

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ADHAM AMIN HASSOUN,

Petitioner,

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

v.

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

Respondent.

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**NOTICE OF MOTION**

**MOVING PARTY:**

Respondent

**PLACE:**

Hon. Elizabeth A. Wolford  
U.S. District Court  
100 State Street  
Rochester, NY 14614

**RELIEF SOUGHT:**

Respondent respectfully requests an Order temporarily adjourning the evidentiary hearing set for April 28, 2020, and certain related scheduling dates.

**PAPERS SUBMITTED IN SUPPORT:**

Memorandum of Law in Support of Respondent's Motion.

Respondent anticipates filing a reply memorandum of law.

Date: March 31, 2020

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UNITED STATES DISTRICT COURT  
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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO  
ADJOURN THE EVIDENTIARY HEARING**

Respondent respectfully moves to adjourn the evidentiary hearing set to commence on April 28, 2020, and certain associated filing deadlines. Since the Court set the evidentiary hearing date in January 2020, the novel coronavirus and the respiratory disease it causes, COVID-19, have raised unprecedented public health concerns in the United States and especially in New York, which is widely considered the current epicenter for the disease within the United States. Respondent therefore requests an adjournment of the evidentiary hearing to comply with government directives, preserve public health, and ensure that all parties have the adequate ability to prepare their case for the hearing. The reasons for the motion, including the national security aspects that compound the nature of the current challenges, and the precise relief requested are as follows.

**BACKGROUND**

As of the time of filing, there have been over 184,200 cases confirmed of COVID-19 in the United States; almost 76,000 confirmed cases in the State of New York; and over 460

confirmed cases in Erie County and over 255 confirmed cases in Monroe County. Johns Hopkins University, *Coronavirus COVID-19 Global Cases*, <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (last visited Mar. 31, 2020). Over 3,700 people have died from COVID-19 in the United States; out of the 1,550 COVID-19-related deaths in the State of New York, 8 were in Erie County and 8 were in Monroe County. *Id.*<sup>1</sup> The virus that causes COVID-19 “seems to be spreading easily and sustainably in the community” and person-to-person transmission of the virus can occur before an infected person shows symptoms. See Centers for Disease Control and Prevention, *How Coronavirus Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last visited Mar. 30, 2020). About one out of every six people who get COVID-19 become seriously ill and develop difficulty breathing. World Health Organization, *Q&A on Coronaviruses (COVID-19)* (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

On March 11, 2020, the World Health Organization publicly characterized COVID-19 as a pandemic. Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Situation Summary* (last updated Mar. 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>. New York has reported the highest number of cases of COVID-19 in the United States and has determined that the virus is spreading by community transmission. See Centers for Disease Control and Prevention, *Cases in the U.S.* last (updated

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<sup>1</sup> The District of Columbia, Virginia, and Maryland have also been hit hard by COVID-19. There are over 490, 1,240, and 1,650 confirmed cases of COVID-19 in the District, Virginia, and Maryland, respectively. Johns Hopkins University, *Coronavirus COVID-19 Global Cases*, *supra*. Further, 9, 15, and 18 people have died from COVID-19 in those jurisdictions, respectively. *Id.* The figures are relevant because these locations are where the Department of Justice, FBI, the Department of Homeland Security (“DHS”), and ICE are headquartered and where most of their headquarters employees reside.

Mar. 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html#reporting-cases>.

The federal government has aggressively responded to the global outbreak of COVID-19 and issued guidance to minimize person-to-person transmission. On March 13, 2020, the President declared a National Emergency in an effort to address the spread of COVID-19, *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Pres. Proc. 9994 (Mar. 13, 2020), and on March 16, 2020, the President announced new guidance to slow the spread of the virus, including listening to and following the directions of state and local authorities, avoiding groups of more than ten people, avoiding discretionary travel, and working or schooling from home whenever possible. The White House, *The President's Coronavirus Guidelines for America*, [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last visited Mar. 30, 2020). Moreover, the President's guidance also recommends for States with evidence of community transmission—such as New York—that “indoor and outdoor venues where groups of people congregate should be closed.” *Id.* He also extended social distancing guidelines through April 30, 2020. Michael D. Shear, *Trump Extends Social Distancing Guidelines through End of April*, N.Y. Times (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/us/politics/trump-coronavirus-guidelines.html>.

This guidance follows recommendations by the Centers for Disease Control and Prevention (“CDC”) to engage in social distancing, and, where there are substantial levels of community transmission or impact of COVID-19, for individuals to limit community movement and, for workplaces to cancel non-essential work travel and work-sponsored conferences. Centers for Disease Control and Prevention, *Implementation of Mitigation Strategies for*

*Communities with Local COVID-19 Transmission*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf> (last accessed Mar. 30, 2020; *see also* Antonia Noori Farzan et al., *Live Updates: Trump Extends Social Distancing Guidelines after Experts Warn the Coronavirus Could Kill 200,000 in the U.S.*, Wash. Post, <https://www.washingtonpost.com/world/2020/03/30/coronavirus-latest-news/> (last visited Mar. 30, 2020)). The CDC has also urged residents of New York, New Jersey, and Connecticut to refrain from non-essential domestic travel through April 11, 2020. CDC, *CDC Issues Domestic Travel Advisory for New York, New Jersey, and Connecticut* (Mar. 28, 2020), <https://www.cdc.gov/media/releases/2020/s038-travel-advisory.html>.

