

James McHenry
Director
Executive Office for Immigration Review

Matthew T. Albence
Deputy Director and Senior Official
U.S. Immigration and Customs Enforcement

Submitted via email March 23, 2020

Re: Legal Access in Immigration Detention and Immigration Courts During COVID-19
Pandemic

Dear Director McHenry and Deputy Director Albence,

The undersigned organizations and their members across the country provide legal services to and advocate for individuals detained in the custody of U.S. Immigration and Customs Enforcement (ICE). We write to you during the worldwide spread of the novel coronavirus, also known as COVID-19. The spread of this disease has been declared a global pandemic by the World Health Organization.¹ The President of the United States has declared a national state of emergency due to COVID-19.² Public health officials have been clear that close interactions with others must be minimized to limit the spread of this virus.³

During this crisis, to protect the health of government employees and contractors, detained persons, legal service providers, and the public, while protecting basic due process rights, we urge you to immediately implement mechanisms to allow for consistent and confidential free phone and videoconferencing (VTC) communication with individuals in ICE custody wherever they are detained, to permit telephonic and VTC appearance by legal representatives in all immigration courts that remain open, and to permit legal orientation and know-your-rights programming to proceed through VTC capacity to the greatest extent possible. We make these

¹ WHO Director General Tedros Adhanoml, Opening remarks at the media briefing on COVID-19, March 11, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>

² Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19). March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

³ The President's Coronavirus Guidelines for America (March 2020), *available at* https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf

recommendations in light of the decision by EOIR and ICE to continue detention and docketing practices that put people's health at risk.⁴

We are particularly alarmed by the new ICE policy that we understand will be going into effect on Monday, March 23 requiring that attorneys bring their own PPE (Personal Protective Equipment) in order to be allowed to enter ICE detention facilities.⁵ The suggestion that such equipment be diverted from first responders who are already facing such a critical shortage is particularly unreasonable and unhelpful when ICE and EOIR could instead choose to uniformly utilize telephonic and VTC legal appearance procedures with which they already have substantial experience.

Many if not most of the facilities used by ICE to confine people for immigration purposes do not provide meaningful ways for legal service providers to speak with detained individuals remotely.⁶ When facilities *do* allow confidential legal calls, their capacity is limited to one or two phones at any given time for the entire ICE population, making calls nearly impossible to schedule. The lack of federal direction to remedy this substantial due process violation is leading to a patchwork of conflicting and insufficient responses regionally and locally.

Similarly, immigration courts and immigration judges across the country do not have a consistent practice of allowing legal representatives to appear on behalf of their clients telephonically. We appreciate the guidance issued by Director McHenry on March 18, 2020 reminding immigration judges that they may issue standing orders regarding telephonic appearances by representatives.⁷ However, immigration courts which remain open for conducting detained or MPP hearings have not consistently established the practices suggested by this memorandum. At the time of this writing, the undersigned are aware of standing orders allowing any party to appear telephonically in some or all matters without prior written motion in only the following courts: Adelanto,

⁴ Many of our organizations have concerns with the use of VTC technology for immigration court hearings given the significant due process concerns inherent in its use; we nonetheless strongly offer these recommendations in the unique context of the national emergency constituted by the COVID-19 pandemic.

⁵ U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* <https://www.ice.gov/covid19> (“ICE/ERO now requires all legal visitors, CODELs, and STAFFDELS to provide and wear personal protective equipment (PPE) (disposable vinyl gloves, N-95 or surgical masks, and eye protection) while visiting any detention facility. ICE will continue to collaborate with the CDC, IHSC, and its network of care providers to provide updates and revise procedures as necessary.”)

⁶ Carl Takei & Julia Harumi Mass, *Forget About Calling A Lawyer Or Anyone at All if You're in an Immigration Detention Facility*, ACLU.org, June 15, 2016, <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/forget-about-calling-lawyer-or-anyone-all-if>.

⁷ Executive Office for Immigration Review, Policy Memorandum 20-10, *Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak (March 18, 2020)*, <https://www.justice.gov/eoir/file/1259226/download>.

Atlanta, Chicago, Elizabeth, Hartford, Las Vegas, Tucson, and York.⁸ In contrast, other courts and court systems around the country have taken much more bold and decisive action to protect their employees, parties, and the public,⁹ while the immigration court system has lagged behind.

