UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

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

v.

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

Respondent.

RESPONDENT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO ADJOURN THE EVIDENTIARY HEARING
AND
MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S EMERGENCY MOTION FOR AN ORDER TRANSFERRING HIM TO HOME INCARCERATION

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INTRODUCTION

Respondent respectfully opposes Petitioner's motion for emergency release (ECF No. 122), and files this reply in support Respondent's motion to adjourn the April 28, 2020 evidentiary hearing (ECF No. 120).

Respondent raised one issue in his opening brief: a request to adjourn the April 28, 2020 hearing and certain related deadlines because of logistical problems presented by the Coronavirus Disease 2019 ("COVID-19") pandemic. Petitioner, in his opposition brief, does not raise any arguments in opposition to that request. In essence, the parties are in agreement that the hearing should be adjourned; therefore, the Court should grant Respondent's unopposed motion.

Rather than opposing the relief sought in Respondent's motion, Petitioner, lacking evidence showing that he is individually at a greater risk of contracting COVID-19 at BFDF than he would be if released, asks the Court to grant him release based on his fear of COVID-19. The Court should deny this relief. Petitioner's fear of contracting COVID-19 is based on speculation that ICE is completely powerless to manage an outbreak of this disease at the detention facility where he is being held, and does not provide a legal basis to order his immediate transfer into home custody. The novel coronavirus pandemic is currently threatening all individuals within the United States. This is not a situation where COVID-19 is spreading in detention facilities but not among the general public.

As most communities are well beyond marking their first instances of COVID-19 infections and now attempting to manage outbreaks of large numbers of infected persons, U.S. Immigration and Customs Enforcement ("ICE") is taking measures to reduce the risk of contracting COVID-19 for immigration detainees. These measures include reducing detainee

populations, maximizing sanitation tactics, implementing screening and testing for all visitors, limiting visitors, and enforcing isolation protocols. The Buffalo Federal Detention Facility ("BFDF") is no exception to these measures. The risk that Petitioner might contract COVID-19 is further diminished as he is being held in a single-occupancy observation room with access to cleaning supplies and disinfectants at any time. In contrast, releasing Petitioner to his intended home confinement location—necessitating an over 1,300-mile journey through at least eight states—would increase the risk of him contracting COVID-19 when compared to sheltering in place at BFDF. In addition, Petitioner's release from ICE custody would pose an undue security risk to any community in which he would reside during his release, and Petitioner has not demonstrated that he is capable of complying with Court orders that merits his release under orders of home confinement.

ICE is closely monitoring this environment and will continue to respond to reduce the risk of infection among those in its custody. Petitioner has given this Court no basis to substitute his self-selection for immediate release for the authority and discretion regarding detention that Congress vested in the Department of Homeland Security ("DHS") and ICE.

RELEVANT BACKGROUND

The Court is familiar with the facts concerning the COVID-19 pandemic, which Respondent recounted in his earlier memorandum of law. Resp.'s Memo. of Law in Supp. of Mot. to Adjourn the Evidentiary Hr'g at 1-7 (ECF No. 120-1) ("Resp.'s Br."); *see also* Order at 3 (ECF No. 136). Petitioner's motion, however, focuses not on the pandemic in general, the challenges of working on this litigation, or the hazards of convening an evidentiary hearing. Instead, he focuses on the alleged susceptibility of BFDF to the novel coronavirus and his personal medical conditions. Respondent addresses those allegations as follows.

I. BFDF Is Prepared for COVID-19.

DHS—including ICE and BFDF—is well aware of the global pandemic. It has taken and continues to take steps to mitigate COVID-19 risks accordingly. Since the onset of reports of COVID-19, ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees. Ex. A, Decl. of Capt. Abelardo Montalvo, M.D. ¶ 5. In testing for COVID-19, the ICE Health Service Corps is also following guidance issued by the Centers for Disease Control and Prevention ("CDC") to safeguard those in its custody and care. *Id.* ¶ 6; Ex. B, Decl. of Jeffrey Searls ¶ 4.

BFDF has a multi-faceted approach to detainee health amidst this pandemic. *First*, it carefully monitors detainee health. As part of this protocol, ICE screens each detainee for disabilities upon admission. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate. Montalvo Decl. ¶ 7. At BFDF, during intake medical screenings, ICE assesses detainees for fever and respiratory illness. *Id.* ¶ 8. ICE asks the detainees whether they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through areas with sustained community transmission in the past two weeks. *Id.* Upon arrival at the garage bay and before they enter the facility, all detainees are checked with a thermometer for fever. *Id.* BFDF has been using this process since as early as March 12, 2020. *Id.*

Additionally, BFDF quarantines all newly arriving detainees for 14 days after their intake screenings. *Id.* ¶ 9. The facility holds incoming detainees in the quarantine unit, kept on minimum movement, and evaluated during the 14-day period to ensure that they do not have symptoms of the COVID-19 virus. *Id.* If new persons are added, or someone becomes ill, then

the 14-day quarantine restarts. *Id.* ¶ 10. Detainees who are moved out of the quarantine unit for any type of emergency are required to wear N-95 masks and gloves. *Id.* ¶ 9.

The facility is carefully watching for any signs of COVID-19 infection. An infection control officer performs rounds to review processes and procedures currently being utilized. *Id.* ¶ 20. Medical staff have received education on how to take a COVID-19 sample. *Id.* BFDF provides daily access to sick calls in a clinical setting, and has an onsite medical infirmary and mental health services with the ability to admit patients at the local hospital for mental health care. *Id.* ¶ 10. BFDF is currently utilizing sick call to screen detainees with any complaints related to the COVID-19 virus. *Id.* Every staff member and every visitor has his or her temperature taken at the main gate, before they even enter BFDF grounds. *Id.* ¶ 19. This includes all delivery persons. *Id.*; Searls Decl. ¶ 8.

Second, BFDF has increased sanitation frequency and thoroughness amid this medical emergency, including cleaning the facility several times daily throughout housing units and common work areas. Montalvo Decl. ¶ 13. Paid detainee workers clean common areas and hallways with Fresh Breeze, a viricide/disinfectant/fungicide/tuberculocide. *Id.* PF 3 Hi-Con, also a viricide/disinfectant/fungicide/tuberculocide, is used in cleaning housing areas. *Id.* The use of detainee workers reduces the contact rate between ICE staff and detainees and helps limit any exposure between populations. *Id.* Detainee workers, who are monitored closely, are provided goggles, gloves, and other personal protective equipment ("PPE") as directed by safety data sheets and manufacturer requirements for chemicals. *Id.* ¶¶ 13, 20.

Staff at BFDF has access to handwashing stations, alcohol-based hand sanitizer, disinfectant wipes, and full PPE. *Id.* ¶ 14 (contradicting Petitioner's claims to the contrary, Hassoun Decl. ¶ 29). Detainees have continual access to handwashing stations. *Id.* Soap is

provided at all handwashing stations, and regularly restocked. *Id.* Detainees and staff alike carry masks for use during transports or pickups. *Id.* ¶ 20.