The federal government has implemented the above guidance on the COVID-19 pandemic internally within the executive branch and with respect to its employees. The Office of Personnel Management (“OPM”) has issued guidance concerning the continuity of Federal Government operations, including recommendations that agencies incorporate telework for employees and social distancing. OPM, *Coronavirus Disease 2019 (COVID-19) Additional Guidance* (Mar. 7, 2020), <https://www.chcoc.gov/content/coronavirus-disease-2019-covid-19-additional-guidance>. The Office of Management and Budget (“OMB”) has asked agencies to “offer maximum telework flexibilities to all current telework-eligible employees, consistent with the operational needs of the departments and agencies as determined by their heads.” Memorandum from the Acting Director of OMB to the Heads of Departments and Agencies, *Updated Guidance for National Capital Region on Telework Flexibilities in Response to Coronavirus* (Mar. 15, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M20-15-Telework-Guidance-OMB.pdf>. On March 17, 2020, OMB ordered an “aggressive posture” to slow the transmission of COVID-19, to include requiring the Federal Government to

“immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.” Memorandum from the Acting Director of OMB to the Heads of Departments and Agencies, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>. While employees of the United States Attorney’s Office for the Western District of New York have continued to work both at its District’s offices and remotely, as of March 25, 2020, employees of the Department of Justice’s Civil Division—including undersigned counsel—are generally prohibited from entering Department of Justice facilities and are expected to telework. Ex. A, Decl. of Anthony D. Bianco ¶¶ 5, 8.

At the state and local level, New York Governor Andrew Cuomo has declared a disaster emergency in the State of New York. *Declaring a Disaster Emergency in the State of New York*, Exec. Order 202 (Mar. 7, 2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>. On March 19, 2020, Governor Cuomo signed an executive order requiring 75 percent of non-essential workforces to work from home. New York State, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Signs Executive Order Mandating Businesses That Require in-Office Personnel to Decrease In-Office Workforce by 75 Percent* (Mar. 19, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-signs-executive-order-mandating-businesses>. One day later, Governor Cuomo signed an executive order directing non-essential businesses statewide to close, ordering that any concentration of individuals outside the home be limited to workers providing essential services. New York State, *New York State on PAUSE*, <https://coronavirus.health.ny.gov/new-york-state-pause> (last visited Mar. 30, 2020). When in public, New York State further ordered individuals,

when in public, to practice social distancing of at least six feet from others. *Id.* Furthermore, New York State ordered individuals to limit the use of public transportation to instances when absolutely necessary. *Id.* All New York schools are closed until at least April 15, 2020. Karen Dewitt, *Cuomo Extends Stay at Home Order Through April 15*, WAMC (Mar. 30, 2020), <https://www.wamc.org/post/cuomo-extends-stay-home-order-through-april-15>. Most school districts within Erie County are closed until April 20, with some closed simply until further notice. Ron Plants, *Some Educators Expect School Shutdowns May Last Longer*, WGRZ.com (Mar. 24, 2020), <https://www.wgrz.com/article/news/education/some-educators-expect-school-shutdowns-may-last-longer/71-9d23e14c-f003-4524-a36f-4ed7193b8a38>.<sup>2</sup> In the National Capital Region, on March 30 the mayor of the District of Columbia and the governors of Virginia and Maryland have issued stay-at-home orders, prohibiting residents from leaving their homes except for essential trips. Antonio Olivo et al., *Hogan, Northam, Bowser Order Residents in Maryland, Virginia, D.C. to Stay at Home* (Mar. 30, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/30/coronavirus-dc-maryland-virginia-live-updates/>.

This Court, too, has reacted by activating its continuity of operations plan. General Order, Court Operations under the Exigent Circumstances Created by COVID-19 (Mar. 13, 2020), [https://www.nywd.uscourts.gov/sites/nywd/files/Court%20Operations%20Under%20COVID-19\\_signed.pdf](https://www.nywd.uscourts.gov/sites/nywd/files/Court%20Operations%20Under%20COVID-19_signed.pdf). The Court's general order stayed all civil jury trials, grand jury selections, and naturalization ceremonies. *Id.* The order also encouraged the judges to limit

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<sup>2</sup> Monroe County has closed schools indefinitely. Jack Watson, *All Monroe County Public Schools Closed Indefinitely*, RochesterFirst.com (Mar. 14, 2020), <https://www.rochesterfirst.com/coronavirus/monroe-county-public-schools-to-close-march-16>. Erie County has closed schools until, at minimum, April 20, 2019, with educators planning for the shutdown to continue longer. *Some Educators Expect School Shutdowns May Last Longer*, WGRZ.com, *supra*.



personal appearances as much as practicable in all other civil and criminal proceedings. *Id.* Finally, the Court has imposed new visitor restrictions on all courthouses in the District as a result of the novel coronavirus. Office of the Clerk, *Visitor Restrictions in the United States District Court for the Western District of New York* (Mar. 12, 2020), <https://www.nywd.uscourts.gov/sites/nywd/files/Visitor%20Restrictions%20Release.pdf>.

