See also* 147 Cong. Rec. S11017 (Oct. 25, 2001) (Sen. Brownback[6]) ("[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."). Section 1226a, therefore, was enacted as part of a broad effort to strengthen the tools available to protect the Nation from the threat of additional terrorist attacks. Given this context and the broad purpose of the legislation, reading the statute narrowly, as Petitioner urges, to apply *only* to dangerous removable aliens not yet detained (but for whom the government has somehow had the time to obtain personal certification by the Secretary), is untenable. Nor is there any indication in the legislative history that Congress intended the statute to be so narrowly construed.

In fact, the legislative history indicates that § 1226a was intended to permit, within the safeguards and limitations provided in the statute, the detention of aliens whose release would threaten national security or public safety. Senator Leahy, Chairman of the Senate Judiciary Committee and the Floor Leader for the bill on the Senate Floor, told his colleagues that § 1226a would permit the Secretary to detain a removable alien whose removal was unlikely in the reasonably foreseeable future if the alien's release would adversely affect national security or

[5] Rep. Sensenbrenner was the Floor Leader for H.R. 3162, which became the USA PATRIOT Act.

[6] Sen. Brownback was the Ranking Member of the Immigration Subcommittee of the Senate Judiciary Committee.

public safety. 147 Cong. Rec. S11004 (Oct. 25, 2001). A similar description was included in a section-by-section analysis of the bill. *Id*. at S11010.[7]

Later, Senator Kennedy, Chairman of the Immigration Subcommittee of the Senate Judiciary Committee, inserted into the record from himself and Senator Brownback, the Subcommittee's Ranking Member, a memorandum describing the immigration provisions of the bill. Senators Kennedy and Brownback submitted their memorandum in lieu of a committee report, which had not been produced given the speed with which the legislation advanced. That memorandum said that § 1226a "sets forth the standards for certification, custody, and detention. *All persons certified* under these new provisions shall be placed in custody and detained until removed or decertified." 147 Cong. Rec. S11047 (Oct. 25, 2001) (emphasis added). The memorandum went on to say that

> For aliens whose removal is unlikely in the reasonably foreseeable future, the Attorney General is required to demonstrate that release of the alien will adversely affect national security or the safety of the community or any person before detention may continue beyond the removal period. Indefinite detention of aliens is permitted only in extraordinary circumstances. *Zadvydas v. Davis*, [533 U.S. 678] (2001).

147 Cong Rec. 11047 (Oct. 25, 2001).

This reference to *Zadvydas* strongly suggests that § 1226a was Congress' response to that decision. *Zadvydas* generally limited post-removal-order detention to the period during which removal was significantly likely in the reasonable foreseeable future, but left open the possibility Congress could authorize detention beyond that point for certain narrow classes of aliens, such as those presenting a risk of terrorism. *Zadvydas*, 533 U.S. at 689-91, 696; *see* Dkt. No. 17-4 at 9-

[7] In that same vein, Senator Kyl observed that "[t]his compromise represents a bipartisan understanding that the Attorney General of the United States needs the flexibility to detain suspected terrorists." 147 Cong. Rec. 11050 (Oct. 25, 2001).

10 (thoroughly explaining how *Zadvydas* repeatedly disclaimed that its decision applied to "terrorism or other special circumstances where special arguments might be made for forms of preventive detention" (quoting *Zadvydas*, 533 U.S. at 696)). As indicated by the Kennedy-Brownback memo, by enacting § 1226a, Congress took up the baton passed to it by the Court to provide clear but narrow statutory authority to detain, pending removal, aliens who present a threat to national security. *See Clark v. Martinez*, 543 U.S. 371, 386 n.8 (2005) (citing § 1226a as Congress' reaction to *Zadvydas*); *Kiyemba v. Obama*, 555 F.3d 1022, 1035-36 (D.C. Cir. 2009) (Rogers, J., concurring) (same), *vacated*, 559 U.S. 131 (2010), *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010); *Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002) (same). Absolutely nothing in the legislative history suggests Congress intended to limit § 1226a's authority to detain aliens presenting a threat to national security or public safety only to those aliens whom the Secretary had been able to certify before initially taking into custody.

Petitioner also argues that § 1226a should be read narrowly because the Regulation covers those other aliens presenting a threat to national security who are not certified before being taken into custody. That argument makes no sense. There is no evidence whatsoever that § 1226a and the Regulation were ever intended to work in tandem. Further, when § 1226a was enacted on October 26, 2001, the Regulation had not yet been promulgated.[8] More generally, there is no indication in the statutes or regulations that only one detention authority at a time may apply to an alien. *Cf. Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 78984, at *8 (W.D.N.Y. Jan. 2, 2019) (in Petitioner's earlier habeas case, finding that § 1231(a) did not justify his detention, but inviting the government to propose other grounds for detention).

