UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v. Case # 1:19-cv-00370-EAW

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

Respondent.

RESPONSE TO PETITIONER'S MEMORANDUM OF LAW REGARDING THE PARAMETERS OF THE EVIDENTIARY HEARING

Consistent with the Court's scheduling order (ECF No. 58), Respondent files this brief responding to Petitioner's brief (ECF No. 60) regarding the parameters of the evidentiary hearing (including but not limited to the appropriate burden and standard of proof).

I. Petitioner Does Not Articulate a Risk of an Erroneous Deprivation That Justifies the Requested Procedural Protections

For the reasons Respondent previously stated in Respondent's Brief Regarding the Parameters of the Evidentiary Hearing (ECF No. 61) at 1-4, the Court should hold that Petitioner bears the burden of proof at the evidentiary hearing. Further, *see id.* at 4, the Court should hold that Petitioner's burden is preponderance of the evidence. If the Court disagrees and places the burden on Respondent, then Respondent's burden should be preponderance and not, as Petitioner requests, clear and convincing evidence. *See id.* at 4-5.

Petitioner's arguments regarding the burden of proof rely on a reflexive application of critically distinguishable case law. As the Court observed in its review of 8 C.F.R. § 241.14(d),

due process is "a flexible concept that varies with the particular situation." December 13, 2019 Order (ECF No. 55) at 20 (quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). Rather than apply the well-established due process considerations articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to the specific circumstances of this case, particularly regarding the process provided for in an 8 U.S.C. § 1226a detention, Petitioner summarily concludes that the Court's logic regarding 8 C.F.R. § 241.14(d) must extend to 8 U.S.C. § 1226a detention. *See* ECF No. 60 at 5. But a sound analysis of the particulars of Petitioner's § 1226a detention under the due process considerations of *Mathews* forecloses the need for the process that Petitioner proposes. Indeed, the relevant case law supports the process that Respondent has proposed. *See generally*, ECF No. 61.

The Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425. But the fact that a private liberty interest is at issue does not, as Petitioner maintains, alone require a clear and convincing standard to justify confinement. *See* ECF No. 60 at 5-6. In *Addington*, which Petitioner heavily relies on in his argument, the Supreme Court arrived at its determination that a burden greater than preponderance of the evidence was necessary only after articulating a significant risk of an erroneous deprivation. There, the Supreme Court held that a clear and convincing standard was required in a civil proceeding brought under state law to commit an individual involuntarily and indefinitely. *Addington*, 441 U.S. at 418. Specifically, the Court warned that the statute at issue, which permitted the state to involuntarily commit persons found to be mentally ill or who posed a danger, created the "possible risk" that a factfinder could commit someone "based solely on a few isolated instances

of unusual conduct." *Id.* at 427. Because the Court determined "[a]t one time or another every person exhibits some abnormal behavior which might be perceived" as the requisite behavior for confinement but is actually not a cause for treatment or confinement, it required a higher burden of proof to ensure that individuals would not be confined merely for "idiosyncratic behavior." *Id*.

There is no such risk of an inappropriate confinement in this case. Petitioner's conduct is not the "idiosyncratic behavior" exhibited by "every person" at some point that the Supreme Court cautioned in *Addington* might result in an erroneous confinement. Rather, Petitioner's confinement is, as certified by the U.S. Department of Homeland Security ("DHS"), because he "engaged in terrorist activity and engaged in an activity that endangers the national security of the United States" under § 1226a, *see* ECF No. 55 at 7, *and* because he "pose[s] a continuing threat to recruit, plan, participate in, and provide material support for terrorist activity," *see* August 9, 2019 Notice of Decision to Certify Detention under Section 236A of the Immigration and Nationality Act (ECF No. 30-2). Indeed, DHS's certification that Petitioner engaged in terrorist activity is supported by Petitioner's conviction for, *inter alia*, conspiracy to provide material support for terrorism and providing material support to terrorists. *See id.*; *Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 78984, at *1 (W.D.N.Y. Jan. 2, 2019).