The facility has prioritized medical and hygienic services, while ICE staff has been reduced in areas that do not affect BFDF's ability to monitor and respond to COVID-19. *Id.* ¶ 18; Searls Decl. ¶ 5.

The facility has increased its stock of PPE and cleaning supplies. Montalvo Decl. ¶ 20. Custody staff fit-tests PPE masks and must remove facial hair that could interfere with the masks' seal. *Id.* BFDF monitors its PPE supplies. *Id.*

Third, BFDF is employing tactics designed to reduce or eliminate in-person interactions between and among persons at the facility. BFDF is at approximately half-capacity. Montalvo Decl. ¶ 12. As of April 8, 2020 at 6:30pm, it has capacity for 716 detainees but is detaining only 390 individuals. *Id.* The facility has decreased intake of new detainees, and continues to evaluate additional detainees for potential release, including non-criminal detainees and detainees at high-medical risk. *Id.* ¶ 20. In dormitories with larger numbers of beds, every other bed is left vacant to ensure distancing between detainees to the fullest extent possible. *Id.*

With respect to security personnel, BFDF has split up and holds several pre-briefing musters, rather than one main muster per shift, to keep staff from congregating in one area. *Id.* ¶ 18. Training sessions have been cancelled until further notice. *Id.*

To prevent the introduction of COVID-19 into BFDF, the facility has also temporarily disallowed personal visits. *Id.* ¶ 15. Notwithstanding the foregoing adjustments, access to legal counsel remains a paramount requirement. *Id.* ¶ 16. BFDF is mitigating the risk of exposure by allowing legal counsel visits in the no-contact room which features a plastic window barrier separating detainees from attorneys. *Id.*; Searls Decl. ¶ 9. Attorneys who refuse to use the no-

contact rooms are required to wear PPE, including face masks and gloves, to limit the transmission of infection. Searls Decl. ¶ 9. Detainees have access to tablets, which can make collect calls, and additional policies have been put in place allowing detainees to make phone and video calls weekly without cost. Montalvo Decl. ¶ 16.

Immigration court proceedings continue apace, but with significant modifications. In nearly all proceedings, all participants appear now by teleconference or video conference. Searls Decl. ¶ 10. The single two exceptions to that procedure were for two attorneys who insisted on meeting with their clients in rooms without a window separation; various other mitigation techniques were used in those instances. *Id.* ¶¶ 10, 11.

As a precaution, gatherings of detainees have been cancelled or are being completed in dorms and their respective outdoor areas. Montalvo Decl. ¶ 17. Recreation remains available outside. *Id.* BFDF has decreased off-site appointments unless deemed a necessity, to decrease exposure of staff and detainees at outside facility. *Id.* ¶ 20. Social distancing is being practiced by staff to the fullest extent possible. *Id.* ¶ 17. This includes distancing between staff members as well as staff and detainees. *Id.* No tours or outside visitors are allowed at BFDF unless deemed necessary. *Id.* Shift changes have been staggered to allow for social distancing. *Id.*

Fourth, ICE is educating detainees about the need to decrease exposure as a result of movement changes. *Id.* ¶ 20. BFDF nursing staff provides sick-call education and staying healthy education to all detainees through intake, the physical exam, and in the detainee handbook. *Id.* The facility holds town halls in dorms to inform and educate detainees as to ongoing concerns and to educate detainees on safe practices such as social distancing and proper handwashing techniques. *Id.* Education material is available for quick reference. *Id.* Finally, BFDF encourages detainees to communicate with BFDF staff via the electronic request and

grievance forms on the tablets; an increased number of staff are monitoring and responding more frequently. *Id.*

Fifth, BFDF has protocols in place to handle the scenario of a detainee showing symptoms of the COVID-19 virus. Pursuant to the established protocols, a detainee will be immediately isolated in one of two negative pressure rooms in the facility. *Id.* ¶ 21. The negative pressure rooms operate to limit the flow of air from the room with the infected individual to outside of the room. *Id.* This will further help limit any exposure should any individual become infected. *Id.* The infected individual will then be tested for COVID-19, monitored, and, as required, transported to a local hospital for treatment. *Id.*

As of April 8, 2020, there are zero confirmed cases of COVID-19 at BFDF—among staff or among detainees. *Id.* ¶¶ 11, 29. Currently there are three detainees who complained of symptoms indicative of COVID-19. *Id.* ¶ 30. These three detainees were placed in isolation in the medical unit and are in the BFDF's negative pressure rooms. *Id.* As a precautionary measure and although they show no symptoms of COVID-19, five additional detainees who indicated they had close contact with the three individuals prior to their placement in isolation have been placed in the special housing unit. *Id.* ¶ 31. All eight are in isolation. *Id.* ¶ 32. BFDF has obtained test samples from all eight of these detainees and expects to have the COVID-19 test results in approximately three to four days. *Id.* at ¶ 33. These eight detainees are not allowed to be in the presence of other detainees, *id.* ¶ 34, and they are being constantly monitored by ICE medical staff, *id.* ¶¶ 35-37. None of these eight individuals have had recent contact with Petitioner, who remains in the special housing unit. *Id.* ¶ 38.

II. ICE Is Taking Petitioner's Health Seriously and Employing Measures to Safeguard His Health.

In addition to the general measures described above, BFDF is taking care to protect Petitioner's health. Captain Montalvo's declaration, which Respondent seeks to have filed under seal, describes Petitioner's medical history. *Id.* ¶ 22. BFDF treats Petitioner, 57, and his conditions with a variety of medication. *Id.* ¶ 23. Nonetheless, Petitioner has multiple documentations of refusing insulin medication and refusing receiving medical evaluation and examinations from certain providers. *Id.*

Petitioner is currently physically separated from the general population of detainees. He is in medical isolation in the special housing unit due to his engaging in a hunger strike and only eating intermittently. *Id.* ¶ 24; Searls Decl. ¶ 19. He is physically in the special housing unit, which is now well below capacity. Searls Decl. ¶ 12. He is placed in a single-person cell with a solid metal door and glass window, which keeps him away from others at the facility. *Id.* ¶ 13. He has an individual toilet, sink, and soap and shampoo for cleaning. *Id.* He has his own shower. *Id.* ¶ 14. He has access at all times to disinfectant and cleaning materials—disinfectants which are specifically registered in New York for use against COVID-19. *Id.* ¶¶ 16-18 (contradicting the claims of Petitioner, *see* Decl. of Adham Hassoun ¶¶ 26-28 (ECF No. 122-4)). The few shared spaces in the special housing unit are cleaned daily. *Id.* ¶ 15.

As a result of his placement in medical isolation, Petitioner has minimal contact with other personnel at the facility. Montalvo Decl. ¶ 26. Specifically, Petitioner's regular contact is due to medical checks. *Id.* When interacting with Petitioner, medical providers wear face masks. *Id.* (contradicting Hassoun Decl. ¶ 24). Again, none of the eight individuals who might develop COVID-19 have had any recent contact with Petitioner, as he has been in a medical

isolation cell for three weeks. *Id.* ¶ 38. Petitioner remains over 150 feet from the cell of the nearest of the five individuals who ICE is monitoring as a precaution. *Id.*

Even if Petitioner were to discontinue his hunger strike, BFDF commits to keeping him in the special housing unit, as described above. Searls Decl. ¶ 20.