[8] The Regulation was promulgated on November 14, 2001. 66 Fed. Reg. 56979 (Nov. 14, 2001).

The plain text of the statute, its purpose, and its legislative history all support the conclusion that § 1226a authorizes the Secretary to detain Petitioner pending removal.

2. The Doctrine of Constitutional Avoidance Is Inapposite Here

Petitioner argues alternatively that, due to supposed constitutional infirmities with the statute, the Court should apply the doctrine of constitutional avoidance to read the statute not to apply to him. Petitioner's appeal to the doctrine of constitutional avoidance should be rejected.

First, the doctrine only comes into play when "statutory language is susceptible of multiple interpretations." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). "When a 'serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that [the court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id*. (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Here, the reading of the statute put forward by Petitioner is not "fairly possible" in light of the statute's language, purpose, and legislative history, as demonstrated above. *See Preap*, 139 S. Ct. at 972 ("Here the text of § 1226 cuts clearly against [the aliens' position,] making constitutional avoidance irrelevant.").

Second, what Petitioner really proposes is not that the Court apply the doctrine of constitutional avoidance, but rather simply that the Court duck the question by adopting his strained reading of the statute. The doctrine of constitutional avoidance, properly applied, is a tool for choosing between plausible interpretations of statutory language where one interpretation would render the statute unconstitutional (or raise serious doubts as to its constitutionality) and the other would "avoid doubts as to its [constitutional] validity." *See Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *see also Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) ("as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.");

Phelps v. United States, 274 U.S. 341, 344 (1927) ("Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."). Petitioner's proposed alternate interpretation of § 1226a here would not "save the Act," or "avoid doubts as to its validity," but rather simply permit the Court to duck the question. That is not an appropriate use of the doctrine of constitutional avoidance.

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

Petitioner claims the statute violates his right to substantive due process under the Fifth Amendment for the same four reasons he previously argued regarding his detention pursuant to the Regulation. As with the Regulation, he is mistaken. First, as noted in Respondent's earlier brief, Dkt. No. 17-4, Petitioner's "liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (internal citations and quotations omitted). Even in the civil context, a person's "constitutionally protected interest in avoiding physical restraint may be overridden." *Id*. at 356. Indeed, "[t]here are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Id.* at 357 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)); *see also Jacobson*, 197 U.S. at 29 (a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense").

"[U]nder the appropriate circumstances, and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law." *Hendricks*, 521 U.S. at 365-66. There is no doubt that preventing danger to the community is a legitimate governmental interest that can, in appropriate circumstances, outweigh an individual's liberty interest. *United States v. Salerno*, 481 U.S. 739, 747, 750 (1987) (collecting cases); *see also Ludecke v. Watkins*, 335 U.S. 160, 173

(1948) (upholding President's authority to detain enemy aliens in war time under Alien Enemy Act of 1798).

Although there is no one formulation that signals when civil detention is permissible, courts have found detention schemes to be constitutional when they typically apply narrowly to a small segment of particularly dangerous individuals and include meaningful procedural protections. *See generally Zadvydas*, 533 U.S. at 690-92; *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008). "[A] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Hendricks*, 521 U.S. at 358. Rather, in cases in which preventative detention is of potentially indefinite duration, and where an individual is being detained because he is dangerous to himself or his community, due process demands the presence of "some other special circumstance . . . that helps to create the danger." *Zadvydas*, 533 U.S. at 691.

Another consideration is that while the Due Process Clause applies to all "persons," the nature of the protection an alien is due "may vary depending upon status and circumstances." *Zadvydas*, 533 U.S. at 694 (citing *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) and *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)); *Hernandez-Carrera*, 547 F.3d at 1254 (citing *Zadvydas*). Petitioner ignores this elementary principle of procedural due process. *See generally* Dkt. No. 28 at 13-21. But as the Supreme Court recognized in *Zadvydas*, in the case of aliens engaged in "terrorism," "special arguments might be made for forms of preventive detention." *Zadvydas*, 533 U.S. at 696. And "even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003); *see also United States*

v. Jayyousi, 657 F.3d 1085, 1117 (11th Cir. 2011) (the appeal in Petitioner's criminal case) (quoting *Meskini*).

