

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

-against-

EXECUTIVE OFFICE OF
IMMIGRATION REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852 (CJN)

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

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Plaintiffs respectfully submit this supplemental brief to bring to the Court’s attention new evidence that denials of motions for continuance are ongoing, including in cases where a hearing participant had tested positive for COVID-19. Indeed, on April 15, as this Court was being assured by Defendants that its concern about such denials was entirely hypothetical, *see* Hr’g Tr. 39:12-13, a detained person who had tested positive for COVID-19 was denied a request for continuance of a hearing scheduled for April 16. As a result, the individual was required to attend a two-hour hearing on April 16, during which the guard accompanying him informed the immigration judge that the individual was too sick even to state his name. Right after the hearing, he was hospitalized, and he is now in intensive care. *See* Ex. 55, Semino Decl. ¶¶ 6-10.¹

As the Court pointedly ascertained in the April 15 hearing, such denials of a continuance create an injury for which there is no remedy. *See* Hr’g Tr. 38:6-42:13. Even setting aside that the immigration system does not provide a viable means of interlocutory review,² interlocutory review could not provide a remedy for the harm to the health of the detained person or to others who are required to participate in such proceedings, or who later come into contact with the participants. This risk goes beyond outright denials – requests for continuances often go unaddressed, so that counsel must appear in court, even when continuances are ultimately granted, irreparably risking the health of all concerned as fully as if the request had been denied.

¹ Although this hearing was nominally “remote,” the detained person’s participation caused him to be transported out of quarantine and to expose at a minimum one guard unnecessarily.

² Executive Office for Immigration Review, *Board of Immigration Appeals Practice Manual* (Feb. 20, 2020), <https://www.justice.gov/eoir/page/file/1250701/download> (“(c) Scope of interlocutory appeals. – The Board does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges. *See Matter of K-*, 20 I&N Dec. 418 (BIA 1991).”).

This supplemental brief accordingly presents additional evidence of this ongoing irreparable injury and summarizes the evidence already in the record that demonstrates a pattern of activity and injury that necessitates this Court's intervention. In addition, at the Court's direction, this brief provides updates as to the circumstances of the individual Detained Plaintiffs.

ARGUMENT

A. In-Person Proceedings Continue To Be Conducted Despite Objections

The record in this case, as well as additional declarations filed with this supplemental brief,³ demonstrate that in-person hearings continue to take place for a variety of reasons, including because:

- Courts deny or fail to timely respond to requests for continuances, such that counsel, detained persons, witnesses, or others must appear in person and commingle with other people before they learn that the hearing has been or will be adjourned.
 - Ex. 9, Terezakis Decl. ¶¶ 32-33
 - Ex. 31, Steiner Decl. ¶¶ 5, 10
 - Ex. 35, Boyle Decl. ¶¶ 7-8
 - Ex. 55, Semino Decl. ¶¶ 5-7
- Courts deny or fail to timely respond to requests to participate by telephone in what is otherwise an in-person proceeding, such that counsel, detained persons, witnesses, or others must appear in person and commingle with other people.
 - Ex. 3, Church Decl. ¶ 11
 - Ex. 9, Terezakis Decl. ¶¶ 36-41
 - Ex. 31, Steiner Decl. ¶ 10
 - Ex. 51, Beckett Decl. ¶¶ 4-6
 - Ex. 52, Stump Decl. ¶¶ 5-8

³ Plaintiffs are submitting additional declarations from practitioners describing recent events. Ex. 51, Beckett Decl.; Ex. 52, Stump Decl.; Ex. 53, Hartnett Decl.; Ex. 54, Edstrom Supp. Decl.; Ex. 55, Semino Decl.; Ex. 56, Lopez Supp. Decl.; Ex. 58, Sud-Devaraj Supp. Decl.; Ex. 60, Decl. Summary Chart. Plaintiffs are also submitting supplemental declarations on behalf of Organizational Plaintiffs AILA, NIPNLG, and IJC to explain which of the new declarants are members of the Organizational Plaintiffs. Ex. 57, Tolchin Supp. Decl.; Ex. 59, Voigt Second Supp. Decl.; Ex. 61, Greenstein Supp. Decl.

- Ex. 53, Hartnett Decl. ¶¶ 4-6

In addition to causing some or all of the participants in a proceeding to come together in person despite objection, these immigration court actions frequently result in other limitations of the right to counsel or due process rights. These include the inability to obtain evidence due to the COVID-19 pandemic, and the exclusion of a necessary person from participating in the proceeding. *See, e.g.*, Ex. 54, Edstrom Supp. Decl. ¶ 3-4; Ex. 35, Boyle Decl. ¶¶ 7-10.