According to Captain Montalvo—a medical doctor who is board-certified in family medicine, Montalvo Decl. ¶ 1—Petitioner's minimal contact and the procedures taken within BFDF will serve to minimize his potential exposure to COVID-19. *Id.* ¶ 27.

Petitioner's declarations do not establish to the contrary. The declaration of Dr. Greifinger was signed three and a half weeks ago and concerns an immigration facility in Washington State, with no reference to BFDF or to Petitioner's circumstances. *See* Decl. of Robert B. Greifinger, M.D. (ECF No. 122-3). Petitioner's own declaration is incomplete as to the extensive measure undertaken to protect his health and safety and the health and safety of all persons within BFDF. *See generally* Hassoun Decl. Dr. Jaimie Meyer's declaration, similarly, has (understandably) not considered the points raised above. *See* Decl. of Jaimie Meyer, M.D. ¶ 8 (ECF No. 129). Indeed, it rests of assumptions or allegations directly contradicted by Captain Montalvo or Mr. Searls. Dr. Meyer assumes that Petitioner lacks access to disinfectants or soap to combat the novel coronavirus, when he in fact has access. *See, e.g.*, *id.* ¶¶ 10, 11, 18 (citing this the lack of access to disinfectants and soap as aggravating factors). He also assumes that BFDF is failing to screen all persons entering the facility, when in fact it is doing such screening. *See id.* ¶¶ 13, 18 (citing the interaction with medical personnel as an aggravating factor). As for the aggravating factor of medical personnel allegedly wearing PPE inconsistently, *see id.* ¶¶ 12, 18, as described above, the facility has increased its stock of PPE, trains personnel in using PPE, and provides PPE. There is no incentive for medical personnel at

BFDF to *not* wear PPE. Finally, Captain Montalvo disagrees with his conclusion about Petitioner's risk at the facility, and opines, "The assertion that Mr. Hassoun faces greater risk at BFDF than in home confinement does not account for the real-world conditions and circumstances Mr. Hassoun would face if released, such as access to medical care, exposure during travel, and controlled living conditions that would minimize outside contact." Montalvo Decl. ¶ 28. For these reasons, the Court should afford Petitioner's declarations minimal, if any, weight.

ARGUMENT

On these facts, the Court should grant Respondent's motion to adjourn the evidentiary hearing but deny Petitioner's motion for immediate transfer to home confinement.

I. Petitioner Has Failed to Oppose Respondent's Motion to Adjourn the Evidentiary Hearing.

Citing the extraordinary challenges and health threats posed by the novel coronavirus pandemic, Respondent moved to adjourn the evidentiary hearing in this case, currently set to begin in less than three weeks. Resp.'s Mot. to Adjourn the Evidentiary Hr'g (ECF No. 120). Respondent cited the public health risks from convening a hearing with dozens of people in the same room and the challenges that several of the government's witnesses would have in traveling to Buffalo for the hearing amidst the threat posed by the novel coronavirus and the recommendations by the CDC and New York State to abate the spread of this highly infectious disease. Resp.'s Br. at 8-12. Respondent also explained how social distancing and telework directives have unduly burdened the government's preparation for a hearing that would begin on April 28, 2020. *Id.* at 12-15. As relief, Respondent moved the Court to temporarily adjourn the hearing until after the pandemic has passed and it is safe to reschedule the hearing, and to

temporarily continue the deadlines to file exhibit lists, witness lists, and pre-hearing legal memoranda, and to assert the state secrets privilege. *Id.* at 15-16.

The Court should grant Respondent's motion, as Petitioner does not object to the relief requested in Respondent's motion for an adjournment. Petitioner suggests that he opposes the motion, but never provides reasons why the hearing should proceed on April 28, 2020, despite the global COVID-19 pandemic. Pet'r's Response to Resp.'s Mot. for an Adjournment and Memo. in Support of Pet'r's Emergency Mot. for an Order Transferring Him to Home Incarceration at 3 n.1 (ECF No. 122-1) ("Pet'r's Br.").

Rather than providing support in opposition, Petitioner's response to Respondent's motion for adjournment provides a conditional consent to the adjournment if he is released to home confinement. *See* Pet'r's Br. at 1 ("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 . . . .") (emphasis added). Indeed, the entirety of Petitioner's argument in response to the motion for adjournment is in support of his motion to transfer him to home confinement. *Id.* at 17–30. Only in a footnote does Petitioner explicitly note his opposition to the motion to adjourn. *Id.* at 3 n.1. Petitioner's footnote argument is insufficient to preserve any opposition to the motion to adjourn as "[a]rguments made only in footnotes need not be considered by the Court." *Express Gold Cash, Inc. v. Beyond 79, LLC*, No. 18-cv-00837, 2019 WL 4394567, at *3 (W.D.N.Y. Sept. 13, 2019) (Wolford, J.).[1]

[1] Petitioner further states that if his emergency motion for immediate release is denied, then he "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." Pet'r's Br. at 3 n.1. But the brief *he just filed*—his self-styled "response" brief—is the place where Petitioner should have explained why he

Beyond the insufficiency of Petitioner's opposition to the motion to adjourn as raised in a one-sentence footnote, Petitioner's entire response belies any argument that an adjournment is unwarranted. Petitioner concedes that proceeding with an evidentiary hearing will create a public health risk. Pet'r's Br. at 2 ("Petitioner does not fault the government for seeking to delay an in-person hearing. He certainly does not want to create a medical or public health risk . . . ."). In setting the context for his argument, Petitioner begins with the piercing yet true summary that "[w]e are living in the midst of a worldwide health emergency caused by the rapid spread of the novel coronavirus, SAR-CoV-2, which is causing a deadly disease, COVID-19." *Id.* at 3. Petitioner relies on the CDC guidance on responding to this health emergency, *see id.* at 4-5 (recommending against gatherings of 10 or more people), which is the very same guidance Respondent argues warrants an adjournment of the evidentiary hearing, Resp.'s Br. at 3-4. Finally, Petitioner makes no argument that, in fact, an evidentiary hearing of April 28 is feasible or safe, or that the government somehow faces no impediments in preparing its case. Thus, even if the Court accepts Petitioner's footnote as an appropriate objection, Petitioner fails to provide any support for such opposition and the Court should therefore grant Respondent's motion for adjournment.

Having himself established the seriousness of the health emergency posed by COVID-19 and the fact that it is "highly transmissible," *id.* at 4, Petitioner's conditional consent thus rings hollow; either proceeding with the evidentiary hearing creates an unwarranted public risk that justifies its adjournment or it does not. Petitioner's attempt to hold the Court and the parties

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opposes the motion for adjournment, or for him to have "propos[ed] alternatives." Respondent notified Petitioner on March 27, 2020, that Respondent would move for adjournment. Petitioner offers no reason why he is unable to explain his opposition to Respondent's proposed plan. The Court should not give Petitioner a second bite at the apple.

hostage to his separate demand for detention under home confinement is unjustified and highlights the weakness of Petitioner's motion for transfer to home confinement to stand on its own. *See infra* Sections II, III.