Section 1226a comports with the Supreme Court's guidance in *Zadvydas* that preventative detention of potentially indefinite duration be accompanied by some other special circumstance and limited to "a small segment of particularly dangerous individuals, say terrorists." *Zadvydas*, 533 U.S. at 691 (internal quotations and citation omitted). First, the statute, as applicable here, authorizes the continued detention of only a narrow subset of post-removal-order aliens who have been determined, following a process requiring certification by a Cabinet-level officer on the basis of "reasonable grounds to believe," to fit within the narrow categories defined in subsection (a)(3), and if the aliens' removal is unlikely in the reasonably foreseeable future, additionally that the alien's release "will threaten national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6).

Second, detention under § 1226a is not indefinite in the way post-removal-order detention under 8 U.S.C. § 1231(a) was pre-*Zadvydas*, when an alien could truly be detained indefinitely without any periodic review of his detention. Section 1226a(a)(6) and (7), by contrast, authorize post-order detention for a maximum of six months at a time. Each additional six-month period of detention requires review by the Secretary or Deputy Secretary of Homeland Security. Further, the alien may submit matters for the Secretary's consideration in making the decision whether to authorize detention for an additional six months. Requiring frequent re-determinations satisfies substantive due process. *See United States v. Comstock*, 560 U.S. 126,

130-31 (2010) (providing review every six months after the initial hearing); *Hendricks*, 521 U.S. at 353 (providing review every year after the initial hearing).[9]

Further, detention pursuant to § 1226a in no way relieves the government of the continuing obligation to work to execute the removal order. Indeed, the Immigration and Nationality Act directs the Secretary to remove aliens who have been ordered removed. 8 U.S.C. § 1231(a)(1)(A) ("when an alien is ordered removed, the [Secretary of Homeland Security] shall remove the alien from the United States"). That obligation is especially pressing where, as here, the alien is particularly dangerous and cannot be safely released from detention in the United States. For that reason, as Respondent has previously stated, the government continues to work to remove Petitioner, as required by law.

It is fully consistent with the demands of due process to detain, subject to regular, periodic review at the highest levels of government, an alien who has been ordered removed—and therefore has no lawful right to remain in the country—pending success in the government's continuing efforts to remove that alien, if the alien presents a significant threat to the national security of the United States or the safety of the community or any person. The Court should hold that § 1226a does not violate substantive due process.

[9] Petitioner also claims that § 1226a violates his substantive due process rights because it unconstitutionally substitutes indefinite civil detention for criminal prosecution. Dkt. No. 28 at 10. Respondent is detaining Petitioner because of the threat he currently poses, based on the totality of the currently known information. *See* Dkt. No. 17-4 at 5-7, 17 n.4 (recounting Petitioner's threat). Petitioner advances absolutely no evidence that his continued immigration detention is punitive rather than purely for the stated purpose, well supported by the factual record, of preventing the threat to national security and risk of terrorism that his release within the United States would present.

C. THE STATUTE, AS APPLIED TO PETITIONER, SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS

Petitioner argues he has been denied procedural due process in the Secretary's application of § 1226a to him. Dkt. No. 28 at 13-20. He is mistaken.

First of all, insofar as Petitioner makes generalized claims about facial deficiencies in the statute, e.g., the absence of any procedures in either the statute's text or regulations promulgated thereunder for making determinations under the statute, he misses the mark. As the D.C. Circuit[10] has stated, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Am. Fed'n of Gov't Emps. v. United States*, 330 F.3d 513, 518 (D.C. Cir. 2003); *see also 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); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (same, citing *Salerno*).

Next, it bears remembering at the outset that due process is flexible, and the process that is due depends on the circumstances of each case. Again, Petitioner fails to acknowledge this point. *See generally* Dkt. No. 28 at 13-21.

Here, Petitioner was afforded due process insofar as he actually had an opportunity to see and respond to the evidence considered by the Secretary in making the certification decision under § 1226a. That the opportunity to see and respond to the evidence occurred, formally, pursuant to the process provided under 8 C.F.R. § 241.14(d) is irrelevant, insofar as the

[10] Unlike with challenges to detention under the Regulation, which use the law of the circuit where the case is brought, a judicial challenge to USA PATRIOT Act detention relies on the law of the D.C. Circuit. 8 U.S.C. § 1226a(b)(4).

substantive decision the Secretary had to make under the Regulation was substantially similar to the determination to be made under the statute, i.e., whether Petitioner's release would present a significant risk to national security or a threat of terrorism.[11]

While Petitioner argues that the government cannot rely on the process afforded him under the Regulation to satisfy his right to due process under the statute, he provides no authority for that proposition. Dkt. No. 28 at 14-16.[12] Nor does he explain how his response to the evidence provided to him—the same evidence relied on by the Secretary in making both certifications—would have been different if he had been formally notified that the Secretary was considering certifying him for detention under § 1226a, in addition to under the Regulation. Given that the record relied on by the Secretary was identical under both § 1226a and the Regulation, that the determinations to be made by the Secretary were substantially similar, and that Petitioner had a similar motive to respond to the factual record presented pursuant to the Regulation as he would have had if he had also been presented the same record pursuant to the statute, he has been afforded the process he was due.