In *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court expressly cautioned against equating all civil commitment candidates where the risk was not equally borne by all members of society. There, the Court adopted a preponderance of the evidence standard where an individual's civil commitment was supported by proof that the petitioner has committed a criminal act as a result of his mental illness. *Id.* at 367. Because a criminal act was "not within a range of conduct that is generally acceptable," the Court concluded that the risk of commitment

for "mere idiosyncratic behavior"—the reason the *Addington* court adopted a heightened standard—was eliminated.[1] *Id.* (internal quotations omitted). Petitioner's argument for a clear and convincing standard because that was the burden of proof required in *Addington* fails to recognize the *Jones* Court's crucial distinction.

Petitioner's attempt to equate this case with immigration detention cases to justify a clear and convincing standard, *see* ECF No. 60 at 7-8, also fails to consider the narrow application and stringent requirements of 8 U.S.C. § 1226a. This statute is not akin to the statute authorizing post-removal-period immigration detention, which the Supreme Court found applies "broadly to aliens ordered removed for many and various reasons, including tourist visa violations" and thus not sufficient alone to warrant indefinite civil detention on a justification of dangerousness. *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (requiring additional procedure when detainee bore burden of proving he was not dangerous). Petitioner already benefits from additional and robust procedural protections not directly afforded to post-removal-period immigration

[1] The *Jones* Court also concluded that it was not required that the prior criminal proceedings reach specific findings to meet the requirements for civil commitment. The Supreme Court found that petitioner's verdict of not guilty by reason of insanity established the commission of a criminal offense and that such commission was due to mental illness. *Jones*, 463 U.S. at 363. While the criminal findings did not explicitly reach a conclusion as to dangerousness—a requirement for petitioner's civil confinement—the Court concluded that it was reasonable to find petitioner to be dangerous based on the verdict. *Id.* at 364; *see Foucha v. Louisiana*, 504 U.S. 71, 87 ("We noted in *Jones* that a judicial determination of criminal conduct provides 'concrete evidence' of dangerousness) (O'Connor, J., concurring). Here, Respondent is not relying solely on Petitioner's prior criminal conviction to support detention pursuant to §1226a, because the statute requires *additional* process. 8 U.S.C. § 1226a (requiring a certification by the Secretary of Homeland Security that an alien has, among other grounds, engaged in terrorist activity, and a determination that the alien's release will threaten national security). Thus, not only is there a diminished concern of a risk of error due to Petitioner's relevant conviction, Petitioner here is entitled to additional procedures beyond those provided to the petitioner in *Jones*. Moreover, Petitioner's argument that the dangerousness requirement of 8 U.S.C. § 1226a(a)(6) requires a burden of proof of beyond a reasonable doubt, ECF No. 60 at 11, is belied by *Jones*, which employed a preponderance standard when dangerousness was implied by a previous criminal finding. *Jones*, 463 U.S. at 364.

detainees: certification by the Secretary of Homeland Security based on Petitioner's criminal convictions, a determination of Petitioner's threat, and direct judicial review. *See* 8 U.S.C. § 1226a; ECF No. 61 at 2.

Furthermore, Petitioner's call for a beyond a reasonable doubt standard of proof is unsupported by the case law. The Supreme Court did *not* require proof beyond a reasonable doubt to authorize civil detention when it validated the Kansas statutory scheme that permitted civil detention following a determination where the standard was beyond a reasonable doubt. *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997). More instructive is the *Addington* Court's discussion of employing the reasonable-doubt standard in cases where "the factual aspects represent only the beginning of the inquiry." *Addington*, 441 U.S. at 429. Where the inquiry is one of whether an individual is mentally ill and dangerous, the Supreme Court recognized that the answer "turns on the *meaning* of the facts" and requires interpretation of experts. *Id.* "Given the lack of certainty and the fallibility" of such expert diagnosis, the *Addington* Court expresses a serious concern of whether the government could ever prove mental illness and dangerousness beyond a reasonable doubt, a standard that may "completely undercut its efforts to further" its legitimate interests. *Id.* at 429-30.

