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

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Defendants' Response (ECF No. 35) to Plaintiffs' Supplemental Brief (ECF No. 31-1) crystalizes yet again why injunctive relief is necessary in this case. Defendants argue that this Court need not act because they have decided to leave discretion with individual immigration courts and immigration judges as to the conduct of hearings for people in detention. This argument amounts to a concession and a repeated demonstration that there has been concrete agency action that is subject to this Court's review, either as an arbitrary and capricious affirmative decision or as an unlawful refusal to take action that was repeatedly sought before this suit was brought.

Moreover, that agency action is the precise source of irreparable injury. In arguing otherwise, Defendants blink at reality. As demonstrated by the raft of evidence Plaintiffs have submitted, as well as the information supplied by the amicus brief of the National Association of Immigration Judges (ECF No. 34), because adjournments of in-person hearings continue to be denied and decided in a chaotic manner that amounts to denial, and because even "remote" hearings are not truly remote as to all participants in the detained-persons process, the individual Detained Plaintiffs and the members of the Organizational Plaintiffs are placed at risk of irreparable health injuries. That Defendants' brief all but ignores this evidence – and relies instead on declarations that claim to be unaware of what is actually happening in the immigration courts – cannot change the facts on the ground, which show the dangerous consequences of the agency action at issue.

Urgent injunctive relief is thus needed and warranted. As shown previously and summarized below, the relief Plaintiffs seek is narrowly tailored and appropriate to the claims and injuries shown. We respectfully request that the Court act quickly to grant it.[1]

ARGUMENT

A. Plaintiffs Have Demonstrated Risk of Irreparable Injury

Plaintiffs' motion concerns Defendants' practices that create unnecessary health risks, including because all Plaintiffs are forced to choose between their health and safety and protecting Detained Plaintiffs' due process and counsel rights.[2] Plaintiffs have submitted substantial additional evidence confirming that, as a result of Defendants' actions, in-person hearings continue to occur and remote hearings are conducted in a manner that is inadequate to protect health and safety or provide due process. In response, Defendants ignore the risk to health and safety posed by their actions and take the position that relief should be withheld until only the due process risks actually materialize (for example, until a detained individual deprived of due process suffers a negative outcome in his or her immigration proceeding).

But this lawsuit is not a post-review challenge to an order of removal. It is a challenge to agency action that puts Plaintiffs at risk of imminent irreparable injury to health during the current COVID-19 pandemic. The Court need not wait for detained persons to be wrongfully removed—or infected with COVID-19—to take action. *See* Mem. Op. at 23, *Banks v. Booth*, No. 1:20-cv-00849-CKK, 23 (D.D.C. Apr. 19, 2020)), ECF No. 51 ("Plaintiffs' theory of

[1] This Reply also provides an update with respect to individual Plaintiff Reynaldo Guerrero-Cornejo.

[2] Defendants exaggerate the importance of the fact that the Organizational Plaintiffs have not raised access-to-counsel claims under the INA or the Fifth Amendment. As discussed *infra* at Sections C and D, all Plaintiffs have standing to pursue relief under the APA and all of Plaintiffs' requested relief is appropriate under the APA.

irreparable harm rests on the risk of contracting COVID-19 and the resulting health complication. The Court concludes that Plaintiffs' risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm."); *cf. Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event."). In any case, Plaintiffs have not only shown the risk of irreparable injury, but the *occurrence* of it. *See* Pls. Supp. Br. at 2-5; Pls. Ex. 60.

Detained persons as well as the attorneys who represent them and who are members of the Organizational Plaintiffs are put at risk of this irreparable injury.[3] These declarations provide first-hand personal knowledge of the declarants themselves, which they are competent to give. *See, e.g.,* Pls.' Ex. 51, Beckett Decl. ¶¶ 4-6, Pls.' Ex. 52, Stump Decl. ¶¶ 5-8; Pls.' Ex. 53 Hartnett Decl. ¶¶ 4-6 (all reporting the denial of the respective affiant's motion to appear telephonically); Pls.' Ex. 42, Boyle ¶¶ 7-8, Pls.' Ex. 41, Lingat Decl. ¶¶ 9-12, *and* Pls.' Ex. 42, Weiner Decl. ¶¶ 7-9 (all reporting the denial of the respective affiant's motion to continue despite inability to obtain evidence due to circumstances created by COVID-19). Defendants' argument that the declarations "have little probative value" is based on inapposite cases involving "anonymous double hearsay" and the claimed standing of anonymous individuals. *See* Defs. Supp. Resp. at 6 (citing *Advance Am. v. FDIC*, No. 14-953 (GK), 2017 WL 2672741, at *8