---

[11] To certify Petitioner's continued detention under the Regulation, the Secretary had to determine whether Petitioner's release presents a significant threat to the national security or a significant risk of terrorism; and whether there are any conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism. 8 C.F.R. § 241.14(d)(1)(ii)-(iii). To certify Petitioner's detention under § 1226a, the Secretary had to determine whether there were reasonable grounds to believe Petitioner was inadmissible or removable for one of the security related grounds spelled out in the statute, or had engaged in any other activity that endangers the national security, and to continue his detention, that Petitioner's release would threaten the national security or the safety of the community or any person. 8 U.S.C. § 1226a(a)(3), (a)(6).

[12] Petitioner argues that it would violate the Administrative Procedure Act to declare that the Regulation applies in every instance in which § 1226a is used. Dkt. No. 28 at 14-15. That is not what Respondent is arguing, however. Respondent argues only that the Regulation was followed in this case, which surpasses the due process threshold for § 1226a detention at least as far as this case goes. *See Salerno*, 481 U.S. at 745 (requiring a facial challenger to establish that there is *no* set of circumstances exist under which the Act would be valid).

Petitioner also argues that the government should not be permitted to rely on the process afforded to him under the Regulation because the government had not adopted that process for use under § 1226a by notice-and-comment rulemaking under the Administrative Procedure Act. First, assuming without conceding that notice and comment are even required for regulations promulgated pursuant to 8 U.S.C. § 1226a, that requirement is only relevant to whether any such regulations were validly adopted, which is a different question than the one before this Court in this case. Here, the question is whether the process afforded to Petitioner—whether or not it was pursuant to some regulatory requirement—was constitutionally adequate under the circumstances. It was.

Petitioner claims that, even if the government can rely on the procedures under the Regulation to provide Petitioner due process under § 1226a, those procedures are themselves constitutionally inadequate. Dkt. No. 28 at 14. He then goes on to reprise, in this context, his earlier arguments against the Regulation on the grounds that there is no independent decision-maker, no opportunity to see the evidence or know the allegations against him, or to present evidence and be heard. *Id*. Respondent answered each of those arguments in his earlier brief, Dkt. No. 17-4 at 18-26, and those responses need not be repeated here, as they apply equally to the certification decision under § 1226a as to the certification decision under the Regulation.

Petitioner next argues that § 1226a provides no standard for the Secretary's decision to continue detention, and that even if the standard were presumed to be "reasonable grounds to believe," that standard would be constitutionally inadequate. Dkt. No. 28 at 17. Petitioner is mistaken. First, the statute clearly states that, in order to certify an alien, the Secretary must have "reasonable grounds to believe" that the alien fits within one or more of the categories of aliens described. 8 U.S.C. § 1226a(a)(3). As for the recertification provision of subsection (7), that is

not before the Court, as Respondent has not invoked those provisions against Petitioner. Petitioner complains that this standard falls below other civil detention standards, Dkt. No. 28 at 17, but as Respondent has previously explained, higher standards were used in cases inapposite to the situation here. Dkt. No. 17-4 at 24-25.

Second, as explained above, whatever standard of proof the statute might theoretically permit, in this particular case, given the Secretary's coincident certification of Petitioner under the Regulation, it is clear that the Secretary determined Petitioner's release would present a *significant risk* to national security or a threat of terrorism, and that no conditions of release can reasonably be expected to avoid those threats. *See* Dkt. No. 26-1. That determination supports Petitioner's certification under each of the Regulation and § 1226a. In other words, the fact that the higher threshold of the Regulation was met here means that the statute was also satisfied.