Section 1226a's condition that detention is warranted "only if the release of the alien *will* threaten the national security of the United States or the safety of the community or any person," 8 U.S.C. § 1226a(a)(6) (emphasis added), raises similar concerns as expressed in *Addington* regarding employing a beyond a reasonable doubt standard. This inquiry requires an assessment of facts not simply to conclude a straightforward factual question, but rather whether such facts can be interpreted to reach a conclusion regarding a future risk. *Id.* This type of inquiry, assessing national security threats to determine and then act to frustrate those that pose a real

danger, must be given proper deference precisely because the attempt to define future actions is an "inexact science at best" and relies on an expert to make an "affirmative prediction."[2] *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *see also Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

The deference due to the Executive in matters of national security assessments does not foreclose regular and meaningful review of the government's threat determination as Petitioner contends. *See* ECF No. 60 at 9-11. Indeed, the statute permits continued detention for *additional* periods "*only if* the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6) (emphasis added). This type of "dangerousness" is explicitly subject to such re-evaluation and does not square with Petitioner's contention to the contrary. *See* ECF No. 60 at 9. Furthermore, Petitioner's argument that once a finding of Petitioner's threat warranting detention is made, the government will rely on such a finding to justify an indefinite detention is also controverted by the explicit requirements of 8 U.S.C. § 1226a(a)(6) of a six-month limitation and threat determination, as well as judicial review of the merits of such a determination.[3] 8 U.S.C. § 1226a(b)(1).

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[2] Indeed, subsection 1226a(a)(3) provides no indication that a heightened standard should apply to that determination either. The government may certify detention under 8 U.S.C. § 1226a(a)(3) if the Attorney General "has *reasonable* grounds to believe" that Petitioner "engaged in terrorist activity" 8 U.S.C. § 122a(a)(3) (emphasis added). Such statutory language does not indicate Congress intended a heightened standard to apply in the certification determination.

[3] In neither *Addington* nor *Foucha* was the petitioner detained under a scheme that required such periodic review to continue justifying the detention. In *Addington*, the petitioner was confined under a Texas law that provided for "indefinite commitment." *Addington*, 418 U.S. at 420. In *Foucha*, the petitioner was confined unless he proved he was not dangerous. *Foucha*, 504 U.S. at 73. Section 1226a's requirement of continued re-evaluation to justify continued detention clearly diminishing the risk of erroneous deprivation that would require the heightened burden of proof required in *Addington* and *Foucha*.

II. Petitioner's Argument that Evidentiary Procedures Are Inflexible Is Unsupported by Relevant Case Law Which Requires a Balancing of Interests

Petitioner argues that the Federal Rules of Evidence should apply in this case as they would generally apply in civil and criminal cases. ECF No. 60 at 15. The Court should find that the Federal Rules of Evidence do not categorically apply in the forthcoming hearing.

Petitioner relies on *Bostan v. Obama*, 662 F. Supp. 2d 1, 3 (D.D.C. 2009), for support, but the court in *Bostan* proceeded to discuss exceptions in habeas proceedings in which courts may admit and consider hearsay evidence directly applicable to this case. *Id.* at 3-4. The issue in *Bostan* was whether, in habeas challenges to military detentions in Guantanamo, the district court would admit hearsay evidence offered by the government. *Id.* at 2. The court held that proffered hearsay evidence could be admitted if the government demonstrated its reliability and provision of non-hearsay evidence would unduly burden the government. *Id.* at 8. In reaching its holding, the *Bostan* court noted *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Boumediene* as setting forth exceptions to the general rule in which hearsay may be accepted. *Bostan*, 662 F. Supp. 2d at 3. The court concluded that the appropriate balance between a detainee's liberty interest and the government's legitimate national security interests was "best achieved by permitted the government to introduce hearsay into evidence" where the evidence is reliable and the use of non-hearsay evidence would "unduly burden the movant or interfere with the government's efforts to protect national security."[4] *Id.* at 4.

Petitioner's attempt to distinguish these cases by claiming the exception to the rules regarding hearsay stem from the "context of wartime detention of enemy combatants" having

[4] The court further concluded that the government may satisfy these conditions "through the use of affidavits or declarations rather than through live witness testimony." *Bostan*, 662 F. Supp. 2d at 4.

"little application here," ECF No. 60 at 17, fails to understand that the exception is based on the court's attempt to balance the government's legitimate national security concerns. *See Bostan*, 662 F. Supp. 2d at 3; *see also Boumediene*, 553 U.S. at 796 (recognizing that "the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible"); *Al-Marri v. Pucciarelli*, 534 F.3d 213, 273 (4th Cir. 2008) (permitting alternatives to the normal due process productions, and specifically the opportunity to confront and question witnesses, "if the government can demonstrate . . . [such protections are] impractical, outweighed by national security interests, or otherwise unduly burdensome because of . . . the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests"). Simply put, the case law establishes the need to balance the legitimate interests, including the government's national security interests, relevant in a particular case prior to reaching a determination regarding the evidentiary process due. *See Boumediene*, 553 U.S. at 796. Petitioner's request to reject hearsay evidence out of hand is thus without merit.