The Department of Justice, including the Federal Bureau of Investigation (“FBI”), and the Department of Homeland Security, including U.S. Immigration and Customs Enforcement (“ICE”) both in Washington and at the Buffalo Federal Detention Facility (“BFDF”), though essential, are, to the extent possible, following the above guidelines to protect their employees, contractors, and communities, and to ensure that they can continue to protect the American people during this national emergency.

## ARGUMENT

These directives, while beneficial to the public health, are severely hamstringing the federal government’s ability to meet its burden at the evidentiary hearing.

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Public health matters may form the basis for such an adjournment or stay. *See, e.g., Porter v. United States*, 19 F. Cas. 1073, 1073 (C.C.S.D.N.Y. 1835); An Act Respecting Quarantines and Health Laws, 5 Cong. ch. 12, 1 Stat. 619, 621, § 7 (Feb. 25, 1799) (permitting district courts to adjourn a hearing to elsewhere within the district when the judge is of “the opinion [that] a contagious sickness shall render it hazardous to hold the next stated session of the said court”).

In light of these circumstances, during the March 16, 2020 oral argument, while discussing the pandemic the Court invited Respondent to file this motion: “the Government certainly can submit a motion to me to adjourn any deadlines that I set or any hearing.” Tr. of Mar. 16, 2020 Hr’g at 43:12-14 (ECF No. 114). The Court cautioned that, based on the circumstances at that time, it was “fully intending to go forward with this [hearing] barring significant changes in the state of things.” *Id.* at 43:25, 44:2.

Respondent respectfully submits that the two weeks that have elapsed since March 16 evince “significant changes” to the status quo. Given the COVID-19 pandemic, briefly adjourning the evidentiary hearing and staying related deadlines would reduce the burdens on the parties while protecting health and safety. As explained below, such an exercise of the Court’s inherent authority is appropriate here.

**I. The Novel Coronavirus Would Adversely Affect the Evidentiary Hearing if Held on April 28.**

The U.S. Government, the Court and Court staff, and even Petitioner face undue burdens in attending, and participating in the evidentiary hearing due to the pandemic. For the U.S. Government, the burdens are shared by government personnel including the FBI, ICE, ICE contractors at the BFDF, and Department of Justice litigators. The hearing is now less than a month away, with no indication that the pandemic will abate or government restrictions will be lifted before April 28. Indeed, on March 24, 2020, Governor Cuomo stated that the projected apex of new infections is approximately 14 to 21 days away (April 7 to 14, 2020), and “[New York is] now looking at a bullet train, because the numbers are going up so quickly.” *New York State, Video, Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Distribution of Health Care Supplies to New York City, Long Island and Westchester Hospitals* (Mar. 24, 2020), <https://www.governor.ny.gov/news/video-audio-photos->

rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-1. The day after that statement, the number of patients hospitalized due to the virus surged 40 percent and 100 people died from the virus in New York State. *100 Deaths from Coronavirus in N.Y. in One Day: Live Updates*, N.Y. Times, <https://www.nytimes.com/2020/03/26/nyregion/coronavirus-new-york-update.html> (last visited Mar. 26, 2020).

The government has two specific concerns with the hearing itself if it took place on April 28, 2020. *First*, the evidentiary hearing will be a large public gathering necessitating travel, which is precisely the type of event that federal, state, and local agencies have warned against for public health reasons. Respondent anticipates that the hearing would be attended by:

- officers and staff of the Court, including Your Honor, a court reporter, a courtroom deputy clerk, and law clerks;
- four to five government litigators and a paralegal;
- Petitioner’s eight counsel of record plus some student counsel, and Petitioner himself;
- more than a dozen law enforcement officers, to include ICE officers and deputy U.S. marshals, to safeguard Petitioner and other detained individuals that may be called as witnesses;<sup>3</sup>
- approximately ten to fifteen witnesses, Bianco Decl. ¶ 9; and
- any interested members of the news media or the public.

*See* Order at 20-21 (ECF No. 75) (expressing concern that the evidentiary hearing should be “sufficiently accessible by the public”).

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<sup>3</sup> A twelve-person team is necessary to transport Petitioner, *see* Decl. of Thomas Brophy (ECF No. 73), and further personnel are needed to transport other detainees called from the Buffalo Federal Detention Facility.

Given the current threat the novel coronavirus poses and the CDC's and New York State's social distancing recommendations, plus the lack of evidence that the pandemic will abate by April 28, 2020, it would be difficult or impossible to hold such a hearing and maintain the social distancing necessary to ensure the health and safety of all participants. Simply put, a hearing during the period that experts have advised for social distancing would not be safe and would negatively impact attempts to mitigate the spread and damage caused by the virus.