Because Petitioner has essentially failed to oppose Respondent's motion to adjourn the evidentiary hearing, the Court should treat that motion as conceded. In addition to his concession, the evidence before the Court leads to only one conclusion: the Court should grant the reasonable relief that Respondent requested therein. *See* Resp.'s Memo at 15-16.

II. Petitioner Has Failed to Show that There Is a Legal Violation for the Court to Remedy.

In his emergency motion for relief (ECF No. 122), Petitioner argues that his continued confinement at BFDF during the pandemic violates the Constitution, and that the Court has the discretion under 8 U.S.C. § 1226a to order his release from detention to home confinement. As explained below, Petitioner's arguments are contrary to well-established law controlling conditions-of-confinement claims. In particular, the government's efforts to minimize the likelihood that Petitioner will be infected with COVID-19 and its provision of medical care to detainees, should they become ill, do not amount to deliberate indifference to Petitioner's medical needs. On the contrary, the government has taken deliberate and ongoing measures to address Petitioner's medical needs at BFDF and to ensure that Petitioner's risk of contracting COVID-19 is minimized in accordance with CDC and New York State guidance and recommendations. The Court should deny Petitioner's motion.

A. There Is No Constitutional Violation for the Court to Remedy.

First, Petitioner argues that his continued confinement at BFDF, in light of the pandemic, violates his Fifth Amendment right to reasonably safe conditions of confinement. Pet'r's Br. at

17-22. Petitioner has not shown a likelihood of success on the merits of his COVID-19 due-process claim and is thus not entitled to release on home confinement.[2]

Even if the Court could order the ultimate relief of release on conditions on an emergency injunctive basis, "[t]he standard for bail pending habeas litigation is a difficult one to meet." *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990).[3] A petitioner must demonstrate that his petition has substantial claims, and that extraordinary circumstances make the grant of bail or supervised release necessary to make the habeas remedy effective. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (citing *Grune*, 913 F.3d. at 44); *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981). In deciding whether extraordinary circumstances exist, this Court considers a detainee's dangerousness and flight risk. *D'Alessandro v. Mukasey*, No. 08-cv-914, 2009 WL 799957, at *4 (W.D.N.Y. Mar. 25, 2009) (Bianchini, M.J.), *modified*, 2009 WL 10194901 (W.D.N.Y. Mar. 26, 2009), and *aff'd*, No. 08-cv-0914, 2009 WL 931164 (W.D.N.Y. Apr. 2, 2009) (granting bail to "a chronic care, non-dangerous, non-flight-risk patient" immigration detainee); *see also United States v. Cooper*, 18-cr-126, 2020 WL 1577852, at *7-8 (W.D.N.Y. Mar. 30, 2020) (Wolford, J.) ("[T]his pandemic does not justify ignoring the provisions of the Bail Reform Act. . . . 'As serious as it is, the outbreak of COVID-19 simply does not override the statutory detention provisions. . . . In the absence of evidence demonstrating a change in circumstances concerning [the defendant's] status as a flight risk and danger to another person or the community, detention

[2] Nor is there even a pleading raising such a claim, such as to properly raise it before the Court. *See Barrientos v. Barr*, 2019 WL 3497055, at *1 (W.D.N.Y. Aug. 1, 2019) ("Petitioner's motion fails . . . . Petitioner is seeking relief outside the scope of the Petition he originally filed . . . . The relief he now seeks is thus beyond the scope of the Petition and, therefore, beyond the reach of this Court's jurisdiction.").

[3] Although Petitioner is not requesting bail *per se*, Respondent is not contesting that the *Mapp* standard could apply to the instant motion for transfer to home confinement.

pending sentence must be maintained.'"); *Montes v. James*, No. 20-cv-0150, 2020 WL 1302307, at *2 (N.D.N.Y. Mar. 19, 2020) ("Serious medical conditions have only been grounds for release on bail in a handful of situations, specifically where the petitioner himself is gravely ill and release was to a medical facility to receive specialized care."). Simply put, Petitioner has not provided evidence to weigh in his favor regarding these relevant factors regarding extraordinary circumstances. *See also infra* Section III.

That standard regarding bail accords with the usual standard for a preliminary injunction, which is what Petitioner seeks here. *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 510 (2d Cir. 2005) (Sotomayor, J.) (cautioning that preliminary injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion") (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)); *accord Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (in a conditions-of-confinement habeas case, noting that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief").

Petitioner has not raised a substantial claim that he is entitled to the extraordinary remedy of release to home custody. Petitioner argues that the Fifth Amendment prohibits detention "when it is eminently foreseeable that the circumstances of detention create a substantial risk of medical danger, serious illness, or death." Pet'r's Br. at 17. Petitioner's Fifth Amendment claim fails, however, because he cannot adequately demonstrate that his confinement at BFDF during the COVID-19 pandemic has created a risk to Petitioner's health and safety warranting the Court's intervention.

To establish that conditions of confinement are so unsafe as to violate the Constitution, a habeas petitioner must show that the precautions taken to prevent harm are "objectively

unreasonable," not just that there is a potential risk. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (concluding that excessive force due process claims do not require the same subjective intent as similar use of force claims brought under the Eighth Amendment); *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (applying *Kingsley* to deliberate indifference due process claims). The institution is not charged with guaranteeing no injury and no risk to detainees; instead, the government is charged with taking reasonable steps to protect those in custody. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993) ("McKinney states a cause of action . . . by alleging that [the government has], *with deliberate indifference*, exposed him to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future risk." (emphasis added); *cf. Darnell*, 849 F.3d at 36 (requiring a *mens rea* more than mere negligence for due process violations in prison condition cases) (citing *Kingsley*, 135 S. Ct. at 2472).

The high standard for a detainee to establish a due process claim challenging conditions of confinement extends to complaints regarding medical care. In *Charles v. Orange County*, the Second Circuit held that "[i]n order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 925 F.3d 73, 85 (2d Cir. 2019) (citation and quotation marks omitted). In particular, an immigration detainee raising a constitutional challenge to the medical care provided in detention must establish "(1) that [the detainee] had a serious medical need . . . , and (2) that the Defendants acted with deliberate indifference to such needs." *Id.* at 86. The Second Circuit further explained that, to establish deliberate indifference in the context of a detainee's medical needs, the detainee had to prove that the defendant failed to provide treatment while having

actual or constructive knowledge that doing so would pose a substantial risk to the detainee's health:

> [A] detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants knew that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants should have known that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health.

Id. at 87.

Even if Petitioner disagrees with the government's efforts to prevent the spread and treatment of COVID-19, he cannot make a "substantial showing" of the relevant standard of "deliberate indifference." Petitioner alleges that he faces irreparable harm based on his fear that he will contract COVID-19 due to his detention at BFDF. But this is not a case where a specific detention facility is proven to currently have a significantly *higher* level of actual exposure to a dangerous infectious agent—unlike what the general public faces.