Petitioner also claims that he has a right to confront and cross-examine the confidential informants who reported information that formed the basis for the Acting Secretary's detention determinations.[5] *E.g.*, ECF No. 60 at 19. The government may "withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). This "informer's

[5] Petitioner attempts to invoke the Sixth Amendment's Confrontation Clause as applicable to this case despite acknowledging that this is not a criminal trial. ECF No. 60 19 n.10. Petitioner provides no support for this position. Indeed, the "fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment." *Middendorf v. Henry*, 425 U.S. 25, 37 (1976).

privilege" "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.* The privilege is "applicable in civil as well as criminal cases" and, in fact, is "arguably greater" in civil cases because "not all constitutional guarantees which inure to criminal defendants are similarly available" in civil cases. *Dole v. Local 1942*, 870 F.2d 368, 372 (7th Cir. 1989); *see also Khan v. Obama*, 655 F.3d 20, 31 (D.C. Cir. 2011) (in the habeas context, "there may well be other forms in which the government can submit information that will permit an appropriate assessment of the information's reliability while protecting the anonymity of a highly sensitive source." (quoting *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)).

While the privilege is not absolute, *United States v. Skeens*, 449 F.2d 1066, 1070 (D.C. Cir. 1971) (stating that the Supreme Court "did not 'impose any absolute rule requiring disclosure of an informer's identity'"), it "give[s] way" only when disclosure of an informer's identity "is relevant and helpful to the" case of the party seeking disclosure, "or is essential to a fair determination of a cause." *Roviaro*, 353 U.S. at 60-61. The propriety of disclosure depends on the particular circumstances of each case, "taking into consideration the crime charged [in the criminal context], the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62; *see Rugendorf v. United States*, 376 U.S. 528, 534-35 (1964); *accord United States v. Saa*, 859 F.2d 1067, 1073 (2d Cir. 1988).

However, the D.C. Circuit[6] has "long adhered to the rule 'that *Roviaro* does not require disclosure of an informant who was not an actual participant in or a witness to the offense

[6] The "law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision" in these proceedings. 8 U.S.C. § 1226a(b)(4).

charged.'" *Warren*, 42 F.3d at 654 (quoting *Skeens*, 449 F.2d at 1071). A party seeking disclosure of informants' identities bears a "heavy burden" to "establish that the identity of an informant is necessary to his defense." *Skeens*, 449 F.2d at 1070 (internal quotation marks and citation omitted). This burden is not met by "mere speculation that the informer might possibly be of some assistance." *Id.*; *see United States v. Mangum*, 100 F.3d 164, 172 (D.C. Cir. 1996).

Petitioner has not carried his "heavy burden" of establishing that disclosure is necessary for him to prove his case at the evidentiary hearing. *Skeens*, 449 F.2d at 1070. The Acting Secretary of Homeland Security, who certified Petitioner's detention under the statute, rendered his decision based off the same government reports that Petitioner has seen and did not cite the confidential informants as factors in his decision. *See* ECF No. 30-2. The agents involved in those reports' creations may be called to testify as they are the witnesses regarding the relevant determinations in 8 U.S.C. § 1226a. *See* 8 U.S.C. § 1226a(a)(3) (regarding certification for an alien who has engaged in terrorist activity), § 1226a(a)(6) (regarding threat to national security if released). Further, Respondent has already represented in his discovery requests that he has no prior inconsistent statements by the informants, and that they were not offered benefits for favorable statements or testimony. Petitioner has failed to offer a sufficient basis to require the government to disclose the identity of any informants.