*Second*, there will be logistical impediments at the hearing. At least one of Respondent's potential witnesses would be traveling internationally from Egypt. Bianco Decl. ¶ 6. The novel coronavirus and COVID-19 outbreak have precipitated travel restrictions that seriously impact the ability of witnesses abroad to travel internationally to the United States, apart from the public health risks that traveling generally poses to a person. The U.S. Department of State has advised U.S. citizens "to avoid all international travel due to the global impact of COVID-19." U.S. Department of State, *Global Level 4 Health Advisory – Do Not Travel* (Mar. 19, 2020), <https://travel.state.gov/content/travel/en/traveladvisories/ea/travel-advisory-alert-global-level-4-health-advisory-issue.html>. The CDC recommends that travelers to Egypt practice social distancing for fourteen days after returning to the United States. Centers for Disease Control and Prevention, *COVID-19 Travel Recommendations by Country*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html> (last visited Mar. 30, 2020).<sup>4</sup> In addition to the global advisory, the U.S. Embassy in Egypt reports that the Egyptian Government has suspended incoming commercial passenger flights into Egypt through April 14, 2020. U.S. Embassy in

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<sup>4</sup> The CDC's directive on social distancing includes: "Stay home and avoid contact with others. Do not go to work or school for this 14-day period." CDC, *Travelers Returning from High Risk Countries*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html> (last visited Mar. 26, 2020).

Egypt, *COVID-19 Information*, <https://eg.usembassy.gov/u-s-citizen-services/covid-19-information/> (last visited Mar. 30, 2020). Indeed, due to these travel restrictions, the Department of Justice cannot authorize and arrange for this witness's international travel from Egypt. Bianco Decl. ¶ 6.

Moreover, requesting leave to depose this witness in Egypt is not a viable alternative given the current travel restrictions which prevent counsel from traveling to Egypt to conduct a deposition. *See* U.S. Embassy in Egypt, *COVID-19 Information*, <https://eg.usembassy.gov/u-s-citizen-services/covid-19-information/> (last accessed Mar. 30, 2020). Requesting leave for this witness to appear at the April 28, 2020, evidentiary hearing by video teleconference is also not feasible as the U.S. Embassy Cairo has suspended routine consular services and visa interviews as of March 24, 2020, due to COVID-19. *Id.* And the Department of Justice's Office of Foreign Litigation has been unable to secure the assistance of local counsel in Egypt to assist with any video conferencing because all foreign counsel contacted informed the Department that their offices are closed for the foreseeable future. Bianco Decl. ¶ 7.

Furthermore, at least one other potential witness would be travelling from New York City. Bianco Decl. ¶ 10. New York City, which has become the epicenter of the coronavirus outbreak in the United States, *see* Michael Rothfield et al., *13 Deaths in a Day: An 'Apocalyptic' Coronavirus Surge at an N.Y.C. Hospital*, N.Y. Times (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html>, has become the target of additional federal restrictions to slow the spread of the virus. On March 24, 2020, the White House Coronavirus Task Force asked "anyone who has traveled out of the New York City metropolitan area to anywhere else in the country to self-isolate for 14 days." White House, *Remarks by President Trump, Vice President Pence, and Members of Coronavirus Task Force in*

*Press Briefing* (Mar. 24, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-10/>. Short of requiring a potential witness to travel to Buffalo for the hearing two-weeks prior to the hearing to allow him or her to self-isolate for 14 days, it is not possible to adhere to the government's safety-based recommendation to limit the spread of COVID-19.

Because traveling to an April 28 evidentiary hearing may not be possible and because the hearing itself may be a public health risk, good cause exists for the Court to adjourn the hearing.

**II. The Novel Coronavirus Is Adversely Affecting the Government's Ability to Prepare Its Case by April 28.**

The U.S. Government also faces undue burdens in *preparing for* the evidentiary hearing due to the pandemic. *First*, the social distancing and telework directives have precluded government employees and contractors from meeting as needed to prepare for the hearing and respond to Petitioner's discovery requests. Such a restriction is detrimental in a case that is of significant interest to the government (as evidenced by the personal consideration of and certifications related to Petitioner's detention by two Acting Secretaries of Homeland Security, the FBI Director, the FBI Deputy Director, and the Acting ICE Director). *See* ECF Nos. 17, 21.

Relatedly, the fact that this case involves classified information necessitates that federal government employees contravene the spirit of the federal, state, and local guidance and directives espousing social distancing to respond to discovery requests and prepare for the evidentiary hearing. Classified documents are the subject of the current discovery dispute, and are the basis for the potential assertion of the state secrets privilege that the Department of Justice is considering. Ex. B, Decl. of Cecilia O. Bessee ¶ 9; *see, e.g.*, Resp.'s Memo. of Law in Supp. of Resp.'s Mot. to Defer Consideration of Possible State Secrets Privilege Assertion (ECF No. 90-1); Tr. of Mar. 16, 2020 Hr'g at 12:2-3 (ECF No. 114). Per the Court's order,

Respondent is also reviewing these classified documents in order to amend certain prior privilege log entries. *See* Order (ECF No. 108).