[3] Plaintiffs have identified the dozens of declarants who are members of one or another of the Organizational Plaintiffs. *See* Pls.' Ex. 57, Tolchin Decl. (ECF No. 29-9) (on behalf of NIPNLG); Pls.' Ex. 59, Voigt Decl. (ECF No. 29-11) (on behalf of AILA); Pls.' Ex. 61, Greenstein Decl. (ECF No. 29-13) (on behalf of IJC).

(D.D.C. Feb. 23, 2017) (declining to rely on "anonymous double hearsay," as distinct from hearsay) and *Young America's Foundation v. Gates*, 560 F. Supp. 2d 39, 50 (D.D.C. 2008) (declining to decide whether plaintiff organization could premise standing on injury to anonymous member)). It is, instead, Defendants whose declarants offer little information of probative value, falling back on a lack of knowledge that is entirely overcome by the specific experiences detailed by Plaintiffs' declarants. *Compare* Defs.' Ex. 1, McHenry Decl. ¶ 88 ("I am also not aware of IJs or the Board systematically failing to use sound judgment in consideration of motions filed during the current situation related to COVID-19, especially after March 20, 2020."), *id.* ¶ 90 ("I am not aware of any motions to continue being filed by Plaintiffs based on these circumstances, nor am I aware of any such motions being denied by IJs due to these circumstances.").

1. In-Person Hearings Continue To Occur And Must Be Postponed

Defendants' response ignores that Plaintiffs have demonstrated a pattern of denials of requests to appear remotely (or grants so belated that they functionally amount to denials), which carry the risk of irreparable injury to health. Indeed, in defending one such occurrence of in-person attendance, Defendants argue "no harm" simply because before the attorney entered the court, which is located within a detention center, his temperature was taken (with a thermometer that appeared to the attorney to be defective, a point to which Defendants do not respond). Defs. Supp. Resp. at 9 (citing Pls. Ex. 51, Beckett Decl. ¶ 6). Defendants entirely fail to address the attorney's concern as to his own safety; that COVID-19 is transmissible by entirely asymptomatic and presymptomatic individuals;[4] and that preparation for and the occurrence of

[4] James R.M. Black, et al. *COVID-19: the case for health-care worker screening to prevent hospital transmission,* The Lancet (Apr. 16, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30917-X/fulltext ("The

an in-person hearing creates multiple risks beyond those involved with actual hearing attendance, NAIJ Amicus Br. at 3-6 (ECF No. 34). This illustrates the need for the relief Plaintiffs request.

As to the other declarations, Defendants' response relies on strained readings of the facts and fails to overcome the overwhelming conclusion that in the absence of the relief Plaintiffs request, in-person hearings for detained individuals will continue to take place, or to be rescheduled at the eleventh hour after substantial risks and harms were already imposed.

First, Plaintiffs cited four declarations demonstrating that "[c]ourts 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." Pls. Supp. Br. at 2:

- **Ex. 9, Terezakis Decl. ¶¶ 32-33 –** Mr. Terezakis went to great lengths to seek a continuance of his client's in person hearing, persisting in the face of pressure from the court to proceed with the hearing and threats that the court would proceed in his absence. That continuance was not granted until the morning of the hearing, *after* his client had already been transferred to the court. This client now has COVID-19, along with at least 49 other detained persons at the same detention center (Buffalo Federal Detention Facility in Batavia, NY). Ex. 40, Terezakis Supp. Decl. ¶ 5. Defendants miss the point by myopically focusing on the fact that the hearing was ultimately rescheduled. Defs. Supp. Resp. at 7.