Examples of these in the record (including the new declarations) are catalogued in the accompanying table. *See* Ex. 60.

B. “Remote” Hearings Often Fail To Protect Health Or Due Process

While Defendants emphasized that individual judges have discretion to conduct hearings remotely by video-conference (“VTC”) or telephone conference, the evidence summarized above demonstrates that the availability of discretion, without clear direction to exercise it, is insufficient to prevent irreparable injury. Further, the use of such hearings does not eliminate the harms to health and to the right to counsel that underlie the need for a temporary restraining order. As noted above, a nominally remote hearing occurred – over the detained person’s objection – on April 16, but this “remote” hearing was not, and could not have been, conducted safely and in accordance with due process. In this case, the detained person’s lawyer learned that the detained person was ill and being tested for COVID-19, and she filed a motion for a continuance on April 14. She also noted that she had not had access to her client to prepare for the hearing due to COVID-19 conditions, thereby depriving him of his right to counsel. After learning of her client’s positive diagnosis of COVID-19, the lawyer supplemented the motion for a continuance on April 15, noting the positive diagnosis and her client’s weak health condition. Notwithstanding this motion, her client was forced to travel through the detention center to appear by VTC for his hearing, accompanied by at least one ICE employee. The hearing

proceeded to consider the detained person's application for a T visa (a form of relief available to victims of human trafficking). After proceeding with the hearing for two hours (without the benefit of meaningful participation by the detained person, who was too ill to speak), the judge finally adjourned it and set it to continue as soon as next week, and even that short delay was due to the judge's inability to set it sooner. *See* Ex. 55, Semino Decl. ¶¶ 5-9. This incident exemplifies the risk to health and right to counsel even in nominally remote hearings.

In addition, immigration courts and detention facilities frequently do not have the capacity to connect all necessary parties remotely. This results in critical participants either being required to gather in common locations and/or being excluded altogether. *See, e.g.*, Ex. 52, Stump Decl. ¶¶ 5-7; Ex. 54, Edstrom Supp. Decl. ¶¶ 3-4; Ex. 38, Bennion Decl. ¶¶ 2-3; Ex. 22, Hollithorn Decl. ¶ 13. There are also numerous examples in the record of attorneys being prepared to appear telephonically, but never receiving calls at the appointed time. *See, e.g.*, Ex. 36, Green Decl. ¶¶ 4-6; Ex. 39, Ford Decl. ¶ 5.

Examples of these injuries in the record are also summarized in the accompanying table. *See* Ex. 60.⁴

C. Update Regarding Individual Plaintiffs

As requested by the Court at the April 15 hearing, the following update is provided concerning the individual plaintiffs.

⁴ Defense attorneys are not the only participants worried about their ability to zealously represent their clients in the face of COVID-19. Attorneys for Defendant ICE have reported to their union president that "not enough documents were available online to do a 'credible job of representing the government.'" Liz Robbins, *As Coronavirus Spreads, So Does Panic and Confusion at Immigration Courts Across The U.S.*, The Appeal (Apr. 3, 2020), <https://theappeal.org/as-coronavirus-spreads-so-does-panic-and-confusion-at-immigration-courts-across-the-u-s/>.

1. Reynaldo Guerrero-Cornejo

Mr. Guerrero-Cornejo continues to be detained at La Palma Detention Center in Eloy, Arizona. ICE currently reports that there are 6 confirmed cases of COVID-19 at La Palma.⁵ His individual hearing on the merits is scheduled to proceed on April 24, 2020. His attorney is at-risk for more serious complications from COVID-19 and cannot participate in an in-person hearing. To adequately represent Mr. Guerrero-Cornejo, his attorney would at a minimum require appearing by VTC, but that is not an option for the April 24 hearing, because to do so she would need to travel to either the Tucson Immigration Court or the detention center, neither of which she can do. Ex. 58, Sud-Devaraj Supp. Decl. ¶¶ 4-6. While the details of the April 24 hearing are still being arranged, she expects that: (1) the Immigration Judge and the interpreter will be together in one room at the Tucson Immigration Court and participate via VTC; (2) Mr. Guerrero-Cornejo will participate via VTC from the La Palma Correctional Center; (3) the DHS attorney will likely participate via VTC; (4) the attorney will appear telephonically; and (5) witnesses supporting Mr. Guerrero-Cornejo will have to participate in-person at the Tucson Immigration Court, which is more than a three-hour drive from where they reside. *Id.* ¶ 7. The attorney is very concerned that she will not be able to see her client while he is being questioned because she cannot participate by VTC.

