

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ADHAM AMIN HASSOUN,

Petitioner,

v.

JEFFREY SEARLS, in his official capacity
Acting Assistant Field Office Director and
Administrator of the Buffalo Federal
Detention Facility,

Respondent.

Case No. 1:19-cv-00370-EAW

**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR AN
ADJOURNMENT AND MEMORANDUM IN SUPPORT OF PETITIONER'S
EMERGENCY MOTION FOR AN ORDER TRANSFERRING HIM TO HOME
INCARCERATION**

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PRELIMINARY STATEMENT

Petitioner suffers from multiple chronic illnesses that put him at extremely high risk for severe, potentially fatal consequences of COVID-19. He is being held in a large detention facility, a uniquely and unavoidably dangerous place for the spread of infectious disease. Inmates in federal custody at other ICE detention facilities and BOP prisons have already contracted the virus and at least one has already died. The virus is spreading within jails and prisons across the country. There is no reason to believe that the Buffalo Federal Detention Facility (“BFDF”) will be spared. If and when Mr. Hassoun contracts the virus, he is likely to suffer severe illness and an alarming probability of death.

Given these facts, Mr. Hassoun will consent to the government’s request for an indefinite adjournment of the evidentiary hearing during the pendency of the pandemic emergency only if he is ordered to be detained under home incarceration at his sister’s house, rather than at the detention facility, for the same period. Mr. Hassoun will consent to whatever conditions of monitoring and supervision the government seeks to impose while he is under home detention, and recognizes that the government can re-detain him upon conclusion of the pandemic emergency, pending resolution of his habeas action. Mr. Hassoun cannot constitutionally be forced to spend the entirety of the pandemic housed in a detention facility that dozens or perhaps hundreds of employees, detainees, and other people enter each day, each one potentially carrying a virus that would expose him to grave risk of death or severe illness. Like the rest of us, he should be permitted to survive this crisis cloistered in the safety of a family home.

Mr. Hassoun finished serving his criminal sentence almost three years ago. His crimes of conviction did not involve any acts of violence, and the sentencing judge determined that he posed so little danger that he merited a sentence drastically lower than the minimum recommended by the Sentencing Guidelines. Indeed, Mr. Hassoun would be free today if not for

the government's last-ditch effort to hold him under a statute whose constitutionality has never been adjudicated, based solely on the allegations of jailhouse informants. That statute, moreover, suffers from many of the same constitutional infirmities as the regulation this Court has already struck down.

Absent the pandemic, Mr. Hassoun would be weeks away from his long-awaited day in court. The government now proposes to delay that day of reckoning and all preparatory deadlines indefinitely while refusing to remove Mr. Hassoun from BFDF—even under home incarceration and the strictest terms of monitoring and supervision. Fifteen months ago, Chief Judge Geraci found that Mr. Hassoun's removal to another country would not happen in the "reasonably foreseeable" future; now, even his day in court may not happen for the reasonably foreseeable future.

Indefinitely delaying the hearing without removing Mr. Hassoun from BFDF will not only prolong his unlawful and unconstitutional detention, but will place him at grave risk of death from a highly contagious disease that is overtaking the nation at a terrifying pace. That risk violates Mr. Hassoun's Fifth Amendment right to reasonably safe conditions of confinement. Mr. Hassoun should not be forced to bear the grave risk he faces from this virus in BFDF even while counsel seek delay because of measures taken to minimize the same risk to themselves, their colleagues, witnesses, court staff, and the broader community.

Petitioner does not fault the government for seeking to delay an in-person hearing. He certainly does not wish to create a medical or public health risk for counsel, witnesses, court personnel, or their families and communities. But the very reason the government seeks a delay is the same reason that Mr. Hassoun cannot be forced to remain in detention. He faces a severe risk of death or grave illness if infected, and the government's proposal would leave him in

detention indefinitely while the virus washes over our country, peaks, and finally subsides. It is deeply unfair to indefinitely extend Mr. Hassoun's already-protracted detention in a way that places him at a heightened risk of grave illness and death before the government has even attempted to make its case against him. Instead, the Court should order that he be transferred to home incarceration, where he can remain detained and subject to whatever forms of supervision the Department of Homeland Security deems necessary and appropriate. Such an order would not only protect Mr. Hassoun's life and health, but would also mitigate all of security concerns the government has alleged. In these circumstances, the Constitution requires—and the law permits—Mr. Hassoun to be transferred to house arrest while the hearing is adjourned due to the pandemic.¹

FACTUAL BACKGROUND²

I. The Buffalo Federal Detention Facility, like other detention centers, is an exceptionally and unavoidably dangerous place in the midst of the COVID-19 pandemic.

We are living in the midst of a worldwide health emergency caused by the rapid spread of the novel coronavirus, SARS-CoV-2, which is causing a deadly disease, COVID-19. There is no vaccine against the virus and there is no cure for COVID-19. On March 11, the World Health

¹ If the Court does not order Mr. Hassoun to be transferred to house arrest due to the pandemic, Petitioner opposes Respondent's proposed adjournment. In that case, Petitioner would ask the Court to schedule a telephonic hearing or set a deadline for written submissions proposing alternatives to the complete and indefinite adjournment of the evidentiary hearing and all related deadlines that the government seeks.

² On March 26, 2020, Petitioner's counsel requested that the government provide the relief requested herein. On March 30, 2020, counsel for the government denied that request. A day later, it filed a motion to indefinitely adjourn the evidentiary hearing scheduled to commence on April 28, 2020.

Organization characterized COVID-19 as a global pandemic.³ On March 13, the President of the United States declared a national emergency with respect to the virus.⁴

As of the time of filing, the number people with confirmed cases of coronavirus in the United States stands at 234,483; at least 5,708 patients with the virus have died.⁵ New York State alone now has more than 83,000 cases.⁶ The disease is spreading extremely rapidly and the number of patients who have died of the virus increases exponentially every day. Just over two weeks ago, on March 16, the total number of *cases* (not deaths) stood at 4,226.⁷

Needless to say, COVID-19 is highly transmissible. The Centers for Disease Control and Prevention (“CDC”) advises that the virus “seems to be spreading easily and sustainably” and that it passes “between people who are in close contact with one another (within about 6 feet),” “through respiratory droplets produced when an infected person coughs or sneezes” and, likely, “by touching a surface or object that has the virus on it.”⁸ Moreover, it appears that the virus can be transmitted by individuals who are not showing any symptoms of disease. Decl. of Dr. Jaimie Meyer ¶ 20 (“Meyer Decl.”) (attached as **Exhibit A**). Indeed, the latest statements from the CDC

³ World Health Organization, Director-General's opening remarks at the media briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁵ Mitch Smith, et al, Coronavirus in the U.S.: Latest Map and Case Count, N.Y. Times (last checked Apr. 2, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁶ N.Y. State Dep't of Health, County-by-County Breakdown of Positive Cases (last updated Apr. 1, 2020, 3:10pm), <https://coronavirus.health.ny.gov/county-county-breakdown-positive-cases>.