More importantly, Petitioner is wrong to suggest that deliberate indifference is met if ICE "cannot prevent the spread of the virus from person or through shared surfaces or items" Pet'r's Br. at 20. BFDF is actively *reducing* the risk that its detainees will acquire the coronavirus. The government's ongoing efforts to respond to the COVID-19 crisis soundly rebut any showing of deliberate indifference in this instance, and preclude Petitioner from succeeding on the merits of his claim. Petitioner has not met his heavy burden to prove, with admissible evidence, that ICE has acted with reckless disregard for his safety, such that he now faces a "certainly impending" injury—infection by COVID-19—as a result. In stark contrast to Petitioner's unfounded accusations, ICE has implemented precautionary measures at BFDF. Such measures, Captain Montalvo, M.D. sets forth, include, but are not limited to, the following:

- reducing the facility population to half-capacity (*id.* ¶ 12);

- increasing sanitation including cleaning the facility several times daily throughout housing units and common work areas (*id.* ¶ 13);
- providing continual access to handwashing facilities, including alcohol-based hand sanitizer, disinfectant wipes, and PPE to prevent transmission of COVID-19 between staff and detainees (*id.* ¶ 14);
- discontinuing personal visits to prevent the introduction of COVID-19 to BFDF;
- providing access to legal counsel in no-contact room, which features a plastic window barrier separating detainees from attorneys (*id*. ¶ 15);
- discontinuing detainee social gatherings, establishing social distancing, and eliminating tours and outside visitors (*id*. ¶ 16);
- taking more than 25 additional steps to help combat the introduction of COVID-19 to BFDF (*id*. ¶ 20); and
- ensuring that Petitioner is kept away from others at the facility and treated with medical providers who wear face masks (*id.* ¶¶ 24-26; *see also* Searls Decl. ¶¶ 12-20).

Simply put, ICE's efforts to protect the detainees at BFDF, including Petitioner, have been robust. As another federal district judge within this Circuit found, a court cannot assume that detention staff will be unable to manage the COVID-19 outbreak or treat detainees. *United States v. Gileno*, No. 19-cr-161, 2020 WL 1307108, at *4 (D. Conn. Mar. 19, 2020).

Petitioner makes a few counterarguments, none of which has merit. Petitioner nonetheless claims the government's efforts to protect him evince "deliberate indifference" and claims it is "eminently foreseeable that the circumstances of detention create a substantial risk of medical danger, serious illness, or death." Pet'r's Br. at 17, 22. Petitioner, however, fails to

submit *evidence* sufficient to establish either "deliberate indifference" or that his continued detention constitutes a "substantial risk of . . . death." *See id.*

He claims that ICE, despite substantial efforts to mitigate the spread of COVID-19 within BFDF, will necessarily violate Petitioner's Fifth Amendment rights because ICE will not be able to enforce the requisite social distancing necessary to protect Petitioner's health. *See id.* at 22. To the contrary, the current CDC guidelines—which Petitioner cites approvingly and appears to recognize as the key guidance—provide standards of care and guidance for congregate facilities, but they do not require shuttering them and releasing all individuals. BFDF is following the CDC guidelines. Searls Decl. ¶ 5. The CDC has issued guidance on proper COVID-19 containment for correctional and detention facilities. *See* Ctrs. for Disease Control & Prevention, *Guidance for Correctional & Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited Apr. 6, 2020). The CDC has also issued guidance for various other communal contexts. *See* Ctrs. for Disease Control & Prevention, *Schools, Workplaces & Community Locations*, https://www.cdc.gov/coronavirus/2019-ncov/community/index.html (last visited Apr. 6, 2020). The CDC guidance does not mandate a *per se* shuttering of all congregate facilities, particularly when there are no infections known in the facility. Social distancing is a desirable strategy for reducing infection risk, but such distancing can be pursued by a variety of strategies short of establishing and maintaining complete individual isolation. For example, as the CDC detention facility guidance states,

> Social distancing strategies can be applied on an individual level (e.g., avoiding physical contact), a group level (e.g., canceling group activities where individuals will be in close contact), and an operational level (e.g., rearranging chairs in the dining hall to increase distance between them).

See Guidance for Correctional & Detention Facilities, *supra*. ICE does not violate the Constitution by following current CDC guidance and taking steps to minimize COVID-19 risk. Moreover, Petitioner, whom ICE has placed in a single-occupancy observation room due to health concerns, Searls Decl. ¶¶ 10-18, is further unable to establish the relevant standard of deliberate indifference required for a due process violation. At base, Petitioner cannot show that the steps taken by Respondent to mitigate the risk of COVID-19 at BFDF and additional steps taken with respect to Petitioner meet the high bar required to establish an actionable due process violation.

Petitioner's argument that the Court should release him based on unsafe conditions at BFDF relies on inapposite Eighth Amendment case law. *See* Pet'r's Br. at 17 (citing *Helling*, 509 U.S. at 32). In *Helling*, the Supreme Court found a Constitutional violation based on exposure to disease-causing agents due to an actual health-damaging exposure that has been shown to exist in the facility, and which was "sure or very likely" to cause injury. *See Helling*, 509 U.S. at 32 (remanding for consideration of whether prisoner might potentially prove an Eighth Amendment violation because of his ongoing exposure to actual tobacco smoke from his cellmate). *Helling* stands in stark contrast to Petitioner's situation, which involves speculation about future exposure to a disease that Petitioner is unlikely to contract based on the precautionary measures taken at BFDF to protect his health. And while it is possible that (despite best efforts) Petitioner might be exposed to and contract the virus while in detention, the same is true if he were released—just as the same is true for members of the general public broadly. "[T]he fact that ICE may be unable to implement the measures that would be required to fully guarantee [Petitioner]'s safety does not amount to a violation of his constitutional rights

and does not warrant his release." *Sacal-Micha v. Longoria*, No. 20-cv-37, 2020 WL 1518861, at *6 (S.D. Tex. Mar. 27, 2020).

Finally, Petitioner argues that a "growing number of federal courts, including within this state," have found due process violations in how detention facilities are responding to the novel coronavirus. Pet'r's Br. at 20. The cases Petitioner cites, however, involve critical facts not present here. Determinations of deliberate indifference are fact-dependent and circumstances that may or may not warrant release in other cases might not be present here. As another court has emphasized in the COVID-19 and detention context, "decisions by other district courts considering similar requests demonstrate the fact-specific nature of the analysis." *Sacal-Micha*, 2020 WL 1518861, at *5. Indeed, to support his motion, Petitioner submitted his declaration focusing on his unique medical conditions. Decl. of Adham Hassoun (ECF No. 122-4).

These differences demonstrate why the cases Petitioner cites are not persuasive here.[4] *Coronel v. Decker* and *Basank v. Decker* involved detainees with specific medical conditions that rendered them particularly vulnerable to COVID-19, and yet who were not in single-person rooms despite confirmed cases of COVID-19 at their detention facilities (unlike with Petitioner at BFDF). *Coronel*, No. 20-cv-2472, 2020 WL 1487274, at *1 (S.D.N.Y. Mar. 27, 2020); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020).

The BFDF case Petitioner cites, *Jones v. Wolf*, found that BFDF detainees in that case were unable to practice the social distancing measures recommended by the government. No.