Classified materials may be handled only on systems approved for the secure handling of national security information. Bessee Decl. ¶ 10. Employees may not take such materials outside of these secure government facilities, such as to personal residences. *Id.* The government employees responsible for reviewing and working on litigation-related tasks concerning the classified information in this case have been urged to telework from their homes in response to directives regarding social distancing. *Id.* Thus, relevant employees need to travel to and work in government offices—despite public health officials’ (and OMB’s) pleas to limit interaction with the public—in order to review and perform litigation-related work on classified materials, including work relating to a possible assertion of the state secrets privilege. *Id.* This creates health and safety risks for these employees and those with whom they may interact at work. *Id.*

*Second*, the travel restrictions and social distancing directives observed by the federal government have critically impeded its attempts to meet with witnesses and potential witnesses. As Respondent noted during the March 16, 2020 oral argument, the government needs to, and has been trying to, meet with multiple witnesses or potential witnesses. Tr. of Mar. 16, 2020 Hr’g at 43:2-11 (ECF No. 114). However, the government has been unable to meet with witnesses in person. *Id.* Social distancing is being practiced by ICE staff at the BFDF, and ICE has moved to “suspend visitation at facilities as necessary,” including at the BFDF where Petitioner and some potential witnesses are housed. Ex. C, Decl. of Jeffrey Searls ¶ 7.h-i. Attorneys must use “no-contact” rooms with a plastic partition, or else have to bring and wear their own personal protective equipment including face masks and gloves. *Id.* ¶ 7.i. The social

distancing requirements implemented by ICE, for the protection of both staff and detainees, has limited the ability for ICE employees to access systems in preparing with the Respondent's case. Telephonic interviews with detainees including witnesses are possible, but do not replace the benefits of face-to-face interviews—which raise health concerns. *See id.* ¶ 7.h-i. Given that the Court has placed the burden of persuasion on Respondent—and a clear and convincing burden at that, *see* Order (ECF No. 75)—Respondent is materially disadvantaged in building his case and from being in the best position to present the type of evidence the Court has indicated it expects to be presented.

The government is also presented with an untenable position in identifying potential witnesses by April 6, 2020. Specifically, based on its current knowledge, the government anticipates naming more witnesses both inside and outside the BFDF, but government counsel is currently unable to travel to meet with these persons. *E.g.*, Bianco Decl. ¶ 4. Thus, under the current schedule, the government is placed in the untenable position of subpoenaing and naming witnesses that may be ultimately unnecessary and bringing more people into the courtroom—thereby increasing the threat to all such individuals and everyone involved in the litigation—or leaving off potentially material witnesses.

Even if there were not internal governmental bans on non-essential travel, public health risks remain. If witnesses must travel to review files and records, to meet with counsel, or to attend a hearing, that would pose a health risk both to them and to others.

Therefore, even if the COVID-19 pandemic were somehow resolved by the April 28, 2020 hearing such that the safety measures identified above were no longer necessary—an assumption that is without support—Respondent would be significantly disadvantaged in the meantime, both in terms of his ability to work on this case and in terms of government



employees and contractors having to violate public health standards and guidance to prepare. An adjournment is warranted given this unprecedented public health threat, especially as no party has previously sought or received an adjournment of this hearing.

As a final point, Respondent acknowledges that the Court has endeavored to move swiftly through this case and to convene the evidentiary hearing with minimal delay. Respondent has not previously sought or received an adjournment of this hearing since the Court set the date for April 28, 2020. That said, the COVID-19 pandemic is unprecedented in the modern era, and undersigned counsel could not have anticipated that the virus would strike when it did at the time Petitioner was detained or at the time the Court set the current evidentiary hearing date. An adjournment is warranted.

#### **RELIEF REQUESTED**

Justice requires some delay of the evidentiary hearing in this case to allow Respondent the opportunity to present its case without the undue prejudice he currently faces and to ensure the safety of those preparing for and participating in the evidentiary hearing. Respondent therefore requests an adjournment of the evidentiary hearing and a stay of certain pre-hearing deadlines. Specifically, Respondent respectfully asks the Court to adjourn the evidentiary hearing until four weeks from the date the Court lifts its COVID-19-based restrictions on courthouse access. As Respondent hopes that the state of affairs will become more settled in the coming weeks, Respondent suggests that the Court could convert the April 28, 2020 hearing date to a telephonic status conference for the parties and the Court could discuss the outlook of rescheduling the hearing.

The requested adjournment will affect certain antecedent pre-evidentiary-hearing deadlines, specifically the deadlines to file exhibit lists, witness lists, and pre-hearing legal

memoranda pertaining to the evidentiary hearing, and the date by which any formal assertion of the state secrets privilege must be made. *See* Order ¶¶ 4-5 (ECF No. 108). Yet, this disruption to the current deadlines is unavoidable for the reasons set forth above. Respondent respectfully requests that the Court extend the April 6, 2020 deadlines to file exhibit lists, witness lists, and pre-hearing legal memoranda, and the April 13, 2020 deadlines to file responses. *See id.* Respondent suggests that those dates could be reset to three weeks and two weeks, respectively, before whatever date on which the Court resets the evidentiary hearing.<sup>5</sup>

Finally, assuming the Court has ruled on Petitioner's motion to compel prior to the date on which COVID-19 related restrictions on courthouse access have been lifted, Respondent further requests that the deadline for any assertion of the state secrets privilege be extended to one week before the rescheduled hearing date.