⁷ Centers for Disease Control, Coronavirus Disease 2019, Cases in U.S. (Mar. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁸ Centers for Disease Control, Coronavirus Disease 2019, How Coronavirus Spreads (Apr. 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

suggest that as many as 25% of people infected with the coronavirus may not show symptoms.⁹ Seemingly healthy people are thus spreading the virus unwittingly. The CDC has issued a guidance that gatherings of more than 10 people must not occur,¹⁰ and is now considering issuing guidance that ordinary people should wear protective masks.¹¹

Jails, prisons, and detention centers are uniquely susceptible to rapid transmission of the virus. Physicians who are experts in infectious disease in the context of jails and prisons agree that the risk posed by infectious diseases is significantly higher inside jails and prisons than it is in the community, in terms of the risk of transmission, exposure, and harm to individuals who become infected. *See* Meyer Decl. ¶ 7; Decl. of Robert B. Greifinger ¶ 10 (“Greifinger Decl.”) (attached as **Exhibit B**). Federal government officials have recognized that jails, prisons, and detention centers are uniquely susceptible to rapid transmission of the virus. For example, the Attorney General of the United States issued an official memorandum directing the Federal Bureau of Prisons (“BOP”) to expand its use of “home confinement” as an alternative to incarceration in a federal prison, “where appropriate, to protect the health and safety of BOP personnel and the people in [BOP] custody.”¹² Other federal courts in New York State considering similar motions have recognized that “[t]he nature of detention facilities makes exposure and spread of the virus particularly harmful.” *Basank v. Decker*, No. 20-cv-2518, 2020

⁹ Apoorva Mandavilli, *Infected But Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Apr. 1, 2020), <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

¹⁰ Centers for Disease Control, Coronavirus Disease 2019, Resources for Large Community Events and Mass Gatherings (Mar. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html>.

¹¹ Mandavilli, *Infected But Feeling Fine: The Unwitting Coronavirus Spreaders*, *supra* note 9.

¹² Memorandum from Attorney General William Barr to Director of Bureau of Prisons, Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (citing the expert declaration of Dr. Jaimie Meyer).

The risk is higher inside detention centers because of several unavoidable features of such facilities. First, detention centers are not isolated from communities. Every day, staff, contractors, vendors, and new detainees come in and out of facilities. *Id.* ¶ 8. In any event, because the virus can be transmitted by people who show no symptoms, it is impossible easily to determine who may bring it into the facility. Greifinger Decl. ¶ 11. All of these risks are present at BDFD. Staff enter and exit the facility daily, and they are not tested for the virus or even, apparently, subject to wellness checks. *See* Decl. of Jeffrey Searls ¶ 7, attached as Exhibit C to Respondent’s Motion To Adjourn (ECF No. 120-4) (“Searls Decl.”). According to the declaration filed by the government in this case, the facility does not even prohibit actively sick employees from coming to work; instead, staff have only been “urged to stay home if they are ill.” *Id.* ¶ 7(f). The declaration acknowledges that facility staff circulate throughout the detention center, *id.* ¶ 7(k), and are not required to wear personal protective equipment, *id.* ¶ 7(k) (“transporting officers have been advised to . . . utilize PPE *where possible*” (emphasis added)). The facility does not appear to be taking measures even to do proactive health checks on detainees, except apparently for an initial “temperature check” and “health history” for newly-arrived detainees. *Id.* ¶ 7(j). The facility appears to be relying on people to self-report symptoms of COVID-19. *Id.* ¶ 7(c) (“medical staff is prioritizing immediate care for anyone who claims symptoms indicative of COVID-19 infection”). At the same time, the immigration courtroom that is located within the BDFD continues to hold in-person hearings for which counsel, court

interpreters, court staff, and court personnel must come in and out of the facility on a daily basis.¹³

Second, detention facilities make it extremely difficult to contain the spread of infection through social distancing and meticulous hygiene. Detainees share facilities and items without disinfection between use. Greifinger Decl. ¶ 11; Meyer Decl. ¶ 9. Food preparation and food service are centralized, with little opportunity for surface disinfection. Greifinger Decl. ¶ 11. Detainees cannot effectively practice social distancing. Meyer Decl. ¶ 9. Opportunities for necessary hygiene measures such as disinfection of surfaces are often limited. *Id.* ¶ 11. Detention center staff may themselves contract and spread the disease due to lack of adequate personal protective equipment like masks, gloves, gowns, and masks. Meyer Decl. ¶ 12. Even detainees with their own living areas simply cannot protect themselves from detention center staff who are responsible for their care and who interact with them multiple times a day. Like the cruise ships that were the site of the largest concentrated outbreaks of COVID-19 a few weeks ago, detention facilities are places where it is effectively impossible to prevent spread of the virus. Greifinger Decl. ¶ 11

Mr. Hassoun faces exactly these dangerous circumstances at BFDf. Even though he is presently being held in a medical observation room in the Special Housing Unit of the facility, he is exposed to numerous, unavoidable risks every day. For example, he undergoes health checks three times a day in close quarters with medical personnel. Decl. of Adham Hassoun ¶ 24 (“Hassoun Decl.”) (attached as **Exhibit C**). These medical personnel sometimes do not wear masks or gloves. *Id.* ¶ 25. Officers who work in his unit do not wear masks. *Id.* ¶ 23. The same

¹³ See Amended Standing Order of the Batavia Immigration Court Relating to Telephonic Appearances at Individual and Master Calendar Hearings (Mar. 24, 2020), <https://www.justice.gov/eoir/page/file/1260956/download>.

medical personnel and officers apparently circulate throughout the facility, potentially carrying the virus with them. *Id.* ¶¶ 23, 25. They also, of course, enter and leave the facility every day, potentially bringing the virus to and from others. *Id.* ¶ 17.