- **Ex. 31, Steiner Decl. ¶¶ 5, 10 –** Mr. Steiner's declaration describes two motions for continuance that were denied. Defendants assert that these denials preceded EOIR's March 18, 2020 policy memorandum, but the policy memorandum does

number of asymptomatic cases of COVID-19 is significant. In a study of COVID-19 symptomatic and asymptomatic infection on the Diamond Princess cruise ship, 328 of the 634 positive cases (51.7%) were asymptomatic at the time of testing. Estimated asymptomatic carriage was 17.9%. Among 215 obstetric cases in New York City, 29 (87.9%) of 33 positive cases were asymptomatic, whereas China's National Health Commission recorded on April 1, 2020, that 130 (78%) of 166 positive cases were asymptomatic. Moreover, transmission before the onset of symptoms has been reported and might have contributed to spread among residents of a nursing facility in Washington, USA. Furthermore, evidence from modelled COVID-19 infectiousness profiles suggests that 44% of secondary cases were infected during the presymptomatic phase of illnesses from index cases . . . ." (footnotes omitted)); Wei et al., *Presymptomatic Transmission of SARS-CoV-2 – Singapore, January 23-March 16* (April 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm

nothing other than "remind" immigration judges of the regulation permitting them to "grant a motion for a continuance upon a showing of good cause." Defs.' Ex. at 3. It is silent on what constitutes "good cause" and does not state that a concern about COVID-19 is presumptively "good cause." It also does nothing to relieve immigration judges of the burden of performance metrics that effectively serve to punish judges for granting continuances. *Amicus* NAIJ Br. at 6-7 (ECF No. 34).[5]

- **Ex. 35, Boyle Decl. ¶¶ 7-8 –** Defendants speculate that the immigration court may have been right to deny Ms. Boyle's motion to continue because she may not have been diligent in pursuing the necessary evidence. Defs.' Resp. at 7. This hypothetical should be rejected both because it lacks any basis and because it requires Ms. Boyle to have had unusual foresight into the ultimate effects of COVID-19 on immigration proceedings.[6] The core fact remains: her request for a continuance was denied.

- **Ex. 55, Semino Decl. ¶¶ 5-7 –** Defendants do not deny that Ms. Semino's ill client was transported through a detention facility while accompanied by at least one guard, then forced to sit through a hearing in which he could not participate because he was too sick to speak. Instead, Defendants irrelevantly focus on the fact that the hearing was ultimately continued (after it had proceeded for two hours) and that (as of today) his claims for relief have not yet been denied. Defs. Opp. at 7-8.

  In addition to displaying shocking callousness towards a person who, after this ordeal, required intensive care,[7] Defendants' nonresponsive response

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[5] Defendants' suggestion that denial of a motion for continuance is solved by the ability of a court to use VTC, *see* Defs.' Resp. at 7, is not responsive to the concern, as Plaintiffs and NAIJ have shown that VTC proceedings require multiple instances in which social distancing is not observed and is not practical. Pls. Supp. Br. at 4; NAIJ Amicus Br. at 4.

[6] On February 26, 2020, President Trump stated that, with respect to COVID-19, "USA in great shape!" Donald J. Trump (@realDonaldTrump), Twitter (Feb. 26, 2020 8:03 AM), https://twitter.com/realDonaldTrump/status/1232652371832004608

[7] Defendants' citation to *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002) is thus completely beside the point. The issue was not that Ms. Semino's client could not communicate effectively. It is that he was ill to the point of being unable to participate consciously in the hearing at all, and that subjecting him to the two-hour hearing undoubtedly exacerbated the illness that led immediately thereafter to his hospitalization. Further, *Rusu* is distinguishable on its face; it involved an applicant whose hearing was riddled by communication issues, many of which were "self-inflicted" because the applicant refused to accept an interpreter. *Id*. at 319, 324.

Ms. Semino has recently received her client's medical records, which reflect that he had to be transported to the hospital immediately following the hearing. *See* Pls. Ex. 63, Semino Supp. Decl. ¶ 5.

demonstrates that the conditions Plaintiffs describe in fact exist and require immediate remedy. Indeed, the harm caused to Ms. Semino's client cannot now be remedied, as his health has been seriously affected, nor can the health risks to the guard who unnecessarily accompanied him to a hearing that should have been postponed, and to other detained persons in the same facility.

Second, Plaintiffs submitted declarations demonstrating that "[c]ourts 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 –** Defendants do not address Ms. Church's statement in paragraph 11 that "I had requested that the court schedule the bond hearing prior to the individual so that I could appear telephonically on the bond, PRIOR to the individual. . . . If the client obtained bond, the need to physically appear would be remedied as the case would be continued as a non-detained matter. The court could not accommodate my request."