[4] For example, *Calderon Jimenez v. Wolf*, No. 18-cv-10225 (D. Mass. Mar. 26, 2020), ECF No. 507, involved a detainee who posed no threat to public safety where there had been a confirmed case of COVID-19 at his detention facility. Motion for Immediate Interim Release 1, *Calderon Jimenez v. Wolf*, (D. Mass. Mar. 24, 2020), ECF No. 500. Factors such as a detainee's threat to public safety are relevant to this calculation of whether extraordinary circumstances exist. *See, e.g.*, *D'Alessandro*, 2009 WL 799957, at *4.

20-cv-361, 2020 WL 1643857, at *10 (W.D.N.Y. Apr. 2, 2020). Petitioner, however, is not in a congregate setting that was a concern in *Jones*. *Id.* at *9 (finding a heightened risk of contracting COVID-19 in communal settings). But more importantly, the *Jones* Court noted that in comparing the risks the detainees faced if released, the government was incorrectly focusing on the differences in *medical care* at BFDF versus at home if they were infected. *Id.* at *9 n.8. Judge Vilardo articulated that the appropriate comparison was whether there was a *greater risk of contracting COVID-19* if released than if in the facility. *Id.* Petitioner has asked to shelter-in-place in Florida, which as detailed in Section III *infra*, exposes him to the risk of contracting the virus upon his discharge from BFDF and along his journey to Florida. In light of the steps ICE has taken to minimize the risk to detainees—and particularly Petitioner—of contracting COVID-19 at BFDF, Petitioner has not established that he is at greater risk of contracting COVID-19 unless the Court grants his relief.

For the reasons above, having failed to produce evidence that his conditions of confinement are "objectionably unreasonable," Petitioner has failed to make the "substantial showing" for emergency release pending final adjudication of his habeas petition. The government has taken reasonable and appropriate measures to mitigate the risk that Petitioner will contract COVID-19 at BFDF, and the Court should not dismiss these efforts as unconstitutional deliberate indifference. The Court should deny Petitioner's claim that the conditions of his confinement violate the Fifth Amendment.

B. Without a Constitutional Violation, Petitioner Is Merely Attacking What He Casts as a Discretionary Decision.

In addition to attacking the constitutionality of his detention, Petitioner paints DHS's decision to detain him at BFDF during the pandemic as discretionary, and argues the Court should overturn that discretionary decision. Pet'r's Br. at 22-24 (citing discretionary release

policies in the Bureau of Prisons, and noting that under "the plain text of 8 U.S.C. § 1226a,[5] nothing prevents [Petitioner] from being detained in government custody under house arrest"). To the extent that Respondent has exercised any discretion available under 8 U.S.C. § 1226a, however, the exercise of such discretion (as opposed to the constitutional aspects of Petitioner's detention) is not subject to judicial review.

Under the Immigration and Nationality Act, "[the Secretary of Homeland Security] shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1).[6] Notably, this authority is not vested in the judiciary. *See generally*, *id.* And assuming Petitioner is correct that § 1226a tolerates release from physical custody, Pet'r's Br. at 22-24—a position Respondent does not concede—then that statute similarly gives such discretion to the Secretary discretion consistent with, and not in abrogration of, § 1231(g)(1). In any event, the authority belongs to the Secretary; the Court does not hold this authority.

Nor may the Court review DHS's decision to detain Petitioner as opposing to releasing him on supervised release. Notwithstanding "section 2241 of title 28, or any other habeas corpus

[5] Petitioner claims that "[t]here is currently only one remaining legal authority that can possibly justify" his continued detention: § 1226a. Pet'r's Br. at 22 & n.34. That is not accurate; Respondent may detain Petitioner at least under 8 U.S.C. § 1231(a)(6), should there again become a significant likelihood of removal in the reasonably foreseeable future. Respondent has been continuously working throughout this litigation on securing Petitioner's removal to another country, including during the COVID-19 pandemic. Although the issue is not germane to this motion, Respondent makes this point simply to reassure the Court that removal attempts are continuing and to avoid any appearance that he acquiesces to Petitioner's claim that § 1226a is the exclusive detention authority that could be invoked.

[6] References in section 1231 to the "Attorney General" must be read to mean the "Secretary of Homeland Security" following the Homeland Security Act of 2002 and its transfer of immigration detention functions from the Department of Justice to the new Department of Homeland Security. 6 U.S.C. §§ 251(2), 557.

provision," the Immigration and Nationality Act prohibits a court from reviewing "any . . . decision or action" the authority for which is "specified under this subchapter" to be in the "discretion" of the Secretary. 8 U.S.C. § 1252(a)(2)(B)(ii). "[R]ead naturally, the word 'any' has an expansive meaning." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted); *see Arar v. Ashcroft*, 414 F. Supp. 2d 250, 271 (E.D.N.Y. 2006) (finding that § 1252(a)(2)(B)(ii) ""essentially bars judicial review of [the Attorney General's] purely discretionary determinations").

The discretionary authority at issue here derives from 8 U.S.C. § 1231(g)(1), which is part of the same subchapter as § 1252(a)(2)(B). It is well-established that a decision under § 1231(g)(1) is discretionary. *Wood v. United States*, 175 F. App'x 419, 420 (2d Cir. 2006); *Calla-Collado v. Att'y Gen.*, 663 F.3d 680, 685 (3d Cir. 2011) ("Congress vested [DHS] with authority to enforce the nation's immigration laws . . . . ICE necessarily has the authority to determine the location of detention of an alien in deportation proceedings . . . ."); *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (holding that "[b]ecause the discretionary decision to transfer aliens from one facility to another" is a decision under § 1252's subchapter, it is precluded from review under §1252(a)(2)(B)(ii)).[7]

[7] A holding that the Court lacks judicial review in this manner is independently compelled by *Mapp v. Reno*. In that case, involving detention under 8 U.S.C. § 1231(a)(6), the legacy Immigration and Naturalization Service ("INS") mistakenly believed that it was required to deny release on bail. 241 F.3d at 229 n.12. However, the INS actually did have discretion to consider bail under that statute. *Id.* The *Mapp* Court thus recognized, "it may be the case that had the INS exercised its discretion under § 1231(a)(6) and decided not to release [a petitioner] on bail, we would be required to defer to its decision . . . ." *Id.*; *accord Halley v. Ashcroft*, 148 F. Supp. 2d 234, 235-36 (E.D.N.Y. 2001).

Here, Petitioner acknowledges that DHS has the statutory discretion to release him on conditions, but it also has the pure statutory discretion to keep him detained. Pet'r's Br. at at 22-23. Unlike in *Mapp*, the Executive here has—by Petitioner's own admission—recognized whatever discretion it has and exercised that discretion. Therefore, per *Mapp*, the Court is

Therefore, the Court lacks jurisdiction over such detention decisions. DHS's decision in this regard is therefore not subject to judicial review. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (providing such decisions not subject to judicial review); *see also* 5 U.S.C. § 701(a)(2) (precluding review under the Administrative Procedure Act for the same reason).