Compounding the problem, Mr. Hassoun has no choice but to use facilities and items that are shared among other detainees, even though he is currently held in the Special Housing Unit. For example, in order to help prepare this case he must use a computer to review documents produced by the government. *Id.* ¶ 26. The computer is located in a law library that is shared by everyone in the unit. *Id.* Mr. Hassoun has no means to disinfect that space or the surfaces he must touch there. *Id.* Similarly, the telephone that Mr. Hassoun must use to make confidential calls to his attorneys is shared. *Id.* ¶ 28.

Detainees in Mr. Hassoun's unit must necessarily share other items too. The tablet computers he is provided to make telephone calls and otherwise communicate with the outside world are shared among detainees and are not always cleaned by the facility. *Id.* ¶ 27. Detainees also share a microwave, phone booth, computer, and typewriter. *Id.* ¶ 28. Importantly, detainees have no way to disinfect these surfaces. Detainees are prohibited from using alcohol-based sanitizers and are not permitted to use disinfectant sprays. *Id.* ¶ 29. Mr. Hassoun can only use napkins and water to try to clean. *Id.* ¶ 29.

Third, detention facilities are typically ill-equipped to treat people who need emergency lifesaving care. Greifinger Decl. ¶ 12. According to the government's declaration, the facility has only three beds in its medical unit. Searls Decl. ¶ 5. In Mr. Hassoun's own case, he has had to be transported to the hospital emergency room on numerous occasions because the facility's medical unit is not equipped to treat him. Hassoun Decl. ¶ 6.

Fourth, the use of administrative segregation or medical units within a detention facility is not an effective disease containment strategy. Unless an infected detainee is held in a specialized negative-pressure room, air will continue to flow outward from the detainee's room to the rest of the facility. Meyer Decl. ¶ 14. Facility staff, including medical staff, circulate throughout the building. Hassoun Decl. ¶¶ 23, 25. Indeed, the cell that Mr. Hassoun is currently held in provides no special protection against infection, even though it is designated by the facility as a medical observation cell. It is an ordinary cell, except that it has a large glass window and is designed to accommodate people with physical disabilities. Hassoun Decl. ¶ 11. In short, Mr. Hassoun is not safe in the Special Housing Unit. Far from it: since ill detainees are likely to be held nearby, people in the Special Housing Unit remain directly in the path of infection.

The government's own medical personnel at BFDF have specifically told Mr. Hassoun that he is not safe even though he is being held in a medical observation cell. Hassoun Decl. ¶ 15. One health care provider explained, consistent with expert the medical opinions described already, that he can be infected at any time he comes into contact with a health provider or a unit officer or any shared surfaces or spaces within the facility. *Id.* ¶ 15. This provider further explained that there was no way to know whether staff were already infected and potentially spreading the disease, and that they could bring it into the facility unwittingly at any time. *Id.* ¶¶ 16-17. The opinion of that health care professional, who spends every work day inside BFDF and understands intimately how it operates, was that there is no way to effectively prevent the spread of the virus or for Mr. Hassoun to effectively protect himself from infection. *Id.* ¶ 17.

Given these realities of life in a detention center, it is no surprise that COVID-19, like other epidemics in the past, has begun spreading through detained populations across the United

States and abroad. As of the time of filing, the Bureau of Prisons has identified 57 inmates and 37 staff who had tested positive for the virus.¹⁴ These include individuals held in several BOP facilities in New York State. Numerous New York state correctional facilities have confirmed cases of COVID-19 among inmates and staff.¹⁵ The same pattern is visible elsewhere: in the Cook County Jail in Illinois alone, at least 167 inmates and 34 staff members have tested positive.¹⁶ There, the number of confirmed cases skyrocketed from 2 to 141 within eight days.¹⁷

ICE detention facilities have not been spared, and will not be. A corrections officer at the ICE detention facility in Bergen County, outside of New York City, tested positive after showing symptoms on March 15. At least one detainee at that facility subsequently tested positive, according to an ICE announcement issued March 24.¹⁸ On March 22, two cases of COVID-19, including one ICE detainee, were confirmed at the Hudson County Jail, another NYC-area detention facility that houses ICE detainees.¹⁹ On the same day, an immigration detainee at a

¹⁴ Federal Bureau of Prisons, COVID-19 Tested Positive Cases (last checked Apr. 2, 2020), <https://www.bop.gov/coronavirus/>. When counsel first checked these figures only three days ago, numbers stood at 28 and 24.

¹⁵ Daniel A. Gross, “*It Spreads Like Wildfire: The Coronavirus Comes to New York’s Prisons*,” *The New Yorker* (Mar. 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

¹⁶ Chicago Sun-Times, *167 Inmates at Cook County Jail Confirmed Positive for COVID-19* (Apr. 1, 2020), <https://chicago.suntimes.com/coronavirus/2020/4/1/21203767/cook-county-jail-coronavirus-positive-covid-19>.

¹⁷ *Id.*

¹⁸ U.S. Immigration and Customs Enforcement, ICE detainee tests positive for COVID-19 at Bergen County Jail (Mar. 24, 2020), <https://www.ice.gov/news/releases/ice-detainee-tests-positive-covid-19-bergen-county-jail>.

¹⁹ David Noriega & Belle Cushing, *2 Coronavirus Cases Confirmed in New Jersey Prison with ICE Detainees*, *Vice News* (Mar. 22, 2020), https://www.vice.com/en_us/article/epg744/2-confirmed-coronavirus-cases-in-hudson-county-correctional-facility.

third NYC-area detention center, the Essex County Correction Facility, was taken to the hospital and later tested positive for COVID-19.²⁰

No confirmed cases have yet been announced at the Buffalo Federal Detention Facility, but there is little reason to believe it will remain unscathed, for all of the reasons described above. The opportunities for spread of the virus are likely impossible to control. For example, on March 12—before cases were detected at the three NYC-area facilities but while the virus is likely to have already been circulating there—approximately 40 to 50 inmates were transferred to the Buffalo Federal Detention Facility from all three of those facilities.²¹ The number of confirmed cases in New York State is now above 83,000 and the number of cases in the counties surrounding BFDF, where staff live, have also begun to climb rapidly.²² These numbers will continue to increase exponentially for the foreseeable future. Across the country, the number of confirmed cases of COVID-19 is currently doubling approximately every five days²³ and the number of deaths is doubling every three days.²⁴

²⁰ Eric Keifer, *More Coronavirus At Essex County Prison; Activists Keep Up Outcry*, Patch.com (Mar. 26, 2020), <https://patch.com/new-jersey/newarknj/more-coronavirus-essex-county-prison-activists-keep-outcry>.