Undersigned counsel has conferred with counsel for Petitioner, who indicated that he opposes this motion unless DHS will release him and place him on house arrest, a proposal DHS declines given the mitigated risk he faces in the BDFD and the countervailing risk his release poses to the public health and to the public safety.

### **CONCLUSION**

Although the Government greatly regrets any disruption caused to the Court and Petitioner, Respondent respectfully moves for an adjournment of the hearing and a stay of certain pre-hearing deadlines, until after the Court has resumed its usual courthouse access policies and U.S. Government employees are permitted to resume their usual functions, unencumbered by the

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<sup>5</sup> In the event the Court grants this motion after April 6 or 13, Respondent requests the opportunity to amend those filings in advance of the rescheduled evidentiary hearing.

drastic but necessary public health measures that have arisen since the Court first set the evidentiary hearing date back in January.

Date: March 31, 2020

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

/s/ Daniel B. Moar  
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Respectfully submitted,

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Chief, National Security & Affirmative  
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/s/ Anthony D. Bianco  
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*Attorneys for Respondent*

# **EXHIBIT**

# **A**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ADHAM AMIN HASSOUN,

Petitioner,

v.

Case # 1:19-cv-00370-EAW

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

Respondent.

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**DECLARATION**

Pursuant to 28 U.S.C. § 1746, I, ANTHONY D. BIANCO, hereby declare and state as follows:

1. I am a Senior Counsel for National Security in the District Court Section, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, and counsel for the Respondent in the above-captioned action. As such, I am familiar with the facts, background, and circumstance of this action.

2. On March 13, 2020, attorneys and staff for my office, the U.S. Department of Justice, Civil Division, Office of Immigration Litigation, District Court Section (“DCS”), received a copy of the March 12, 2020 Memorandum for the Heads of Departments and Agencies from the Executive Office of the President, Office of Management and Budget (“OMB”), (available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-13.pdf>) providing guidance on telework. The guidance encouraged telework for eligible employees who

the Centers for Disease Control has identified “as being at higher risk for serious complications from COVID-19.”

3. On March 14, 2020, attorneys and staff for my office, DCS, received a copy of the March 14, 2020 Memorandum for the Heads of Departments and Agencies from OMB (available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-14-travel-guidance-OMB-1.pdf>) which provided additional guidance to executive branch employees regarding work related travel. The guidance provided that “[o]nly mission-critical travel is recommended at this time.”

4. As a result of the travel guidance, my prior-approved government travel authorizations for travel to two distinct locations to interview in person two potential witnesses in this case were rescinded.

5. On March 15, 2020, the Deputy Attorney General directed components, including DCS, to move to a posture of maximum telework in the National Capital Region effective March 16, 2020. This directive applies to myself and includes Respondent’s counsel based in Washington, DC: Steven Platt and Timothy Belsan.

6. On March 24, 2020, the DCS Director denied a request for the Department of Justice to authorize and arrange the international travel of a potential witness from Egypt to appear at the evidentiary hearing in this case due to the travel restrictions implemented in response to COVID-19.

7. In response to the Department of Justice’s inability to approve of the witness travel from Egypt, my office worked with the Department’s Office of Foreign Litigation (“OFL”) to arrange for the assistance of local counsel in Egypt to assist with video conferencing.

OFL informed my office that the foreign counsel contacted stated that their offices were closed for the foreseeable future.

8. On March 25, 2020, the U.S. Department of Justice, Civil Division, issued further guidance that the Department of Justice has directed employees to maximize telework and that non-critical employees should not come into the office unless specifically directed to by a supervisor or manager.

9. While Respondent has not finalized his witness list for the evidentiary hearing, I anticipate that Respondent will call between ten and fifteen witnesses in his case in chief.

10. At least one other potential witness would be travelling from New York City.

Dated: March 31, 2020

Respectfully submitted,

/s/ Anthony D. Bianco

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# **EXHIBIT**

# **B**



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ADHAM AMIN HASSOUN,

Petitioner,

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

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

Respondent.

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**DECLARATION OF CECILIA O. BESSEE**

I, Cecilia O. Bessee, hereby state and declare as follows:

1. I am the Section Chief of the Litigation Section (LS), Litigation Branch in the Federal Bureau of Investigation's (FBI), Office of the General Counsel (OGC), at FBI Headquarters in Washington, D.C. I have been a member of the FBI's Senior Executive Service since 2017 when I was promoted to this position. Within the Litigation Branch, I have previously served as the Acting Deputy General Counsel, for approximately three years. Prior to that, I was selected as the Unit Chief of Civil Litigation Unit I, and I have also held a position in the Employment Law Unit.
2. The statements contained in this declaration are based upon my personal knowledge, my review and consideration of information available to me in my official capacity, and on information obtained from other FBI employees.
3. This declaration is submitted in support of Respondent's Motion to Adjourn the Evidentiary Hearing in the captioned matter.