Petitioner ignores § 1252 and resorts to § 1226a, but that section does not enable the Court to grant him such relief. Section 1252(b)(2)(A)'s jurisdiction-stripping provision, discussed above, explicitly applies "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." That capacious language encompasses review of Respondent's detention decisions under § 1226a, which is expressly habeas corpus review. Petitioner argues that judicial review of those decisions is available under the text of § 1226a(b)(1) alone. Pet'r's Br. at 24. Even if that argument were correct, it is completely beside the point, as § 1252(b)(2)(A) controls and supersedes § 1226a(b)(1).

III. Even If the Court Finds There Has Been a Legal Violation It Can Remedy, the Court Should Decline to Afford Petitioner's Requested Relief.

Even if the Court were to find a due process violation—which does not exist on the facts presented—the Court should decline to order Petitioner's release on home confinement. Such a remedy is unwarranted.

Well-established principles of judicial review counsel against a federal court issuing rulings beyond what is necessary to resolve a particular case. *See, e.g.*, *Soc'y for Good Will to*

"required to defer to [DHS's] decision" regarding where Petitioner is detained. *See Mapp*, 241 F.3d at 229 n.12; *Cinquemani v. Ashcroft*, No. 00-cv-1460, 2001 WL 939664, at *7-8 (E.D.N.Y. Aug. 16, 2001) (deferring to an INS decision not to release a foreign national, per *Mapp*, because INS had exercised its discretion).

Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1251 (2d Cir. 1984) (in a civil conditions-of-housing case, noting "[i]njunctive relief should be narrowly tailored to fit the specific legal violations adjudged"). This principle is not only constitutionally rooted in the limitations of Article III but also prudentially based in the notion that a court should decline to reach out to determine issues not sufficiently sharpened for resolution by the facts before it. Such prudential concerns apply with greater force in the context of the Court's interpretation of the immigration laws enacted by Congress, including § 1226a: "There can be no doubt that, with respect to immigration and deportation, federal judicial power is singularly constrained." *Mapp*, 241 F.3d at 227 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). Therefore, the power to grant any sort of release from immigration detention should be exercised only when it is necessary to remedy the violation necessitating the release. *Id.* Above all, a court's exercise of its inherent authority (which Petitioner invokes, Pet'r's Br. at 24, 25) must "be a reasonable response to a specific problem." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016).

As explained below, these prudential reasons against the Court ruling on the constitutionality of Petitioner's detention are vindicated in this case. *First*, the Court should decline to order Petitioner's release in the emergency fashion he requests. Because of the high bar in establishing "deliberate indifference," in the immigration detention context, courts have largely rejected challenges to immigration detention based upon fears of COVID-19 infection and transmission. *See Dawson v. Asher*, No. 20-cv-409, 2020 WL 1304557, at *2 (W.D. Wash. Mar. 19, 2020). *Dawson*, for instance, emphasized that the proper remedy would be enjoining the unsafe conditions—*not* releasing the detainee. *Id.* ("[E]ven if Plaintiffs could show a Fifth Amendment violation, Plaintiffs provide no authority under which such a violation would justify immediate release, as opposed to injunctive relief that would leave Plaintiffs detained while

ameliorating any alleged violative conditions within the facility."). An unrealized *potential* exposure to COVID-19 does not satisfy Petitioner's burden to show that the conditions of his confinement "amount to punishment of the detainee." *Id.* at *3 (no evidence that anyone at the detention facility had COVID-19, and Plaintiffs did not address the measures Defendants were taking to prevent such a spread from occurring); *Sacal-Micha*, 2020 WL 1518861, at *8 (record showed ICE implemented preventative measures to reduce the risk to detainees of contracting COVID-19); *United States v. Raia*, — F.3d. —, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020) (regarding incarceration: "[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread.").

Even if the Court finds that Respondent's infection mitigation tools are not constitutionally sound (as required for the Court to be considering the remedy of release), ICE's good-faith efforts weigh in favor of ameliorating BFDF's response and weigh against Petitioner's requested relief. ICE, at BFDF, is taking extreme steps to prevent the risk of the novel coronavirus spreading to BFDF and to prevent Petitioner from contracting the virus. These measures include screening and quarantining new detainees, even if asymptomatic and afebrile, for 14 days for medical observation and monitoring; increasing the frequency of sanitation of high-touch and communal areas; making additional cleaning products available to detainees in housing areas; educating detainees and staff about proper hygiene practices; encouraging social distancing within housing units, at outdoor recreation, and in dining halls; reducing occupancy limits at law libraries, intake, medical, and court hold rooms; limiting in-person contact with members of the community; and so forth. Montalvo Decl. ¶¶ 3-21. BFDF

still has zero confirmed cases of COVID-19, and the detainees whom BFDF is monitoring as a precaution are residing in cells over 150 feet from Petitioner's. *Id.* ¶¶ 29-38.

Not only is the medical risk to Petitioner low in his current detention, but also he faces a graver risk were the Court to order his release and permit him to proceed to Florida. ICE is not required to transport Petitioner to Florida. If Petitioner avails himself of the second option he proposes—travel by car—he would have to drive approximately 1,380 miles and over 21 hours to go from Batavia, New York, to Sunrise, Florida. Google Maps, www.google.com/maps/ (last visited Apr. 7, 2020). Such a trip will surely necessitate using public services along the way (public gas stations, restaurants, restrooms, lodging, etc.). Petitioner's continued use of public facilities violate the CDC's recommendation to "[a]void large and small gatherings in private places and public spaces, such a friend's house, parks, restaurants, shops, or any other place." Ctrs. for Disease Control & Prevention, *Social Distancing*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited Apr. 6, 2020). Moreover, the CDC has a domestic travel advisory for residents of New York "to refrain from non-essential domestic travel for 14 days." Ctrs. for Disease Control & Prevention, *Travel in the US*, https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (last visited Apr. 6, 2020). Just by traveling to his intended shelter-in-place destination, Petitioner is putting himself at risk of contracting (and potentially spreading) COVID-19 and thus violating the very guidelines he argues he is unable to adhere to at BFDF. *See* Montalvo Decl. ¶ 28. In contrast, Petitioner has the same opportunity to follow the guidance of the CDC and other organizations at BFDF in his single-occupancy observation room as he would in Florida.

Second, the Court should consider the grave public threat that Petitioner poses. "Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint." *Dietz*, 136 S. Ct. at 1893; *see also Acosta*, No. 16-cv-401, 2019 WL 4140943, at *9 (W.D.N.Y. Sept. 2, 2019) (granting bail after concluding a lack of flight risk); *D'Alessandro*, 2009 WL 799957, at *3-5 (weighing the risk of danger to community and flight risk in determining whether to grant a detainee bail). The threat posed by Petitioner's release is precisely such a "vital interest" that would be undermined by granting him the relief he seeks. The FBI has reiterated that there are *no* conditions of release that would mitigate the threat Petitioner's release poses to the general public. Ex. C, Decl. of Michael H. Glasheen ¶¶ 12-17 (subject of a pending motion to file under seal). Petitioner argues that the relief he 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." Pet'r's Br. at 27. Should the Court order Petitioner's release, the government would seek the imposition of reasonable conditions of release that would enable it to protect the public to the best of its abilities, but such conditions are not reasonable guards against Petitioner's threat to the national security and a risk of terrorism. Glasheen Decl. ¶¶ 13-15. After all, it was only because Petitioner, while in immigration detention, sufficiently alarmed some other detainees who decided to come forward and inform the government as to Petitioner's conduct that the government was able to ascertain that he was planning a terrorist attack and attempting to recruit others to support terrorist activity. *Id.* Ex. A (Letter of FBI Director Christopher Wray). There is also a significant connection between Petitioner's dangerousness and the place he has asked to stay, as detailed in the Glasheen Declaration submitted under seal. *Id.* ¶ 16.