²¹ Noelle C. Evans, *Advocates call for ICE detainees' release at Batavia amid threat of possible COVID-19 outbreak*, WXXI News (Mar. 22, 2020), <https://www.wxxinews.org/post/advocates-call-ice-detainees-release-batavia-amid-threat-possible-covid-19-outbreak>. eth

²² See N.Y. State Dep't of Health, *County-by-County Breakdown of Positive Cases* (last updated Apr. 1, 2020, 3:10 p.m.), <https://coronavirus.health.ny.gov/county-county-breakdown-positive-cases>. BFDF is located in Genesee County. There are 17 confirmed cases and 63 more people under quarantine or isolation in that county. Genesee Orleans County Health Departments COVID-19 Status (Apr. 2, 2020), https://www.co.genesee.ny.us/departments/health/coronavirus_2019/index.php. Neighboring Erie County has reported 603 confirmed cases, and Monroe County has reported 390. See WIVB, *COVID-19 Erie County Chart* (Apr. 2, 2020), <https://www.wivb.com/news/covid-19-erie-county-chart/>; Monroe County, N.Y., *COVID-19 Dashboard* (Apr. 2, 2020), <https://mappingmonroe.maps.arcgis.com/apps/opsdashboard/index.html#/217749730f174776a3896b3e8950e03b>.

²³ N.Y. Times, *Coronavirus Map: Tracking the Global Outbreak* (Apr. 1, 2020), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

²⁴ Josh Katz & Margot Sanger-Katz, *Coronavirus Deaths by U.S. State and Country Over Time: Daily*

The likelihood that the virus enters—or has already entered—the BFDF increases every day. Mr. Hassoun himself has observed activity at the facility that suggests that a suspected case may have been identified there in recent days. *See* Hassoun Decl. ¶¶ 18-21. In particular, Mr. Hassoun observed, for the first time, a health care provider covered head-to-toe in protective gear. *Id.* ¶¶ 18-19. When Mr. Hassoun asked whether someone else inside the facility was infected with the virus, the provider responded, “I am not at liberty to say,” but indicated that they were heading to check on detainees in another unit. *Id.* ¶ 20. To be sure, the BFDF director has stated, in a declaration dated March 30, that “BFDF has 0 cases.” Searls Decl. ¶ 8. But even if the virus has not yet arrived, it is almost inevitable that it will enter and spread within the facility.

Other federal courts in New York have recognized the particular danger posed by ICE detention facilities. Judge Analisa Torres in the Southern District of New York observed that “medical doctors, including two medical experts for the Department of Homeland Security, have warned of a ‘tinderbox scenario’ as COVID-19 spreads to immigration detention centers and the resulting ‘imminent risk to the health and safety of immigrant detainees’ and the public.” *Basank*, 2020 WL 1481503, at *3 (quoting Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/>).

The government seeks to delay the evidentiary hearing precisely because this virus is spreading so rapidly and posing grave health risks. But every day of that delay increases the likelihood that the virus will enter the facility and infect Mr. Hassoun. The government should

Tracker, N.Y. Times (Apr. 1, 2020), <https://www.nytimes.com/interactive/2020/03/21/upshot/coronavirus-deaths-by-country.html>.

not be permitted to force Mr. Hassoun to bear that risk, given his underlying health conditions, by remaining incarcerated at BFDF, a sitting duck for the virus. Instead, Mr. Hassoun can and should be ordered to remain in custody pending the hearing, but under house arrest, in the much safer confines of his U.S.-citizen family's home where he can practice proper social distancing, hygiene, and all of the other precautionary measures that high-risk individuals must take to prevent grave, potentially fatal consequences.

II. Mr. Hassoun suffers from multiple chronic diseases that put him in an especially high-risk category for severe consequences, including death.

COVID-19 is not an indiscriminate killer. Its victims are disproportionately older people who suffer from certain chronic conditions. The best available research shows that death is most common among people with underlying chronic health conditions including heart disease, lung disease, and diabetes, as well as older age. Meyer Decl. ¶ 21. In particular, the CDC reports that the case fatality rate—i.e., the percentage of people diagnosed with COVID-19 who will die—is much higher for people who suffer from these diseases.²⁵ According to the CDC, 10.5% of people with cardiovascular disease die, 7.3% of people with diabetes die, and approximately 6% of people with chronic respiratory disease die.²⁶ A similar proportion of people with hypertension die. By contrast, patients with no reported underlying medical conditions die only 0.9% of the time.²⁷ See *Basank v. Decker*, No. 20-cv-2158, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (“The Court takes judicial notice that, for people of advanced age, with

²⁵ Centers for Disease Control, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19): Risk Factors for Severe Illness (last updated March 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

²⁶ *Id.*

²⁷ *Id.*

underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality.” (citing CDC guidance)).

Mr. Hassoun has *all* of these diseases. He suffers from diabetes, coronary artery disease (which has required placement of two coronary stents), asthma (a form of chronic respiratory disease), and hypertension. Hassoun Decl. ¶¶ 3b–4. He is also almost 60 years old. Am. Pet. While statistics regarding the death rates for people who suffer from all of these risk factors in combination do not appear to be available, it stands to reason that they raise Mr. Hassoun’s risk of death well above the highest reported rate of 10.5% for those with cardiovascular disease alone.

The medical danger that Mr. Hassoun faces from COVID-19 is thus far higher than that of the general population or the general detainee population at BDFD. He is in a small category of people who have a severely elevated risk of dying if they contract the virus. Medical staff at BDFD have told Mr. Hassoun as much. Hassoun Decl. ¶ 14 (“Health care providers at the facility have told me repeatedly that I personally am acutely vulnerable to this illness because I suffer from many chronic illnesses that are serious risk factors and because my immune system is compromised.”). Even short of death, he is much more likely to be among those with severe symptoms that require hospitalization or treatment in an intensive care unit with mechanical respiratory support. Meyer Decl. ¶ 22; Greifinger Decl. ¶ 6. Moreover, the long-term health effects of such severe manifestations of the disease are not yet well-understood but likely to be significant.²⁸

²⁸ Erika Edwards, *'Post intensive-care syndrome': Why some COVID-19 patients may face problems even after recovery*, NBC News (Mar. 28, 2020), <https://www.nbcnews.com/health/health-news/post-intensive-care-syndrome-why-some-covid-19-patients-may-n1166611>.