I will be unable to judge from his body language and facial expressions whether he understands the questions posed to him, whether he is getting overwhelmed during cross-examination, whether he needs a break from the questioning, etc. Typically, I am able to gauge this information when a hearing is conducted in-person. For instance, when I am able to see my client during a hearing, I can tell when my client is not understanding a question or not following what the interpreter is saying. In that sort of scenario, I would normally request that the DHS attorney rephrase the question or I would rephrase any of my questions. By appearing telephonically, I will be unable

⁵ U.S. Immigrations and Customs Enforcement, *ICE Guidance on COVID-19*, <https://www.ice.gov/coronavirus> (accessed Apr. 19, 2020).

to fully and adequately represent Mr. Guerrero-Cornejo during his upcoming hearing.

Id. ¶ 8. The attorney, an AILA member, joined to support the TRO in this case in hopes that it would be granted in time to enable her to participate more fully in representing her client in the hearing, without having to put her life and health at risk.

2. Enrique Napoles Vaillant

Mr. Vaillant continues to be detained at La Palma Detention Center in Eloy, Arizona, where there are at least 6 confirmed cases of COVID-19. His individual hearing on his asylum claim is scheduled for June 22, 2020. He still does not have counsel.

3. Ernesto Rodriguez Cedeno

Mr. Cedeno continues to be detained at La Palma Detention Center in Eloy, Arizona, where there are at least 6 confirmed cases of COVID-19. After Mr. Cedeno's motion to continue was denied, his April 2 hearing ultimately was rescheduled to August 5, 2020. This fortuitous outcome, however, was only a result of EOIR's *sua sponte* rescheduling due to judge unavailability. Mr. Cedeno still does not have counsel.

4. Arlety Aliaga-Cobas

Ms. Aliaga-Cobas continues to be detained at Eloy Detention Center in Eloy, Arizona. Her individual hearing on her asylum claim is scheduled for June 2, 2020. She still does not have counsel.

5. Roberto Fausto Velasquez Quiala

Mr. Quiala continues to be detained at Pine Prairie ICE Processing Center in Pine Prairie, Louisiana. ICE currently reports that there are 4 confirmed cases of COVID-19 at Pine Prairie.⁶

⁶ U.S. Immigrations and Customs Enforcement, *ICE Guidance on COVID-19*, <https://www.ice.gov/coronavirus> (accessed Apr. 19, 2020).

Mr. Quiala's individual hearing is scheduled for May 19, 2020. Mr. Quiala's attorney has attested to how the constraints on remote access to communicate with individuals detained at Pine Prairie have caused him to struggle to communicate with Mr. Quiala. Ex. 4, Lopez Decl. ¶¶ 5-8; Ex. 56, Lopez Supp. Decl. ¶¶ 4-5.

D. A Temporary Restraining Order Is Necessary And Warranted

To avoid irreparable injury and to promote the public interest, in-person proceedings for detained individuals must be stopped during the public health emergency caused by the COVID-19 pandemic, and related continuances granted as of right. Consistent with the evidence previously presented and summarized above, immigration judges have likewise encountered an approach by EOIR that “has been marked by a chaotic, inconsistent and confusing series of pronouncements—some by order, some by memo, some by email, and some by Tweet . . . that are not based on conditions in the surrounding communities.” Former Judges Br. at 3, ECF No. 20. The result is that “EOIR and therefore the immigration court system itself, has sacrificed due process in favor of rapid removals, leaving the court without any incentive at all to plan to protect the public health or the individuals and participants in the system.” *Id.* at 2-3. Government prosecutors are likewise concerned for their health and support an end to in-person hearings. The head of the American Federation of Government Employees Local 511, which represents ICE attorneys, publicly stated that “[a]ll of the attorneys . . . in our agency, they are scared to death.”⁷ Other members of the union have also criticized Defendants' agency actions,

⁷ Alejandro Lazo, *Fear of Coronavirus in Immigrant Detention Leads to Preparation, Calls for Release*, The Wall Street Journal (Mar. 21, 2020), <https://www.wsj.com/articles/fear-of-coronavirus-in-immigrant-detention-leads-to-preparation-calls-for-release-11584810004>.

calling the decision to keep immigration courts open “absolutely outrageous” and a “conscious disregard for human life and safety.”⁸

This is a national problem stemming from Defendants’ actions to decline to set national standards.⁹ In these circumstances, it is entirely appropriate for the Court to require Defendants to exercise their authority to supervise the national system of immigration court and detention facilities. It is not realistic or consistent with basic notions of due process to instead require individual detained persons or their counsel to deal with these risks on a one-off basis in a game of whack-a-mole all over the country. This is especially the case when the record shows that Defendants can and do move detained persons around the country, far from where their counsel are located.¹⁰

Defendants have it within their power to bring order to the chaos by adopting clear statements that a request for continuance of a hearing based on COVID-19 shall be deemed granted upon filing. They also have the ability to require that remote hearings must proceed in a