Petitioner requests that the evidentiary hearing feature the open testimony of confidential informants, which requires the government to divulge the identities of confidential informants who serve a critical role in ongoing counterterrorism investigations and operations in the United States. The United States Government has a significant interest in withholding the identities of informants, who play a critical role in the counterterrorism mission of the United States. *Larson v. Dep't of State*, 565 F.3d 857, 863-64 (D.C. Cir. 2009) ("The Supreme Court has acknowledged

the paramount importance of protecting intelligence sources. . . . 'If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place. . . . . The continued availability of [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger their personal safety.'" (quoting *CIA v. Sims*, 471 U.S. 159, 175–76 (1985)) (second ellipses and alteration in original)). As with the CIA, the confidentiality surrounding their identity and cooperation with the United States Government is key to the success of DHS's and FBI's counterterrorism missions. *See United States v. Fields*, 113 F.3d 313, 324 (2d Cir. 1997) ("[The Government's] interest in protecting the anonymity of informants who furnish information regarding violations of law is strong—withholding an informant's identity improves the chances that such a person will continue providing information and encourages other potential informants to aid the government."); *cf. United States v. Martinez*, 764 F. Supp. 2d 166, 169 (D.D.C. 2011) ("Safety of witnesses is, of course, an important public interest.").

Confidential informants operate under cover, and the degree of cover depends on the target of investigation. This cover provides the confidential informant a degree of personal protection and safety, *see Skeens*, 449 F.2d at 1070, as well as protects law enforcement sources and methods, *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 768 (D.C. Cir. 1965) (while the express purpose of the privilege "is not to protect the particular informer from retaliation," it certainly is to "protect the flow of information to the Government"). If the identity of one or more of these confidential informants is disclosed, their safety and security will be placed at high risk by the individuals about whom they are gathering information. *See United States v. Edelin*, 128 F. Supp. 2d 23, 31 (D.D.C. 2001). Once an identity is compromised, those

individuals that the informant is gathering information on may be quick to retaliate. *See id.* ("If the Court were to provide this information to the defendants here, it would needlessly jeopardize the safety of potential witnesses and government informants."); *Cofield v. City of LaGrange, Ga.*, 913 F. Supp. 608, 619 (D.D.C. 1996). This is especially true when the confidential informant is identified as working with law enforcement. Furthermore, any disclosure of the identity of a confidential informant creates a chilling effect on the desire of other confidential informants to be forthcoming with information regarding individuals who pose serious threats to national security.

U.S. Immigration and Customs Enforcement ("ICE") bears the obligation to create a safe and secure detention environment for detainees located in ICE's detention facilities. The disclosure of the identity detainees, especially those individuals who have cooperated with the government on counterterrorism investigations, could lead to retaliation and violence not only against these individuals themselves, but also the families and acquaintances of these individuals.

If the Court rejects the government's assertion of this privilege and wants informants' testimony, then Respondent asks that the Court first assess the informants' identities and proffers *in camera* and issue any necessary protective order(s). District courts should tailor any habeas fact finding to the type of case at issue, including in the national security context by considering a protective order and considering *ex parte* and *in camera* evidence. *See Al Odah v. United States*, 559 F.3d 539, 547-48 (D.C. Cir. 2009); *Khan*, 655 F.3d at 31-32 (relying on such information); *Boumediene*, 476 F.3d at 1011-12 (Rogers, J., dissenting) ("District courts are well able to adjust these proceedings in light of the government's significant interests in guarding national security[] . . . by use of protective orders and ex parte and in camera review . . . ."), *rev'd*, 553 U.S. 723.

III. Location of the Evidentiary Hearing

Petitioner argues that "the Court should hold the hearing the federal courthouse for the Western District of New York, either in Rochester or Buffalo." ECF No. 60 at 21. It would be more fair and reasonable for the Court to instead hold the evidentiary hearing in the courtroom designed for a federal judge in the Buffalo Federal Detention Facility, as it undoubtedly has the authority to do. *See* 28 U.S.C. § 141(a); *United States v. Tomaiolo*, 249 F.2d 683, 692, 693 (2d Cir. 1957) (affirming a district court's decision to move a criminal trial to a witness's home).[7] "If the Court finds, upon proper application, that it is in the interest of justice to move the trial in order to take testimony which is relevant to the issues, that is sufficient." *Tomaiolo*, 249 F.2d at 693.