III. Mr. Hassoun could safely be held under home incarceration, vastly reducing the threat to his health, while subject to continued detention and supervision by the government.

Mr. Hassoun's sister, a U.S. citizen, is fully prepared to accommodate Mr. Hassoun in her home in Sunrise, Florida under complete house arrest and monitoring. Hassoun Decl. ¶ 32. Her home was the place designated by the U.S. Office of Probation and Pretrial Services for Mr. Hassoun to reside under criminal supervised release following the end of his criminal sentence, and she has previously represented to the Court that she would take responsibility for Mr. Hassoun's care if he were released under supervision or following Chief Judge Geraci's decision ordering release under *Zadvydas v. Davis*, 533 U.S. 678 (2001). See Affidavit of Beth Hassoun, *Hassoun v. Sessions*, No. 18-cv-586 (W.D.N.Y. filed Oct. 22, 2018) (ECF No. 29-5). Counsel for Petitioner has recently spoken with her to confirm that she is ready and able to accommodate Mr. Hassoun subject to the house arrest and the demands of the current public health guidelines. She is.

Mr. Hassoun can be transported safely to Florida by ICE. ICE continues to operate flights to deport immigrants and, on information and belief, to transport immigrants within the United States.²⁹ ICE has also recently begun flying U.S. citizens stranded abroad back to the United States on its flights.³⁰ Mr. Hassoun could readily take all necessary precautions to avoid contracting the virus on a flight, such as wearing a protective mask, gloves, and frequent hand-washing or use of hand-sanitizer. Transport to Florida is also likely to be feasible because the

²⁹ Daniel Gonzalez, *273 Americans stuck in Central America flown back to U.S. on ICE deportation flights*, USA Today (Mar. 27, 2020), <https://www.usatoday.com/story/travel/2020/03/27/coronavirus-americans-stuck-central-america-return-ice-flights/2932039001/>.

³⁰ *Id.*

government maintains another major ICE-owned-and-operated detention facility in that region, the Krome Service Processing Center in Miami.³¹

Even if the government cannot arrange for travel to Florida, Mr. Hassoun would make alternative arrangements for safe private travel by car, likely driven by a U.S.-citizen relative. Petitioner would also be willing to investigate alternatives for home incarceration closer to the Buffalo Federal Detention Facility in the event that travel or transport proves to be a sticking point. Any such arrangements would be much safer than being held in a detention facility indefinitely during the entirety of the pandemic with hundreds of other detainees and a large contingent of staff and material entering and exiting daily.

Mr. Hassoun is also willing to consent to *any* monitoring or other conditions the government wishes to impose while he is detained under home incarceration, including electronic monitoring of all movements and all communications. Mr. Hassoun would, as a legal matter, remain in the custody of the Department of Homeland Security. 8 U.S.C. § 1226a(a)(2) (“[T]he [Secretary of Homeland Security] shall maintain custody of such an alien until the alien is removed from the United States.”). To the extent the government perceives any legal restrictions on its ability to impose such conditions, Mr. Hassoun is willing to waive them for the purposes of his home incarceration during the pandemic. In this way, the government could maintain strict control and surveillance over Mr. Hassoun, in much the same way it does now at BFDF, while he awaits his evidentiary hearing.

³¹ Mr. Hassoun was detained at Krome for approximately 19 months during the pendency of his original immigration proceedings before the government filed criminal charges against him in 2004. *See* Am. Pet. ¶ 25, ECF No. 13.

ARGUMENT

I. Mr. Hassoun’s continued detention at BFDF would violate his Fifth Amendment right to reasonably safe conditions of confinement.

The Constitution forbids the government from detaining individuals—particularly civil detainees who are not subject to punishment—when it is eminently foreseeable that the circumstances of detention create a substantial risk of medical danger, serious illness, or death. The Supreme Court has recognized, under the Due Process Clause, that “[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.” *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). Indeed, the Fifth Amendment standards that apply to people in civil detention, like Mr. Hassoun, are more demanding than those required by the Eighth Amendment because “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg*, 457 U.S. at 321–22.

In the context of criminal punishment, the Eighth Amendment not only prohibits “unsafe conditions,” but also “protects against future harm to inmates.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In particular, “[t]he Amendment requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’” *Id.* (quoting *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 200 (1989)).

In *Helling*, for example, the Supreme Court held that a person serving a criminal sentence had stated a viable Eighth Amendment claim for exposure to secondhand tobacco smoke in prison. *Id.* at 25 (“McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of [environmental

tobacco smoke] that pose an unreasonable risk of serious damage to his future health.”). In order to reach this determination, the Court recognized that even long-term risks to health that are much less acute and immediate than the one Mr. Hassoun faces from COVID-19 are unconstitutional. Indeed, the Court explicitly recognized that the risk of illness from infectious disease is a harm prohibited by the Eighth Amendment. *Id.* at 33.

The Court in *Helling* also held that an individual need not to wait to actually get sick or be exposed to a virus in order to state a constitutional violation. The Court rejected the proposition that “prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.* at 33. The Court also rejected the “thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.” *Id.* at 34. Instead, the Court held that “the Eighth Amendment protects against future harm to inmates” and observed that “it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.*

In *Helling*, the federal government, as *amicus*, agreed that “conditions of confinement that truly pose a significant risk of proximate and substantial harm to an inmate” are prohibited by the Eighth Amendment even if “the injury has not yet occurred and the inmate does not yet suffer from its effects.” *Id.* at 34. In its submission to the Court, the government appears to have anticipated and accepted that the Constitution forbids exactly the kind of risk that Mr. Hassoun now faces from the novel coronavirus:

The Government recognizes that there may be situations in which exposure to toxic or similar substances would “present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance

should therefore be prevented—that” the Amendment's protection would be available even though the effects of exposure might not be manifested for some time.

Id. (quoting Brief for the United States as Amicus Curiae 19). The Court itself also recognized that the possibility of “exposure of inmates to a serious, communicable disease” is precisely the kind of dangerous situation that the Eighth Amendment forbids. *Id.* at 33. Individuals like Mr. Hassoun who are held in civil, non-punitive, and purely preventive detention “deserve at least as much protection as those who are criminally incarcerated.” *Charles v. Orange Cty.*, 925 F.3d 73, 82 (2d Cir. 2019).