4. On January 31, 2020, Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19. On March 11, 2020, the World Health Organization publicly characterized COVID-19 as a pandemic.<sup>1</sup> On March 13, 2020, the President declared a National Emergency in an effort to address the spread of COVID-19.<sup>2</sup> Further, on March 16, 2020, the President announced new guidelines to slow the spread of the virus, to include avoiding groups of more than 10 people and closing schools in many communities.<sup>3</sup> This guidance follows recommendations by the Centers for Disease Control (CDC) to engage in social distancing,<sup>4</sup>

5. The United States Office of Personnel Management (OPM) has been issuing guidance to address how the Federal Government can implement measures to protect its workforce and the American public. Specifically, on March 7, 2020, OPM recommended the "incorporation of telework and 'social distancing' in COOP [Continuity of Operations] and emergency planning [to] allow the Federal Government to continue functioning efficiently and effectively, while ensuring the health and safety of employees."<sup>5</sup> Further, on March 15, 2020, the Acting Director of the Office of Management and Budget (OMB) issued guidance to Federal agencies in the

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<sup>1</sup> Centers for Disease Control and Prevention. "Coronavirus Disease 2019 (COVID-19): Situation Summary." [www.cdc.gov](http://www.cdc.gov), accessed March 13, 2020.

<sup>2</sup> See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed Mar. 17, 2020).

<sup>3</sup> See The President's Coronavirus Guidelines for America, [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last accessed March 17, 2020).

<sup>4</sup> See, e.g., Centers for Disease Control "Interim Guidance for Businesses and Employers" <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last accessed March 17, 2020).

<sup>5</sup> United States Office of Personnel Management Memorandum "Coronavirus Disease 2019 (COVID-19); Additional Guidance" (March 7, 2020), <https://www.chcoc.gov/content/coronavirus-disease-2019-covid-19-additional-guidance> (last accessed March 17, 2020). See also United States Office of Personnel Management Memorandum "Updated Guidance on Telework Flexibilities in Response to Coronavirus" (March 12, 2020), <https://www.chcoc.gov/sites/default/files/M-20-13.pdf> (last accessed March 17, 2020).

National Capital Region (NCR) to implement maximum telework flexibilities. OMB's guidance asked agencies "to offer maximum telework flexibilities to all current telework eligible employees, consistent with operational needs of the departments and agencies as determined by their heads."<sup>6</sup>

6. Moreover on March 17, 2020, the Executive Office of the President, Office of Management and Budget, issued guidance to agency heads to aggressively slow the spread of COVID-19 by directing, among other things, "...[T]he Government must immediately adjust operations and services to minimize face-to-face interactions...." "Exceptions may be needed when continued operations and services are necessary to protect public health and safety, including law enforcement and criminal-justice functions. Non-mission-critical<sup>7</sup> functions that cannot be performed remotely or that require in-person interactions may be postponed or significantly curtailed."<sup>8</sup>

7. The FBI is implementing these guidelines to protect its employees and their communities, and to ensure that it can continue to protect the American people during this national emergency.

8. Those employees designated as non-mission critical and non-telework capable due to the nature of their duties, work location, or technology, may be approved for what OPM/OMB refer to as "weather and safety leave (administrative leave)."

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<sup>6</sup> Memorandum from the Acting Director of The Office of Management and Budget to the Heads of Departments and Agencies "Updated Guidance for National Capital Region on Telework Flexibilities in Response to Coronavirus" (March 15, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M20-15-Telework-Guidance-OMB.pdf> (last accessed March 30, 2020).

<sup>7</sup> A mission-critical position is one whose functions absolutely cannot be put on hold.

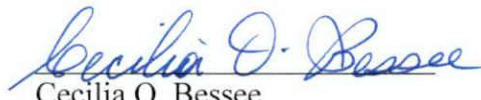
<sup>8</sup> Memorandum from the Acting Director of Office of Management and Budget to the Heads of Department and Agencies titled Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19" (March 17, 2020). <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf> (last accessed March 30, 2020).

9. In this action, Petitioner has filed a motion to compel that seeks, among other things, FBI documents containing classified information. The FBI has asserted the law enforcement privilege, and the protections of the National Security Act of 1947, over this classified information. The government is also considering the possibility of asserting the state secrets privilege over this classified information, which would only need to be invoked were the court to compel the production of this information.

10. Pertinent to the foregoing, the classified materials involved in this case may be handled only on systems approved for the secure handling of national security information. FBI employees may not take such materials outside of FBI facilities, such as to personal residences.

Nevertheless, the FBI employees responsible for reviewing and working on litigation-related tasks concerning the classified information in this case have been urged to telework from their homes in response to directives regarding social distancing. Thus, in order to review and perform litigation-related work on classified materials in this case, including work relating to a possible assertion of the state secrets privilege, the relevant FBI employees need to travel to and work in FBI space despite state and federal public health officials' pleas to limit interaction with the public. This creates health and safety risks for these employees and those with whom they may interact at work.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 30<sup>th</sup> day of March 2020.

  
Cecilia O. Bessee  
Section Chief  
Litigation Section  
Office of the General Counsel  
Federal Bureau of Investigation

# EXHIBIT C

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ADHAM AMIN HASSOUN,

Petitioner,

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

v.

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

Respondent.