A. Transporting Detainees from Batavia Poses an Unreasonable Risk and Burden.

The interest of justice supports holding the hearing at the facility in Batavia, primarily because moving the hearing to Batavia would eliminate the need to transport Petitioner or any other detained individuals. Petitioner, for one, is a convicted terrorist who "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). The government has provided evidence that Petitioner's release poses a serious threat to public and national safety, as he has plotted future terrorist attacks and is attempting to recruit terrorists. *See, e.g.*, Federal Bureau of

[7] The "law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision" in these proceedings. 8 U.S.C. § 1226a(b)(4). The location of the hearing is collateral to the merits of the case and therefore not a "rule of decision." Therefore, Respondent cites the usual Second Circuit law as binding precedent in this section.

Investigation Letter (Feb. 21, 2019) (ECF No. 21 at 11-15) (sealed document outlining this conduct); Jan. 13, 2020 Brophy Decl. ¶ 6 (Ex. A, sealed document).

Given Petitioner's dangerousness, bringing detainees from Batavia to Rochester or Buffalo invites a risk found unacceptable by ICE Enforcement and Removal Operations, who are experts in transporting detainees. *See* Ex. A. Consistent with courts' ordinary practice in such instances, the Court should defer to that finding. In *United States v. Zuber*, 118 F.3d 101, 102 (2d Cir. 1997), the Second Circuit rejected a defendant's claim that the district court violated his due process rights by deferring to the Marshals' recommendation that he appear at his sentencing hearing in arm and leg restraints without making an independent evaluation of the need to employ those restraints. The court noted that "district judges regularly consult with the Marshals Service regarding precautions to be taken at hearings involving persons who are in custody," as the Marshals are "of course, charged with the movement of persons in custody." *Id.* at 104. "Not surprisingly, in most such cases, a district judge will defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances." *Id.* Similarly, the Supreme Court has cautioned judges on the dangers of "second-guessing" detention facility administrators. *Bell v. Wolfish*, 441 U.S. 520, 544 (1979). The Court observed that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions" and that detention facility administrators should therefore be "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547-48. The principle expressed in *Zuber* and *Wolfish* should extend to the considered judgment of ICE, which like the Marshals charged with

transporting prisoners, is the agency charged with transporting immigration detainees. *See* Ex. A ¶¶ 2, 4.

Here, that considered judgment is that transporting Petitioner or other detainees to the federal courthouse in Rochester or Buffalo would be an expensive and exhaustive security event for ICE, the United States Marshals Service, the Federal Protective Service, U.S. Customs and Border Protection, and multiple state and local law enforcement agencies. *Id.* ¶¶ 6, 7; Decl. of Deputy Field Office Director Thomas P. Brophy ¶ 6 (ECF No. 51) (filed under seal). The sealed Brophy declaration provides ample detail as to the extensive preparation and effort needed to transport even one detainee, including specially trained officers, a complicated and multijurisdictional convoy, and intensive control of Petitioner while he would be in the Rochester or Buffalo courtrooms. Ex. A ¶¶ 6, 7.

Petitioner provides no response to these arguments. Therefore, it would be unreasonably dangerous and unreasonably burdensome to transport Petitioner and other detainees to one of the federal courthouses.

B. Batavia Is a Safe, Cost-Effective, and Adequate Place for the Court to Hold the Hearing.

The unreasonableness of transporting Petitioner to Buffalo or Rochester is all the more apparent when considering that Batavia is a safe, cost-effective, and adequate substitute. The primary objective of court space should be to allow the factfinder and the observing public to safely hear all testimony. *See Tomaiolo*, 249 F.2d at 693-94 (upholding a change of hearing location to a basement of a private home where the witness was examined "fully and freely" and "there [wa]s no showing that public was excluded"). The courtrooms in Batavia, which the Executive Office of Immigration Review will make available for the Court's use, meet that objective. The Batavia facility has a specially fitted courtroom designed for use by a U.S.

District Court under these exact circumstances. These courtrooms "were initially designed to house a U.S. Magistrate Judge," and include "room for [the Court's] staff, a separate entrance, private bathrooms, and private chambers." Brophy Decl. ¶ 11. The courtroom can accommodate multiple attorneys and members of the public. *Id.* The facility's courtrooms has held criminal defendants for the United States Marshals Service for over 20 years. *Id.*

Petitioner responds that the Batavia facility has a "gauntlet of ICE-controlled security measures unlike those at any federal courthouse." ECF No. 60 at 22. Petitioner's attempt to characterize the Batavia facility as inaccessible is not grounded in fact.