In the immigration context, “detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official ‘knew, or should have known’ of a condition that ‘posed an excessive risk to health,’ and failed to take appropriate action.” *Basank*, 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020) (quoting *Darnell*, 849 F.3d at 35). This is a more lenient standard than the one that applies under the Eighth Amendment, because “an official can violate the Due Process Clause . . . without meting out any punishment.” *Darnell*, 849 F.3d at 35. Instead, “deliberate indifference . . . can be shown by something akin to recklessness, and does not require proof of a malicious or callous state of mind.” *Charles*, 925 F.3d at 86; *id.* at 87 (“Deliberate indifference . . . can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff’s health or safety.” (alteration and quotation marks omitted; emphasis in original)).

Here, Mr. Hassoun faces a grave threat to his life and safety from the virus because he suffers from diseases that make him especially vulnerable. While ICE may be taking various

general measures against the virus, it has not and cannot prevent the spread of the virus from person to person or through shared surfaces or items. *See supra* 6–9. To be sure, Mr. Hassoun is currently being held in a cell in the medical unit of the facility under observation because he has been on a modified hunger strike, protesting his years-long detention without charge. Hassoun Decl. ¶¶ 8-10. But it is an illusion to believe that this protects him against the virus. Medical professionals at the facility itself have specifically advised that he is at acute risk and that he cannot protect himself. *Id.* ¶¶ 12-17; *supra* 9, 14. Mr. Hassoun cannot socially distance from other inmates and staff; he must continue to use facilities (like food service, telephones, and tablets) that are shared among inmates; he must necessarily interact at close quarters with medical staff who sometimes do not wear masks, *id.* ¶¶ 24-25, and with unit officers who generally do not wear any protective equipment, *id.* ¶ 23. Perhaps of particular concern given these ongoing proceedings, he must use shared computers in the law library in order to review discovery and other documents in this case, and he can only make confidential calls to his attorneys on a shared telephone. *Id.* ¶ 26.³² Mr. Hassoun is not able to use any kind of disinfectant to clean these or other shared facilities. *Id.* ¶ 29.

A growing number of federal courts, including within this state, have recognized that the risk of infection with COVID-19 in detention facilities likely violates the Due Process Clause’s prohibition on unsafe conditions. *See, e.g., Basank*, 2020 WL 1481503, at *4–6; *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020). Earlier today, Judge

³² The facility has asked counsel to send Mr. Hassoun case-related material on a flash drive that Mr. Hassoun can access and review on computers in the law library. Counsel has been discouraged from sending paper copies of such material, which is voluminous. While counsel has previously hand-delivered paper copies of discovery to Mr. Hassoun, that is no longer possible given travel restrictions, and so counsel have provided the most recent re-released documents on a flash drive. Some discovery materials, including thousands of audio files of recorded telephone calls, cannot be provided to Mr. Hassoun in any other format.

Vilardo issued an opinion holding that the health measures currently in place at BFDf likely violate the Due Process rights of high risk individuals. *See Jones v. Wolf*, No. 20-cv-361 (W.D.N.Y. Apr. 2, 2020) (ECF No. 44).

Other courts have held that the risk of COVID-19 warrants relief from incarceration under other laws, such as the Bail Reform Act. *See United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020); *Matter of Extradition of Toledo Manrique*, No. 19-mj-70155, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020) (ordering release with special bail conditions even though detainee was “a flight risk”); *United States v. Garlock*, No. 18-cr-418, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020) (delaying defendant’s date of surrender to prison from June 2020 to September 2020); *United States v. Damian Campagna*, No. 16-cr-78-01, 2020 WL 1489829 (S.D.N.Y. Mar. 27, 2020) (shortening criminal sentence by four months and transferring to home incarceration in light of detainee’s compromised immune system).

At least two courts in this Circuit have specifically rested their Fifth Amendment holdings—and their orders requiring outright release of detainees—on the unique risks faced by immigration detainees who suffer from medical conditions that place them at elevated risk of severe illness or death. *See Basank*, 2020 WL 1481503, at *4-6; *Coronel*, 2020 WL 1487274, at *4-6.

In these cases, courts determined that medically vulnerable detainees were likely to prevail on their Fifth Amendment claims because ICE had not taken the precautions necessary to prevent infection. *See Basank*, 2020 WL 1481503, at *5; *Coronel*, 2020 WL 1487274, at *4-6. As these courts recognized, ICE appears to be taking certain measures in response to the pandemic, including “screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a

time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities.” *Basank*, 2020 WL 1481503, at *5. But “[t]hese measures are patently insufficient to protect Petitioners” because “[c]onfining vulnerable individuals . . . without enforcement of requisite social distancing and without specific measures to protect their delicate health ‘pose[s] an unreasonable risk of serious damage to [their] future health,’ and demonstrates deliberate indifference.” *Id.* (quoting *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002)). The declaration filed by the Respondent in this case shows that BFDF is taking essentially the same “patently insufficient” measures as the New York City-area detention centers. *Compare* Searls Decl. ¶ 7 with *Basank*, 2020 WL 1485103, at *5; *Coronel*, 2020 WL 1487274, at *5. Indeed, as mentioned already, another judge in this district found earlier today that existing measures at BFDF are likely unconstitutional. *Jones*, No. 20-cv-361, slip op. at 26–27 (W.D.N.Y. Apr. 2, 2020). Petitioner likewise faces a grave threat to his life and health in ICE custody at BFDF and his constitutional rights are violated for the same reason.³³

II. The Court should order that Mr. Hassoun be detained by the government under home incarceration rather than at the BFDF.

There is currently only one remaining legal authority that can possibly justify the government’s continuing detention of Mr. Hassoun: Section 412 of the PATRIOT Act, 8 U.S.C. § 1226a.³⁴ With respect to the requirements of detention, that statute says only that “the

³³ The court in *Jones* has given the government an opportunity to try identify a plan to prevent the risk of infection, with a deadline of tomorrow, April 3, 2020 at 5pm. *See Jones*, No. 20-cv-361, slip op. at 32. But for all of the reasons described above, the kinds of “isolation” measures that are possible at BFDF cannot prevent the spread of disease. *See supra* 8–11. Indeed, a BFDF health professional specifically advised Mr. Hassoun that it is impossible to keep him safe; that staff, including especially medical staff, could infect him unwittingly; and that any shared surfaces that are not properly disinfected could spread the virus—with particularly devastating consequences for Mr. Hassoun. *See Hassoun Decl.* ¶¶ 12–17, 22–29.