Nor was Petitioner denied due process by not having been notified *in advance* that the Secretary was considering him for certification under § 1226a.[13] As already noted, Petitioner did, in fact, have an opportunity, in advance of his certification, to see the evidence on which the Secretary would rely and to submit evidence of his own on whether he presented a threat to national security. Further, the Constitution permits the Executive to act and defer providing notice in situations where harm to the public is threatened and the gravity of the risk to the public

[13] Only one of the cases Petitioner cites in support of his argument that he was entitled to advance notice of the § 1226a certification decision, *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980), actually addresses the question of the timing of any required notice. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966); *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 352-53 (1997). *Vitek* is inapposite here because the detained individual there was not apparently an alien, and aliens like Petitioner are entitled to less process than are U.S. citizens. *See generally Vitek*, 445 U.S. 480. Further, while *Vitek* addresses the timing of the required notice and opportunity to be heard, it is inapposite here, as it concerns a person who was then at liberty, as opposed to someone already in government custody.

outweighs the individual's interest in pre-action notice. *See Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 264 n.10 (1970) (collecting cases); *Fahey v. Mallonee*, 332 U.S. 245, 253-53 (1947); *Yakus v. United States*, 321 U.S. 414, 436 (1944); *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315 (1908); *R.A. Holman & Co. v. Sec. & Exch. Comm'n*, 299 F.2d 127, 131 (D.C. Cir. 1962). Clearly, the situations for which Congress enacted § 1226a—the incapacitation of aliens who threaten the national security or public safety—is an urgent and weighty public interest, and it will often be the case that it would be highly imprudent to notify such aliens in advance that the government is aware of the information underlying the need to certify the alien. Here, not only was Petitioner aware of the *information* on which the Secretary's certification decision would be made in advance of that decision, he was also promptly provided notice of the certification. Ex. D (Notice to Petitioner of § 1226a detention). As § 1226a explicitly states, Petitioner will have a later opportunity to request that the Secretary reconsider the certification, and to submit documents and other evidence for the Secretary's consideration. 8 U.S.C. § 1226a(a)(7).

For all these reasons, the Court should reject Petitioner's contention that he has been denied procedural due process in the decision to certify him under 8 U.S.C. § 1226a.

D. THE STATUTE DOES NOT VIOLATE PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAW

Plaintiff also contends that § 1226a violates his right to equal protection of the law because it targets aliens and interferes with their fundamental right to liberty. Dkt. No. 28 at 21-22. Petitioner argues that the statute impermissibly distinguishes between aliens who pose a threat to national security or public safety versus citizens who pose such threats. *Id*. Petitioner is wrong that heightened scrutiny is appropriate here, and his equal protection argument fails.

Where an equal protection challenge is made to an immigration law, rational basis review applies. *See, e.g.*, *Matthews v. Diaz*, 426 U.S. 67, 83 (1976). Rational basis review applies even when the federal government distinguishes on the basis of alienage. *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979); *Diaz*, 426 U.S. at 83 (drawing distinction between alienage classifications imposed by the federal government and those created by state and local governments). "[I]mmigration regulation differs fundamentally from [other legal contexts] because classifications on the basis of nationality are frequently unavoidable in immigration matters." *Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008). "Given the importance to immigration law of, *inter alia*, national citizenship, passports, treaties, and relations between nations, the use of such classifications is commonplace and almost inevitable." *Id*.; *Narenji*, 617 F.2d at 747 ("Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive.").

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

Government action will withstand rational basis review unless "there is no 'rational relationship between [the challenged government action] and some legitimate government interest." *Gordon v. Holder*, 721 F.3d 638, 656 (D.C. Cir. 2013). Rational basis review does not

require courts to identify the actual rationale for a distinction; the classification "may be based on rational speculation unsupported by evidence or empirical data." *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc). Instead, a law reviewed under this lens receives a strong presumption of validity, and the court must uphold the law "[s]o long as such distinctions are not wholly irrational." *Narenji*, 617 F.2d at 747. This means that a law cannot be invalidated merely because it is overbroad or under-inclusive. *See Gordon*, 721 F.3d at 656; *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592-93 (1979) (ruling that over-inclusiveness is acceptable under rational basis review, considering the circumstances of the case). Finally, "[i]t is hard to imagine a more deferential standard than rational basis," especially so in special contexts like military regulations, *Steffan*, 41 F.3d at 685—not unlike the special circumstances presented here by terrorist detention.