To ensure consistent national practice across all immigration courts that remain open during this public health crisis, we urge EOIR to go further than the March 18 guidance and require that EOIR immediately authorize telephonic or VTC appearance by legal representatives (without onerous conditions like waiving evidentiary objections) in all courts that remain open during this public health crisis.

We as legal service providers should not be asked to make the difficult choice to put our clients, ourselves, and our families at risk because ICE and EOIR refuse to employ simple and effective ways for us to speak confidentially by phone or VTC with individuals who need legal assistance. Our inability to have those conversations and appear in court in a safe way during a pandemic is impeding our ability to meaningfully represent the individuals we serve.

There is no excuse for failing to immediately implement nationwide consistent and confidential mechanisms for legal service providers to conduct intakes, prepare individuals detained in ICE custody, and allow remote appearance before all immigration courts.

We urge EOIR to issue a new policy memorandum with blanket authority for the duration period of this national public health emergency that:

- Restricts public access to physical court installations. Only EOIR court personnel should be allowed in the court.
- Authorizes attorneys and representatives to appear telephonically at any hearings, dispensing with a requirement for a written motion and replacing it with an instruction to email the clerk of the corresponding court.
- Grants automatic continuances when requested, dispensing with the requirement for a formal written motion.
- Waives presence of represented respondents for bond hearings and master calendar hearings unless respondents request otherwise¹⁰.

⁸ Executive Office for Immigration Review, *Immigration Court Practice Manual*, Appendix R-1 <https://www.justice.gov/eoir/page/file/1259631/download>.

⁹ For example: The Supreme Court of the United States is closed to the public until further notice and the Court has issued a standing order extending many filing deadlines. <https://www.supremecourt.gov/>. The Fifth Circuit Court of appeals has waived the requirement for paper filing. <http://10.205.1.61/docs/default-source/default-document-library/order-1-clerks-office-covid-19.pdf>

¹⁰ See 8 C.F.R. 1003.25(a).

- Requires courts to arrange respondents' appearance at bond and master calendar hearings by telephone or VTC during the extent of the COVID-19 national emergency.
- Disallows reopening of physical court installations until EOIR can ensure adequate procedures and supplies to disinfect courtrooms.
- Prioritizes adjudication of bond hearings over all other hearings to allow for quick release where possible.
- Authorizes detained merits hearings to go forward if the respondent and legal representative wish to do so.
- Ceases issuance of *in absentia orders*.
- Automatically tolls any deadline imposed by statute, regulation, local rule, standing order, or policy guidance.

In addition, EOIR and ICE should act to:

- Ensure that free, unmonitored phone calls are made available to all immigrants in detention, *at any time*, to contact attorneys or legal service providers in a sufficiently private space to protect confidentiality. All facilities (including CDFs, IGSAs, DIGSAs, and SPCs) must instruct staff to be available to accommodate requests from legal service providers to schedule time-certain private calls with clients. Sufficient staffing must be made available on the facility phone lines so attorneys and legal service providers can reach an operator to schedule such calls.
- Facilities should all be equipped to allow individuals in custody to have free video-conferencing sessions with legal service providers (via tablet or other mechanisms) in private spaces to protect confidentiality to engage in case preparation.¹¹
- Ensure that non-profit organizations providing legal orientation programming or know-your-rights programming are permitted broad and flexible access to provide group presentations by video-conference and to schedule and receive free calls/televideo conferences from individuals in custody for individual orientations.
- Legal service providers, law firms, and attorneys providing pro bono legal services should be permitted broad, flexible access to schedule and receive free phone calls to conduct intake and screenings to consider representation and exchange confidential legal mail with clients via fax.
- Provide secure internet services to ensure providers are able to conduct interactive services.
- Issue directives to staff encouraging flexibility by ICE and facility staff to permit free attorney/client communication and communication by legal service providers for the

¹¹ ICE's National Detention Standards (NDS) require one telephone for every 25 people in detention and the same ratio should be adopted for televideo access in light of the current pandemic.
<https://www.ice.gov/doclib/dro/detention-standards/pdf/teleacc.pdf>.

purpose of intake without signature on ordinarily required forms including but not limited to the ICE privacy waiver, the EOIR-28, and the G-28.