³⁴ Chief Judge Geraci held that Mr. Hassoun’s prolonged detention under 8 U.S.C. § 1231(a)(6) was unlawful under *Zadvydas v. Davis*, 533 U.S. 678 (2001), and the government did not appeal that decision. *Hassoun v. Sessions*, No. 18-cv-586, 2019 WL 78984 (W.D.N.Y. Jan. 2, 2019). This Court has held that

[Secretary] shall maintain custody of such an alien” and that the Secretary “may . . . detain” an individual for successive six month periods indefinitely. 8 U.S.C. § 1226a(a)(1)–(2), (6). It does not specify that such detention must take place in an ICE facility or anywhere in particular; it requires only that the individual remain detained in the Secretary’s custody unless and until the Secretary revokes his certification and directs the detainee to be released from custody.

§ 1226a(a)(7). Petitioner does not ask this Court to remove him from the Secretary’s custody or to “release” him. That decision must await the evidentiary hearing at which the government will, finally, be forced to try to prove its case. Instead, Petitioner simply asks this Court to order the government to maintain custody of Mr. Hassoun and detain him in a home incarceration setting.

Home incarceration is a well-recognized form of “custody” and detention. The Supreme Court recognized many decades ago that a person can remain “in custody” of the government even when not physically confined to a jail or prison. Thus, a person is “in custody” of the government when on parole in the community following the end of a term of imprisonment, *Jones v. Cunningham*, 371 U.S. 236 (1963), or even while released on bail pending criminal trial, *Hensley v. Municipal Court*, 411 U.S. 345, 348–49 (1973).

Other parts of the U.S. Code also make clear that the government keeps someone in “custody” even when they are on various forms of house arrest or home confinement. For example, “home detention” is a sentencing option under the U.S. Sentencing Guidelines that can be imposed “as a substitute for imprisonment.” Federal Sentencing Guidelines Manual § 5F1.2. The Attorney General and Bureau of Prisons may also determine that certain eligible people serving terms of imprisonment in BOP prisons may be placed on “home detention” to serve out

the government has no authority to detain Mr. Hassoun under 8 C.F.R. § 241.14(d). *Hassoun v. Searls*, No. 19-cv-370, 2019 WL 6798903 (W.D.N.Y. Dec. 13, 2019).

their term of imprisonment. 34 U.S.C. § 60541(g)(1). Such individuals are, by statutory definition, people “in the custody of [BOP],” § 60541 (g)(5)(A),(D). Indeed, in response to COVID-19, BOP is expanding its use of this kind of detention with respect to inmates in its custody. *See* Memorandum from Attorney General William Barr to Director of Bureau of Prisons, Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020).

Under the plain text of 8 U.S.C. § 1226a, nothing prevents Mr. Hassoun from being detained in government custody under house arrest. Even if that option were not available under the statute, the Court has independent habeas authority to order that result. *See infra*.

A. This Court has the authority to order the government to hold Mr. Hassoun in home incarceration rather than at the BFDF.

This Court has authority to order Mr. Hassoun detained in home confinement, rather than at the BFDF, on the basis of the habeas authority granted in § 1226a itself and the general power afforded to habeas judges not to issue order to end illegal circumstances of detention. First, this court has explicit statutory authority to engage in “[j]udicial review of *any* action or decision relating to this section.” 8 U.S.C. § 1226a(b)(1); *see also Hassoun v. Searls*, No. 19-cv-370, 2019 WL 6798903, at *3, 11 (W.D.N.Y. Dec. 13, 2019). That capacious language encompasses the government’s “action or decision” to hold Mr. Hassoun in a particular facility when doing so creates a grave medical risk and violates Mr. Hassoun’s constitutional rights.

Second, habeas courts have inherent authority to issue orders necessary to protect a person’s liberty and effectuate their constitutional rights, including the power to order detainees released or transferred in order to vindicate constitutional rights. “Habeas is the appropriate action to challenge conditions of confinement where the prisoner seeks to be moved in order to remedy past constitutional violations.” *Boudin v. Thomas*, 732 F.2d 1107, 1111 (2d Cir. 1984);

accord Neal v. Dir., D.C. Dep't of Corr., 684 F.2d 17, 20 (D.C. Cir. 1982) (“The writ of habeas corpus has been used by federal courts in the past to remedy a federal prisoner's unlawful confinement in the wrong institution even though the federal government was entitled to confine the prisoner in some institution.”). In the criminal context, habeas courts order federal inmates removed from solitary confinement or other restraints that violate their constitutional rights. *See, e.g., United States v. Bout*, 860 F. Supp. 2d 303, 307 n.12, 312 (S.D.N.Y. 2012) (granting habeas petition to transfer inmate out of solitary confinement to remedy Eighth Amendment violation); *United States v. Basciano*, 369 F. Supp. 344 (E.D.N.Y. 2005) (granting habeas petition to transfer pre-trial detainee out of Special Housing Unit to remedy Due Process Clause violation).

Petitioner here seeks an order simply requiring that he be detained under house arrest rather than at the BFDF. In the immigration context, habeas courts have the power to issue much stronger remedies, including directly setting bail or directly ordering outright release of immigrants from detention. In *Mapp v. Reno*, a case involving a detained immigrant, the Second Circuit held that “federal courts have inherent authority to admit to bail individuals properly within their jurisdiction.” 241 F.3d 221, 226 (2d Cir. 2001); *accord Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) (“Release is available in a habeas corpus action, which is a civil collateral attack.”)

Courts have exercised this authority repeatedly in recent days to order immigrants released on bail due to the threat of COVID-19. *See, e.g., Jovel v. Decker*, No. 18-cv-236, 2020 WL 1467397, at *1 (S.D.N.Y. Mar. 26, 2020); *Arana v. Barr*, No. 19-cv-7924, 2020 WL 1502039 (S.D.N.Y. Mar. 27, 2020) (report and recommendation); *Coronel*, 2020 WL 1487274, at *8; *Thakker v. Doll*, No. 20-cv-480 (M.D. Pa. Mar. 31, 2020) (slip opinion); *Hernandez v. Decker*, No. 20-cv-1589, 2020 WL 1547459 (S.D.N.Y. Mar 31, 2020). Even immigrants who are

subject to mandatory “no-bond” detention have been ordered released due to COVID-19. *See Basank*, 2020 WL 1481503, at *6 (“Courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c).”). This Court plainly has the power to direct the government to hold Mr. Hassoun under home incarceration.