⁸ Megan Towey, *Citing coronavirus pandemic, judges and ICE attorneys demand closure of immigration courts*, CBS News (Mar. 25, 2020), <https://www.cbsnews.com/news/citing-coronavirus-pandemic-judges-and-ice-attorneys-demand-closure-of-immigration-courts/>

⁹ Because detained persons are moved around the country and counsel may be in states far from the detention center, these are not solely localized issues. Likewise, because of the risk of transmission by asymptomatic or presymptomatic carriers, the absence of formal diagnoses of COVID-19 infection in a particular facility is not a reason to refuse minimum national guidance as is sought by this motion. For example, on Friday, April 17, Governor DeWine of Ohio reported that testing by the Ohio Department of Health in the population of a single correctional facility found high levels of COVID-19 infection among “individuals who otherwise are asymptomatic or would recover without a test. For example, the testing of one prison dorm in Marion found that out of 152 inmates, 39 percent tested positive for COVID-19 although they did not show any symptoms.” WKTN, *Gov. DeWine’s COVID-19 Update: Recovery Phase, Inmate Testing* (Apr. 17, 2020), <https://wktn.com/gov-dewines-covid-19-update-recovery-phase-inmate-testing>.

¹⁰ Ex. 51, Beckett Decl. ¶¶ 1, 3-4; Ex. 53, Hartnett Decl. ¶¶ 1-3, 7-8; Ex. 49, Durham Decl. ¶ 4.

manner that respects the right to counsel and due process by ensuring that all necessary participants may in fact participate meaningfully, rather than (as is the case now) dropping witnesses or interpreters because the court's system does not accommodate more than a minimal number of remote participants.¹¹ Their decision not to adopt such minimum standards (or to refuse to do so) constitutes agency action that the Court may set aside as arbitrary and capricious, or unlawfully withheld.

The Court need not find that Defendants have acted in bad faith – Plaintiffs make no such claim. Nor must the Court disregard the presumption of regularity of agency action, as Defendants contend. The agency action (or refusal to act) at issue is that of Defendants, not those of individual immigration judges or individual facilities. As to that action (or refusal to act), the Court is compelled to find, based on the uncontroverted evidence in the record of this case, that it has resulted in irreparable injury and presents an imminent and ongoing risk of irreparable injury to members of Organizational Plaintiffs and to Detained Plaintiffs for which the Court may afford relief in the form of a temporary restraining order.

CONCLUSION

For the foregoing reasons, and those set forth in the record of proceedings to date, this Court should GRANT Plaintiffs' Motion for a Temporary Restraining Order to prevent imminent

¹¹ For example, in a typical "remote" hearing (a) the immigration judge and interpreter will likely appear together by VTC from the immigration court, (b) the government attorney may appear by VTC from a separate location, (c) the detained person's attorney will likely appear by telephone from a separate location, and (d) witnesses, if they are permitted at all, are likely required to appear at the courthouse, either by VTC in a separate courtroom or in the same room as the judge. *See* Ex. 58, Sud-Devaraj Supp. Decl. ¶ 7; Ex. 54, Edstrom Supp. Decl. ¶ 4; Ex. 52. Stump Decl. ¶ 4.

and ongoing risk of irreparable injury, which is supported by the likelihood of success on the merits, the absence of injury to Defendants, and the public interest.

Dated: April 20, 2020
Washington, D.C.

Respectfully submitted,

/s/ Sirine Shebaya

Sirine Shebaya (D.C. Bar No. 1019748)
Khaled Alrabe (pro hac vice)
Amber Qureshi (pro hac vice)
Cristina Velez (pro hac vice)
NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD
2201 Wisconsin Ave NW, Suite 200
Washington, DC 20007
(202) 656-4788
sirine@nipnlg.org
khaled@nipnlg.org
amber@nipnlg.org
cristina@nipnlg.org

/s/ Matthew D. Slater

Matthew D. Slater (D.C. Bar No. 386986)
Elsbeth Bennett (D.C. Bar No. 1021393)
CLEARY GOTTlieb STEEN & HAMILTON
LLP
2112 Pennsylvania Avenue, N.W.
Washington, D.C. 20037-3229
T: 202-974-1500
F: 202-974-1999
m Slater@cgsh.com
ebennett@cgsh.com

Jennifer Kennedy Park (pro hac vice)
Lina Bensman (pro hac vice)
CLEARY GOTTlieb STEEN & HAMILTON
LLP
One Liberty Plaza
New York, New York 10006
T: 212-225-2000
F: 212-225-3999
jpark@cgsh.com
lbensman@cgsh.com

Attorneys for Plaintiffs