For example, Petitioner takes issue with the fact that a visitor must surrender an identification card and register as a visitor: "at federal courthouses, [] anyone may freely enter off the street to attend court proceedings, without presenting identification." *Id.* Petitioner's representations regarding federal courthouse screening are inaccurate. For the Western District of New York's Rochester and Buffalo courthouses, "[w]hen visiting either Courthouse, a picture ID is required for entry into the building." *Accessing the Court*, U.S. District Court for the Western District of New York, https://www.nywd.uscourts.gov/accessing-court (last visited Jan. 12, 2020). He appears to also object to security screening, yet concedes that security screening is required even at a federal courthouse. ECF No. 60 at 22.

Petitioner also complains that visitors must disclose the purpose of the visit and their U.S. citizenship status. *Id.* However, he does not expand on this to explain how, and in what situation, this feature of the detention facility impairs his ability to receive a fair hearing. Objections to the facility in the abstract do not outweigh the actual costs that the government will bear if it had to transport him or other detainees to the federal courthouse. *See Tomaiolo*, 279 F.2d at 693 (permitting a trial to be held in a private basement where "there was no showing that

the defendants or their counsel suffered from any lack of privacy or any disability," and "there [wa]s no showing that the public was excluded.").

Finally, Petitioner argues that detainees confined at Batavia will experience "an atmosphere of coercion" if they testified there, and "may naturally feel reluctant to testify against ICE's interests." *Id.* at 23. Petitioner fails to explain how detainees testifying at another facility despite having been transported by ICE and still under ICE supervision, *see generally* Ex. A, would no longer subject them to the claimed "atmosphere of coercion."[8]

In short, Petitioner fails to demonstrate any material differences between the courtroom environments at Batavia, Rochester, and Buffalo. And other than speculation, Petitioner has given no indication that a Batavia hearing would cause him any prejudice that would outweigh the government's strong interest in not transporting him or other detainees. In *Tomaiolo*, the Southern District of New York had sufficient justification to hold part of a criminal trial in a "basement of a private home [which] does not provide all the usual courtroom conveniences," "quarters [which] were necessarily somewhat cramped." *Tomaiolo*, 279 F.2d at 693. The Batavia courtrooms far exceed those venue shortcomings. And as in that case, here there has been no showing of prejudice or exclusion of visitors. *Id.* at 693-94. Batavia is a fair, safe, and reasonable location for the Court to hold the evidentiary hearing in this case.

[8] Petitioner again claims that Respondent has transported him in the past without apparent incident. ECF No. 60 at 23. As Respondent has previously explained (ECF No. 43 at 4-5), the sealed Brophy Declaration addresses why such situations are not comparable to his current request to have the hearing in Rochester or Buffalo. Brophy Decl. ¶ 6. Moreover, the government is *not* claiming that transporting Petitioner and other detainees would be physically impossible—rather, that it would require unwarranted efforts and unwarranted risk to the detainees and to the law enforcement officers charged with protecting them and the public. *Id.* ¶¶ 6, 8, 9.

IV. The Court Should Identify for the Record the Precise Provision of the Evidentiary Hearing at Issue

Finally, Respondent asks the Court to clearly identify on the written record which provision of 8 U.S.C. § 1226a is the subject of the evidentiary hearing. The statute provides for "judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)." 8 U.S.C. § 1226a(b)(1). Subsections (a)(3) and (a)(6), however, have different standards. Although Petitioner indicated during the most recent telephonic contest that the focus of the evidentiary hearing should be subsection (a)(6), he has since walked that back by noting that his "Counsel *expects* the evidentiary hearing to focus on" the subsection (a)(6) standard. ECF No. 60 at 5 n.3 (emphasis added).

Petitioner is the party who requested an evidentiary hearing in the first place. Supplemental Memorandum Concerning Petitioner's Detention under 8 U.S.C. § 1226a, in Further Support of Petitioner's Verified Petition for Writ of Habeas Corpus at 22-25 (ECF No. 28). As such, he should have to identify what part of the government's § 1226a detention decisions are allegedly unlawful—regardless of who bears the burden. In light of Petitioner's representations, the Court should note on the written record that Petitioner is not challenging the subsection (a)(3) determination in this evidentiary hearing.

Dated: January 13, 2020

Respectfully submitted,

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