Indeed, Petitioner's most recent conduct while in detention has raised the Court's concern as to the issue of Petitioner's alleged dangerousness and whether there are any conditions of release that would address such concerns. On April 7, 2020, the Court issued a Decision and Order denying as moot Respondent's motion to enforce the terms of the Protective Order and Rule 502(d) Order (ECF No. 104). *See* ECF No. 138. The Court noted that Petitioner had violated the Protective Order by disclosing the identity of an informant to a number of other detainees congregated for religious services. *Id.* at 4. While the Court did not reach a conclusion as to whether Petitioner intentionally and knowingly violated the Protective Order, it noted "Petitioner's willingness to follow a Court Order is directly relevant to the issues of his alleged dangerousness and whether he should be released from custody with appropriate conditions." *Id.* at 5 n.2. The Court also noted that an alleged threat that Petitioner made against the informant is relevant to "whether Petitioner's release would threaten the national security of the United States or the safety of the community or any person." *Id.* at 4 n.1. These instances—including some which Petitioner admitted—to which the Court expressed its concerns add to the significant record that Petitioner is a public threat that forecloses his release.

Petitioner acknowledges the government's concerns, noting the government's belief "he poses a risk of recruiting others to engage in criminal acts." Pet'r's Br. at 27. He then argues that if he "is on house arrest, subject to total monitoring and restrictions on his contacts, such activities are impossible." *Id.* Certainly, Petitioner poses a danger at home in front of a computer; he was criminally convicted after "the government presented evidence that [Petitioner and his co-defendants] formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that [they] knew used violence in their efforts to establish Islamic states." *United States v. Jayyousi*, 657 F.3d 1085, 110 (11th Cir.

2011). But the issue here is not whether the government could, in theory, attempt to monitor every communication Petitioner attempts to have. The issue is that allowing Petitioner to leave BFDF and travel to Florida amid a pandemic requires the government to undertake monitoring efforts which are unwarranted and unduly burdensome, especially during a pandemic.

Moreover, Petitioner has provided no basis to overcome the justified concerns that he will comply with the Court-ordered conditions of release. He has admittedly already violated the Court's protective order in this case. Order at 4 (ECF No. 138) ("Petitioner admits that he violated the Protective Order."); *see also id.* at 5 n.2 (noting that "Petitioner's willingness to follow a Court Order is directly relevant to the issues of . . . whether he should be released from custody with appropriate conditions"). If Petitioner violates the terms of any supervised release, then it might not be feasible to return him to detention, as he otherwise claims is viable, depending on the state of the world and how the global pandemic may have progressed. Pet'r's Br. at 29-30. In that case, the preliminary relief he seeks could well become permanent, which violates the purpose of a *preliminary* injunction. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.").

Third, Petitioner argues he should be released because he thinks the government has a weak case. Pet'r's Br. at 28-30. He claims he is not asking "the Court to prejudge the government's evidence now," *id.* at 28, then proceeds to do exactly that. The Court should reject this argument out of hand.

To begin, Petitioner conflates his success on the merits of his habeas challenge to the *legality* of his detention, with his success on the merits of his new challenge to the *conditions of confinement*. *Compare* Supp. Memo. Concerning Pet'r's Detention under 8 U.S.C. § 1226a, in

Further Supp. of Pet'r's Ver. Pet. for Writ of Habeas Corpus (ECF No. 28), *with* Pet'r's Emergency Mot. for Transfer to Home Incarceration (ECF No. 122), *and* Mot. for Expedited Hr'g at 1 (ECF No. 123) ("Petitioner seeks expedited consideration because he faces a grave threat of being infected with the novel coronavirus while detained at [BFDF]."). To secure the emergency habeas relief he is now requesting, he must show that will succeed on the challenge connected to that relief: his conditions of confinement challenge under the Fifth Amendment. *See supra* Section II.A; *see Dietz*, 136 S. Ct. at 1892 (inherent authority limits a court to ordering a "'reasonable response to the problems and needs' confronting the court's fair administration of justice"). Put differently, arguments on the length and legality of his detention are relevant only if the emergency relates to those items, which it does not; the alleged emergency relates to the conditions of confinement. Petitioner commits an untenable sleight of hand by asking the Court to consider, and prejudge, the government's evidence as to the claim unrelated to his present motion.

In any event, even if the strength of the government's § 1226a case (as opposed to its Fifth Amendment conditions-of-confinement case) were relevant to the instant motion, it is the *evidentiary hearing*, not this motion, where the government will put on its case. Petitioner himself concedes that the evidentiary hearing is when "the government will, finally, be forced to try to prove its case." Pet'r's Br. at 23. Nevertheless, he argues that "many weaknesses in the government's case have already become apparent." *Id.* at 28. What Petitioner fails to recognize is that Respondent has not yet filed final exhibit and witness lists. *See* Order (ECF No. 121) (continuing those deadlines).[8] Petitioner's claim that his detention under 8 U.S.C. § 1226a is

[8] Petitioner claims that his "interrogatories asked for a list of all potential witnesses." Pet'r's Br. at 29. That is not accurate. Petitioner's Interrogatory No. 4 asked Respondent to identify all witness Respondent "intends to call" at the hearing. Resp.'s Second Supp. Responses to Pet'r's

factually unjustified should therefore properly be resolved within the ordinary course of this litigation—at the evidentiary hearing, not now. *See Irish Lesbian & Gay Org. v. Guiliani*, 143 F.3d 638, 646 (2d Cir. 1998) ("Because it is likely that one or more of the parties will not present their entire case at an unconsolidated preliminary injunction hearing, it ordinarily is improper to decide a case solely on the basis of that type of hearing." (quoting 11A Charles A. Wright et al., *Federal Practice and Procedure* § 2950 (2d ed. 1995))).

CONCLUSION

The Court should grant Respondent's largely unopposed motion to adjourn the April 28, 2020 evidentiary hearing (ECF No. 120).

Further, the Court should deny Petitioner's motion to release him from detention pending the evidentiary hearing (ECF No. 122). DHS is making objectively and subjectively reasonable efforts to ensure the safety of the detainees in its care, including Petitioner. Petitioner is safely being held in a single-occupancy observation room, away from other detainees. His continued detention comports with the Constitution, and even if it did not, the appropriate judicial response is not his release to home confinement, particularly in light of the grave danger he poses to the community and the United States.

First Set of Interrogatories at 4 (ECF No. 122-5). Respondent has disclosed all witnesses it presently "intends to call" at the hearing, but—as permitted by the Court's decision to continue the final witness list deadline—is still making decisions as to whether witnesses not presently named might testify.

Date: April 8, 2020

Respectfully submitted,

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