These principles explain why § 1226a does not violate the equal protection guarantee of the Fifth Amendment. Specifically, public safety and national security undergird the statute's authorization of immigration detention pending removal. This is demonstrated by the text of § 1226a, which permits the Secretary to continue to detain where it is unlikely the alien will be removed in the reasonably foreseeable future, only if the alien's release will threaten national security or public safety, and then only for six months at a time. It is also demonstrated by the statute's legislative history and historical context. After September 11, 2001, Congress responded to *Zadvydas* with both public safety and national security concerns by enacting § 1226a. *See Xi*, 298 F.3d at 839 ("[J]ust months after *Zadvydas* was handed down, Congress passed legislation providing for the mandatory detention of suspected terrorists."); *Kiyemba*, 555 F.3d at 1035-36 (Rogers, J., concurring) (noting that § 1226a gives the government the "authority to detain terrorist aliens pursuant to removal longer than six months under certain

circumstances, after the Supreme Court in *Zadvydas* found no such statutory authority then existed").

The statute seeks to address a legitimate and serious governmental interest, i.e., how to protect the country and the public from aliens who have been ordered removed from the country—and therefore have no lawful right to remain in the United States—but who cannot be removed in the reasonably *foreseeable* future, and whose release from detention would pose a threat to national security or public safety.

Public safety and national security are rational bases sufficient to survive constitutional scrutiny, as the Supreme Court has found. *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2420-21 (2018) (finding national security to be a conceivable permissible purpose under rational basis review). Under *Parker* and *Hawaii*, the Secretary has a wholly valid reason to treat aliens who have been ordered removed and who pose a threat to national security or public safety differently than citizens, who have every right to be at large in the country. *See Parker*, 348 U.S. at 32 (1954); *accord Hawaii*, 138 S. Ct. at 2420-21. Further, the law governing civil detention *requires* the government to narrowly distinguish the category of people potentially subject to extended civil detention in these circumstances. And *Flores* and *Narenji* establish that the government is free to treat alien national security threats differently from U.S. citizens who might pose the same threat. *See Flores*, 507 U.S. at 305-06; *see also Narenji*, 617 F.2d at 747-45.

Removable aliens who pose a threat to national security or public safety, like Petitioner, are properly subject to detention under § 1226a. This distinction is based solely on the grave threat such aliens pose, which the Supreme Court has upheld as a valid reason to treat these aliens differently than U.S. citizens. *See Diaz*, 426 U.S. at 79-80 (distinguishing between the different constitutional protections afforded citizens, aliens, and different classes of aliens). "This burden 'to negative every conceivable basis which might support' the law is especially difficult to meet." *Gordon*, 721 F.3d at 656. Petitioner has failed here to meet that burden.

E. THERE IS NO NEED FOR AN EVIDENTIARY HEARING IN THIS CASE

Finally, Petitioner asks this Court to find that his § 1226a detention is not justified on the facts of this case. In the alternative, he asks the Court to hold an evidentiary hearing to substitute its judgment for that of the Secretary of Homeland Security on the necessity of Petitioner's continued immigration detention as a threat to national security or the public safety. Dkt. No. 28 at 22-23. The Court should find that Petitioner has failed to meet his habeas burden, and reject his ill-advised, unnecessary, and inappropriate invitation to convene an evidentiary hearing.

First, Respondent agrees with Petitioner that the Court should first assess the paper record to determine whether his detention is justified, before even considering an evidentiary hearing. Dkt. No. 28 at 23-24 (asking for an evidentiary hearing "[i]n the event that the Court is not prepared to make a determination that Mr. Hassoun's detention is unjustified as a matter of law on the present record"). The record here, under the properly deferential standard of review and considering Petitioner's burden, amply demonstrates the lawfulness of Petitioner's detention.

In February 2019, the ICE Deputy Director initiated procedures to assemble a record for the ICE Director to consider in deciding whether to seek the Secretary's certification for continued detention under both § 1226a and the Regulation. The ICE Deputy Director's decision to initiate the process took into account Petitioner's prior conduct and the Federal Bureau of

Investigation Director's recommendation, which formed the basis for his conclusion that Petitioner was likely to engage in activity that endangers the national security, that his release in the United States presents a significant threat to national security and a significant risk of terrorism, and that no conditions of release can reasonably be expected to avoid that threat or risk. On May 24, 2019, having reviewed all the evidence of record, including the material submitted by Petitioner, the ICE Director forwarded the administrative record to the Secretary, recommending that the Secretary certify Petitioner's continued detention under both the Regulation and § 1226a. The Secretary then reviewed the record and certified Petitioner's continued detention for an additional six months. The evidence of record demonstrates that the Secretary's determination was reasonable.

Petitioner asks the Court to review the facts undergirding the Secretary's detention decision *de novo*. *See* Dkt. No. 28 at 22-25. That is not the proper standard. The standard of review of an administrative immigration decision in a habeas case is generally more limited than on direct review. *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"). Indeed, 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.*; *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 . . . .").