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**DECLARATION OF JEFFREY SEARLS**

Pursuant to the provision of 28 U.S.C. § 1746, I, JEFFREY SEARLS, hereby declare and state as follows:

1. I am an Officer in Charge (“OIC”) with the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”). I have held this position since September 2018. Prior to this position, I was the Assistant Officer in Charge from May 2017 to September 2018. I have worked in other positions within ICE since March 2001.

2. As the OIC, I am responsible for the direction and oversight of the Buffalo Federal Detention Facility (“BFDF”). My responsibilities include maintaining the order of the BFDF, and preserving the health and safety of detainees and staff at the BFDF. The mission of the BFDF is to provide for and maintain a set of standards and conduct, ensuring that detainees are treated with respect and dignity and are provided with the best possible care while they are in the custody of the facility.

3. Medical care at the BFDF is overseen by ICE Health Services Corps. (“IHSC”), which provides medical services through a combination of U.S. Public Health Commissioned Corps (“USPHS”) officers, federal civil servants, and contract health professionals. There is access to medical care 24 hours per day, 7 days per week at the facility.

4. The BFDF has the capacity to house up to 650 detainees and has historically operated near capacity. As of March 27, 2020, there are only 382 detainees currently housed in the facility.

5. The BFDF consists of housing units with single cell/double occupancy and dormitory style units. There are nine units. One unit is limited to female detainees. The other eight units are for male detainees and split between criminal and non-criminal status. Additionally, BFDF has a Special Housing Unit (“SHU”), which consists of an additional 32 single capacity cells. BFDF also has a medical unit which provide 3 beds for any sick individuals or for overflow.

6. Each unit consists of cells for detainees, with a central open area where detainees can congregate. The central area contains chairs and tables, telephones, and a small kitchen area. Restrooms are communal and are open 24/7 in the dormitory units, and in the celled units each cell has an individual toilet and sink. All detainees have access to soap and sinks at all times.

7. In response to the ongoing COVID-19 epidemic, BFDF has taken the following precautions:

- a. BFDF is in constant communication with our government partners and local, state, and federal health agencies as we work to keep our employees and those in our care safe and healthy.
- b. Current guidelines from the Center for Disease Control (“CDC”) and World Health Organization (“WHO”) for COVID-19 have been implemented,

including those for operational preparedness, communication and coordination, personnel practices, operations & supplies, prevention, operations, cleaning and disinfecting practices, hygiene, prevention practices for incarcerated/detained persons, prevention practices for staff, prevention practices for visitors.

- c. BFDF medical staff is prioritizing immediate medical care for anyone who claims symptoms indicative of COVID 19 infection, although there have been 0 reported cases to date.
- d. Revised policies and procedures to include best practices for the prevention and handling of coronavirus COVID-19. This includes, among other things:
  - i. The maintaining of social distances between and among employees and detainees.
  - ii. Frequent hand washing.
  - iii. Limiting physical contact.
  - iv. Instructing as to the importance of personal hygiene practices and not touching one's face.
- e. Best practices for personal hygiene to prevent the spread of the disease has been communicated to detainees and staff at the BFDF
- f. Employees have been urged to stay home if they are ill and expanded PTO policies have been implemented for sick employees or those caring for ill family members.
- g. ICE has begun reviewing the custody status of detainees who are at a higher risk for negative health consequences from COVID-19 and making appropriate custody determinations.
- h. Working closely with our government partners to suspend visitation at facilities as necessary. Currently visitation is limited to detainee attorneys only.
- i. Attorneys visiting clients are asked to use the "no-contact" rooms which have a plastic partition separating detainees from their counsel. Attorneys who refuse to use the no-contact rooms are required to wear personal protective equipment ("PPE") including face masks and gloves to limit the transmission of any illness or infection that attorneys may have from spreading to their clients. Attorneys are responsible for providing their own PPE as BFDF does not have the resources to equip attorneys with PPE.
- j. Detainees who arrive from other facilities are medically screened in the garage bay prior to entering into the facility. This includes questioning the detainee as

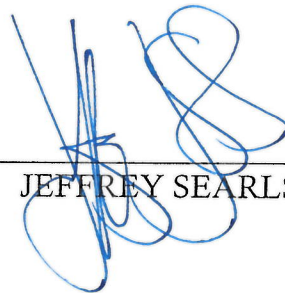


to health history and performing temperature checks. New arrivals are then placed a new intake unit for two weeks.

- k. All transporting officers have been advised to maintain social distancing and utilize PPE where possible.
  - l. Detainees are allowed to use facility phones and their tablets to make collect calls at any time and engage in video communications.
  - m. Each detainee is now receiving 2 free 5-minute phone calls and one free 15 minute video visit each week. The current proposed schedule is on Mondays, detainees will get two free 5 minute calls, and on Thursdays, they will receive one free 15 minute video visit.
  - n. Work programs, religious services, and any other activities in which crowds may congregate or increased contact between detainees may occur have been temporarily suspended.
8. The BFDF is located in Batavia, New York, in the county of Genesee. As of March 27, 2020, Genesee County has 4 confirmed COVID-19 cases. The BFDF has 0 cases.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 30, 2020  
Batavia, New York



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JEFFREY SEARLS