Sincerely,

Adelante Alabama Worker Center
Advocates for Basic Legal Equality, Inc.
Al Otro Lado
Aldea - The People's Justice Center
Allies for Immigration Justice
Alston & Bird LLP
American Immigration Council
American Immigration Lawyers Association
Athens Immigrant Rights Coalition
Boston University Immigrants' Rights and Human Trafficking Program
Brooklyn Defender Services
Bronx Defenders
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities of Southern New Mexico
Center for Gender & Refugee Studies
Center for Victims of Torture
Center Global, a Program of the DC LGBT Community Center
Children's Legal Center
Church of Our Saviour/La Iglesia de Nuestro Salvador
Coalition on Human Needs
Columbia Law School Immigrants' Rights Clinic
Community Immigration Law Center
Community Justice Exchange
Detention Watch Network
Dignidad Inmigrante en Athens
Dilley Pro Bono Project
Dominican Development Center, Inc.
Dominican Sisters of Sinsinawa, Wi. Immigrant and Refugee Committee
East End Cares
Families For Freedom
Fenwick & West LLP
Florence Immigrant & Refugee Rights Project
Freedom for Immigrants
Georgia Asylum & Immigration Network (GAIN)

HIAS Pennsylvania
HIAS, Inc.
Human Rights First
Human Rights Initiative of North Texas
Immigrant and Non-Citizen Rights Clinic, CUNY School of Law
Immigrant Defenders Law Center
Immigrant Families Together
Immigrant Justice Clinic University of Wisconsin Madison
Immigrant Justice Idaho
Immigrant Legal Advocacy Project
Immigration Counsel
Infant and Early Childhood Mental Health Resource of Georgia
ISLA: Immigration Services and Legal Advocacy
Juntos
Kitsap Immigrant Assistance Center
L&L Immigration Law, PLLC
Law Office of Daniel Gracey
Lawyers for Good Government, Georgia Chapter
Legal Aid Justice Center
Loyola University College of Law
Manos: Migrantes Apoyados, No Olvidados
Mariposa Legal, a COMMON Foundation program
McCrummen Immigration Law Group
Mid-South Immigration Advocates
MomsRising
Morris County Organization For Hispanic Affairs
NASW-NJ
National Association of Social Workers
National Immigrant Justice Center
National Immigration Project of the National Lawyers Guild
Neighbors Link Community Law Practice
NELSON | SMITH, LLP
NETWORK Lobby for Catholic Social Justice
New Haven Legal Assistance Association
New Mexico Immigrant Law Center
New Sanctuary Movement of Philadelphia
New York Immigration Coalition
Northern Illinois Justice for Our Neighbors
Ohio Immigrant Alliance

Park View Farmers Market
PATHWAYS VT
Pennsylvania Immigration Resource Center
Perez McGill Law Firm PLLC
Political Asylum Immigration Representation (PAIR) Project
RAICES
Reformed Church of Highland Park
Reggie Smith Law
Sanctuary for Families
Santa Fe Dreamers Project
Sharon Barr Consulting
SIFIC (Support for Immigrant Families in Crisis)
Sisters of Notre Dame de Namur
Skylight Engagement, Inc.
Snohomish Immigration Advocacy
Southern Poverty Law Center
St. George's Episcopal Church, Hawthorne
Stanford Law School
Stephenson & Fleming, LLP
Still Waters Anti-Trafficking Program
Stratton Immigration
Stroock & Stroock & Lavan
Sueños Sin Fronteras
Tahirih Justice Center
Terra Firma, a program of Montefiore Medical Center and Catholic Charities
The Resurrection Project
Transformations CDC
Transnational Legal Clinic, University of Pennsylvania Carey School of Law
Undocumented Partnership Task Force (N. Georgia Conf. UMC)
University of Maryland Carey Immigration Clinic
University of Michigan Law School
U.S. Legal Solutions, LLC
Vanderbilt University School of Medicine
Virginia Coalition for Immigrant Rights
Virginia Coalition of Latino Organizations
Virginia Coalition of Latino Organizations
Whidbey Indivisible RAIN (Refugee and Immigrant Network)
Wilco Justice Alliance (Williamson County, TX)
Witness at the Border