A habeas court reviewing an administrative immigration decision must accept the agency's facts unless, at most, "some essential finding of fact is unsupported by the evidence." *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) ("[I]f the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of habeas corpus."). Further, Petitioner, not the government, bears the burden of showing that it is more likely than not that the government's factual determinations fail to meet the *Bilokumsky* standard. *See Miller v. Cameron*, 335 F.2d 986, 987 (D.C. Cir. 1964). Although the Secretary's own standard is "reasonable grounds to believe," 8 U.S.C. § 1226a(a)(3), that does not mean that the Court reviews that determination *de novo*. Rather, under the ordinary habeas principles not displaced by § 1226a, the Court should review the Secretary's determination deferentially and with the burden on Petitioner.

In reviewing the evidence to determine whether Petitioner has met his burden, the Court should bear in mind the unique context in which this case arises. As explored in Respondent's earlier brief, Dkt. No. 17-4 at 25-26, the Supreme Court has repeatedly and recently reminded that "the Government's interest in combating terrorism is an urgent objective of the highest order." *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. *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.").

That deference should extend to § 1226a determinations. As a statute enacted to govern continued detention where there exists a threat to the national security or public safety, detention under § 1226a is particularly justified. The *Zadvydas* Court, in analyzing post-removal-period immigration detention, left open the possibility of extended detention in cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. The statute that Congress enacted in response to *Zadvydas*, § 1226a, applies to those aliens whose release "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); *see Kiyemba*, 555 F.3d at 1035-36 (Rogers, J., concurring).

Against that background, Petitioner has failed to carry his burden to show it is more likely than not that the essential facts found by the Secretary are wholly unsupported by the evidence. *See Bilokumsky*, 263 U.S. at 153-54; *Miller*, 335 F.2d at 987. In fact, faced with this evidence, Petitioner submitted no new evidence of his own for the Secretary's consideration. *See* Dkt. No. 28 at 23 (Petitioner's brief simply attacking the evidence that the Secretary relied upon). Nor has he explained what he would have submitted, but did not, had he known the Secretary was considering certification under § 1226a as well as the Regulation. *See id.* Just as with the Regulation, Petitioner has thus "made no effort" to affirmatively "rebut any portion" of the administrative record bearing on his § 1226a detention. *Goncalves-Rosa v. Shaughnessy*, 151 F. Supp. 906, 910 (S.D.N.Y. 1957). Having forgone that opportunity, Petitioner cannot now cast aspersions on the government's evidence. Essentially, Petitioner "has chosen to remain mute rather than attempt to sustain []his burden." *Id*. at 911.

This is fatal to his case because, as Respondent chronicled exhaustively in justifying Petitioner's detention under the Regulation on the same factual basis, the Secretary fairly concluded that Petitioner has engaged in an activity that endangers the national security. Dkt. No. 17-4 at 44-47. Notably, Petitioner has already been indicted, prosecuted, and convicted in federal district court of: conspiracy to murder, kidnap, and maim persons in a foreign country; conspiracy to provide material support to terrorists; and providing material support to terrorists. *United States v. Hassoun*, 476 F.3d 1181, 1183 (11th Cir. 2007). The basis for this conviction, as both the ICE Director and the Federal Bureau of Investigation Director found, was Hassoun's recruiting, fundraising, and otherwise materially supporting terrorist groups overseas in three continents over a seven-year period. *Jayyousi*, 657 F.3d at 1092-1101; Dkt. No. 17-4 at 44. In so doing, he became "one of the primary radicalizing influences in south Florida during that time." ECF No. 17-2 at 11 (ICE000010). He was sentenced to 188 months of imprisonment, and is now on a 20-year period of supervised release. *Id.* at 33-38 (ICE000032-37). Petitioner's conviction clearly establishes that he meets the statutory criteria for certification under subsection (a)(3). Because Petitioner has failed to carry his burden on any part of the government's detention assessment, the Court should deny relief.

Petitioner alternatively asks the Court to hold an evidentiary hearing to hear facts not already in the record. The Secretary based his decision to certify detention solely on the information in the record, all of which was unclassified and made available for Petitioner's review. Ex. D ("I have considered that procedural history, and all matters contained in the Administrative Record, in making my decision under [§ 1226a]."). Moreover, Petitioner's broad and speculative request for additional evidence may implicate information that is entirely

unrelated to him but is sensitive for other reasons. Thus, the Court should deny this request and rule on the papers.