B. The circumstances warrant an order directing that Mr. Hassoun be transferred to home incarceration.

This Court should exercise its authority to order Petitioner be held under house arrest in order to protect his Due Process rights to life and liberty. All of the relevant factors here—including the risk to Petitioner, the public interest, and the presence of extraordinary circumstances—militate in favor of such an order. *Cf. Mapp*, 241 F.3d at 230 (holding that, in order to obtain an order from a habeas court ordering *bail* pending adjudication of the habeas petition, the Court “must inquire into whether ‘the habeas petition raises substantial claims and [whether] extraordinary circumstances exist[] . . . that make the grant of bail necessary to make the habeas remedy effective.’” (quoting *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981) (alterations in original))).

As discussed already, the medical risk to Petitioner is grave and growing with each passing day. *See supra* 3–14. There is no way for Mr. Hassoun to meaningfully protect himself, and if he is infected, he faces terrible odds of death and worse odds of severe illness. Detaining him under house arrest with his sister will substantially mitigate that risk immediately. Several other courts have recognized, in the context of requests for bail under *Mapp*, that “[s]evere health issues’ are ‘the prototypical . . . case of extraordinary circumstances that justify release pending adjudication of habeas.’” *Hernandez*, 2020 WL 1547459, at *3 (S.D.N.Y. Mar. 31, 2020) (quoting *Coronel*, 2020 WL 1487274, at *9); *accord Basank*, 2020 WL 1481503, at *4; *Thakker*, No. 20-cv-480 (M.D. Pa. Mar. 31, 2020).

Moreover, the relief Petitioner seeks will allow the government to monitor his every move to ensure he remains confined and to monitor any and all of his communications and contacts just as stringently as at BFDf. He would for both legal and practical purposes remain in the custody of the government under 8 U.S.C. § 1226a, and the government would be empowered to return him to Batavia once the pandemic passes, pending resolution of his habeas proceeding.

These extraordinarily stringent conditions prevent whatever threats the government (incorrectly) believes Mr. Hassoun poses. Even the most serious allegations the government has pressed against Mr. Hassoun—which he categorically denies—amount essentially to the claim that the government believes he poses a risk of recruiting others to engage in criminal acts. But if Mr. Hassoun is on house arrest, subject to total monitoring and restrictions on his contacts, such activities are impossible.

An order of release is especially warranted here because the government's request for indefinite delay, made though it is against the backdrop of a major health crisis, will prevent Mr. Hassoun from finally hearing and confronting the government's evidence against him for an unknowable and possibly extended period. Courts elsewhere have begun ordering release due to COVID-19 where a mere bond hearing would be delayed by a matter of *days* due to an overwhelmed-but-still-operating immigration court system. *See, e.g., Coronel*, 2020 WL 1487274, at *9 (“Requiring Petitioners to wait a significant additional period of time in detention is an inadequate remedy given their exceptionally imminent health risks.”). In this case, the government seeks to delay Mr. Hassoun's merits hearing as long as the pandemic lasts. If the circumstances of the pandemic are extreme enough to justify a delay that so profoundly harms

Mr. Hassoun, then they are also extreme enough to justify ordering Mr. Hassoun's strict detention at home—where, at least, his risk of infection and death will be reduced.

It also bears emphasis how threadbare the government's case against Mr. Hassoun is likely to be. Petitioner does not ask the Court to prejudge the government's evidence now; the Court's ultimate factual findings must of course await the evidentiary hearing. But the nature and apparent strength of the government's case may be relevant to the Court's determination whether the equities favor detention under home incarceration.

The government's central allegations still rest on the statements of jailhouse informants who have extraordinarily strong motives to provide useful lies to the government because they are all detained fighting deportation at the hands of immigration officials who wield enormous discretionary power. While Petitioner has not yet had an opportunity to confront the government's witnesses or its evidence, many weaknesses in the government's case have already become apparent.

For example, the Court is aware from prior discovery motions that the most alarming allegations against Mr. Hassoun all stem from a single jailhouse informant, Shane Ramsundar. He was previously convicted of defrauding immigrants by impersonating an ICE official and promising immigration assistance. *See* Memorandum in Support of Pet's Motion to Compel at 12 & Ex. 10 (ECF No. 101). There is ample reason to doubt the credibility of his fantastical allegations. *Id.*

Although Petitioner has not yet had an opportunity to challenge the government's allegations and evidence at an evidentiary hearing, it bears noting that in reviewing the investigatory files that the government has produced in response to discovery, Petitioner has not yet discovered *a single piece* of independent evidence—e.g., phone calls, correspondence, or

evidence about any supposed conspirators outside BFDF—that tends to corroborate the accusations of these jailhouse informants.

Moreover, based on the government’s discovery responses and court filings to date, it appears that the government intends to rely overwhelmingly on the testimony of its investigators and employees, rather than the informants who generated the allegations. Petitioner’s interrogatories asked for a list of all potential witnesses. The government’s most recent response identified 15 people. But all of those potential witnesses were government investigators or employees except for one informant, Mr. Abdelraouf, and a placeholder for as-yet-unspecified “John Doe” informants. *See* Respondent’s Second Supplemental Responses to Petitioner’s First Set of Interrogatories, at 4–7 (attached hereto as **Exhibit D**).

In that same discovery response, the government waived privilege with respect to Mr. Ramsundar and two other informants, and yet it did not name any of them as potential witnesses. *Id.* at 2. Since then, the government has waived privilege with respect to all other confidential informants, yet it has not updated its interrogatory responses to name any additional potential witnesses. The government’s motion to adjourn indicates that it “will call between ten and fifteen witnesses,” but does not clarify whether it intends to call any of the informants who actually generated the allegations against Mr. Hassoun, except possibly Mr. Abdelraouf, a peripheral witness at best. This Court has already warned the government that such a trial strategy is unlikely to be able to satisfy the stringent standard of proof that applies in this case. *See Hassoun v. Searls*, No. 19-cv-370, 2020 WL 408349, at *8 (W.D.N.Y. Jan. 24, 2020).

In these circumstances, the government’s mere allegations—which continue to be unsupported by even a single sworn affidavit or declaration—do not justify requiring Mr. Hassoun to be held at the BFDF to suffer potentially fatal illness. This is particularly true

because any violations of the terms of his home incarceration would of course be grounds for the government to seek his immediate transfer back into a detention facility.

CONCLUSION

In these circumstances, an order directing the government to hold Mr. Hassoun under home incarceration is necessary to protect his constitutional right to life and safety. We ask the Court to enter such an order as soon as possible in light of the alarmingly fast spread of the virus.

Respectfully submitted,

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