An evidentiary hearing is not always required on a petition for a writ of habeas corpus. *Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). Indeed, neither the habeas statute nor the 28 U.S.C. § 2254 rules—which the Court may apply to immigration habeas proceedings—mandate a hearing. *See* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."); Rules Governing 2254 Proceedings, Rules 8(a) (directing the judge to determine, based on the paper record, "whether an evidentiary hearing is warranted"), 1(b).

Rather, the need for an evidentiary hearing depends on the documentary evidence already before the court: "[T]he necessary scope of habeas review in part depends upon the rigor of any early proceedings." *Boumediene v. Bush*, 553 U.S. 723, 781 (2008). As discussed earlier, courts must defer heavily to the Executive Branch's findings of facts in immigration habeas cases, which would extend to § 1226a detention. *See, e.g.*, *Heikkila*, 345 U.S. at 233-36. Further, the Secretary based his decision to certify detention solely on the information in the record, all of which was unclassified and made available for Petitioner's review. Ex. D. Given the clarity and completeness of the present record, the Court can summarily decide this case without imposing the costs and intrusions of further, unwarranted factfinding. *See Jhirad v. Ferrandina*, 536 F.2d 478, 484 (2d Cir. 1976) ("[T]he district judge has the right to authorize such discovery procedures 'as law and justice require,' 28 U.S.C. § 2243. [The case law] plainly does not compel their availability no matter what the circumstances.").

Even if the Court wishes to hear further evidence on a matter raised by Petitioner, there is no need to convene an evidentiary hearing to do so. A habeas court must "summarily" hear and

determine disputed questions of fact. 28 U.S.C. § 2243. But a court has wide discretion over *how* to decide such factual questions. *Id.* § 2246; *Harris v. Nelson*, 394 U.S. 286, 299 (1969). For example, in a habeas matter, a judge may receive evidence by affidavit or interrogatory. 28 U.S.C. § 2246; *see Haliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1242 (11th Cir. 2003) (concluding that by receiving evidence in the form of interrogatories pursuant to 28 U.S.C. § 2246, a habeas court provided "a full and fair evidentiary hearing"). District courts should also tailor any factfinding to the type of case at issue by considering a protective order and considering ex parte and in camera evidence. *See Al Odah v. United States*, 559 F.3d 539, 547-48 (D.C. Cir. 2009); *Boumediene v. Bush*, 476 F.3d 981, 1011-12 (D.C. Cir. 2007) (Rogers, J., dissenting) ("District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security[] . . . by use of protective orders and ex parte and in camera review . . . ."), *rev'd*, 553 U.S. 723.

Here, if the Court concludes that it needs more evidence to render a decision, it should exercise its discretion under 28 U.S.C. § 2246 to receive documentary evidence only. Petitioner asks for an in-person evidentiary hearing in addition to written discovery, but fails to provide any justification for why written discovery would be insufficient. Whether the government meets the evidentiary threshold for § 1226a detention is determined best by examining the records of the government (subject, of course, to the rules of evidence), not by compelling government witnesses to testify or by compelling the production of evidence. Such evidence would be a sufficient way for the Court to determine whether Petitioner has met his burden (assuming the Court does not rule on the record already in existence). Therefore, the present administrative record is more than enough for this Court to fulfill its duty to "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243.

Further, Respondent is unsure of what evidence, exactly, Petitioner will seek from Respondent. To the extent Petitioner may try to solicit sensitive information (which would be unrelated to his detention certification), the Court should also enter a protective order and consider receipt of ex parte and in camera evidence.

IV. CONCLUSION

Petitioner's detention under 8 C.F.R. § 241.14(d), as discussed in Respondent's Memorandum in support of the Answer, Dkt. No. 17-4, is lawful and constitutional, and has been properly applied to the facts in Petitioner's case. Therefore, the Court need not reach the statutory issues here. But if it does, then for the foregoing reasons, the Court should hold that Petitioner's detention under 8 U.S.C. § 1226a is similarly lawful. This Court should deny Petitioner any relief on the Amended Petition. Finally, should the Court decide that further factfinding is required, then Respondent respectfully requests that the Court limit such factfinding to limited discovery and documentary submissions, and decline to convene an evidentiary hearing.

Date: October 1, 2019

Respectfully submitted,

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

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

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

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

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

/s/ *Steven A. Platt*
STEVEN A. PLATT
Counsel for National Security
National Security & Affirmative Litigation Unit
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044-0868
Tel: (202) 532-4074
Email: steven.a.platt@usdoj.gov

Attorneys for Respondent