- **Ex. 9, Terezakis Decl. ¶¶ 36-41 –** Defendants do not address that in paragraphs 36-41, Mr. Terezakis states that his request to appear telephonically was not granted until the morning of the hearing, after his client's mother went to the courthouse and provided the court with Mr. Terezakis' letter reiterating his request to appear telephonically. His client's mother was later diagnosed with COVID-19. *Id.* ¶ 42.

- **Ex. 51, Beckett Decl. ¶¶ 4-6 –** As discussed above, Defendants do not deny the core facts in this declaration but instead embrace the denial of a continuance that it describes.

- **Ex. 52, Stump Decl. ¶¶ 5-8 –** Ms. Stump's declaration stated that she "represented a client at an individual merits hearing in the Dallas Immigration Court." She also explained that the immigration judge that heard the hearing participated by VTC from the Immigration Adjudication Center in Falls Church, VA (a common circumstance). Defendants inexplicably and incorrectly assert that her client's proceeding was located in Falls Church, VA[8] and otherwise fail to respond to her core allegation that she was required to attend an in-person hearing.

[8] For the avoidance of any doubt, Plaintiffs are submitting a supplemental declaration from Ms. Stump clarifying that she was directed to continue making all filings in the Dallas Immigration Court. Pls. Ex. 64, Stump Supp. Decl. ¶ 4.

- **Ex. 53, Hartnett Decl. ¶¶ 4-6 –** Contrary to Defendants' implication that Mr. Hartnett ignored that his client was physically transferred to a different detention center and his proceeding was moved to a different immigration court, Defs. Supp. Resp. at 9, those facts were not communicated to Mr. Hartnett before he was required to appear in person for the scheduled hearing. Mr. Hartnett learned of the transfer from his client's wife *four days after* the scheduled hearing. *Ten days after* the scheduled hearing, Mr. Hartnett received DHS's motion to change venue and the court's grant of it. Mr. Hartnett was never afforded the opportunity to oppose this motion.

In the present pandemic circumstances, this disorganization, when coupled with insistence on in-person hearings, is precisely the avoidable and intolerable risk that gives rise to Plaintiffs' claims.[9]

2. "Remote" Hearings Currently Do Not Protect Health And Safety And Due Process

Defendants argue at length that remote hearings protect health and safety and further due process by allowing hearings to go forward during the current health crisis. Defs. Supp. Resp. at 12. This may be so in theory, but as Plaintiffs' substantial evidence demonstrates, in practice, remote hearings are not conducted in a minimally adequate manner sufficient either to provide due process or to protect health and safety. The evidence shows that EOIR's policies and practices regarding the conduct of remote hearings, combined with ICE's policies regarding remote access to detained persons, present a risk to the health and safety of all Plaintiffs and deny Detained Plaintiffs' their right to counsel.[10]

[9] Defendants incorrectly suggest that Plaintiffs cited Ms. Edstrom's declaration as evidence of denials or untimely dispositions of requests for counsel to appear telephonically, Defs. Supp. Resp. at 8, but Plaintiffs cited Ms. Edstrom's declaration in support of the point that necessary persons (e.g., witnesses) have been excluded from ostensibly "remote" hearings. Pls. Supp. Br. at 3.

[10] Examples in the record of individual detained persons who do not want delay in their hearings merely evidence the need for robust remote hearings and remote communication options at detention centers to prepare for hearings that should go forward notwithstanding the health

As discussed in the previous section, continuances are not uniformly granted. EOIR's failure to make clear that COVID-19 is "good cause" to grant a continuance is critical. Without the routine grant of continuances, even remote hearings may be a risk to health and safety in certain circumstances. *See supra* Section A.1 (discussing Semino declaration). And even when remote hearings may be safely conducted, they are not uniformly protective of due process.

The record demonstrates the following ongoing failures with respect to remote hearings:

- Remote access to clients is difficult and limited, rendering it nearly impossible to prepare clients for their hearings;
- Remote participation is unreliable and thus risky, as the courts sometimes do not actually call the attorney (and proceed without his or her participation); and
- Remote participation may exclude necessary parties.[11]

See Pls. Supp. Br. at 2-5, Pls. Ex. 60. Defendants' only response to Plaintiffs' evidence on these points consists of speculation and unsupported assertions. *See* Defs. Supp. Resp. at 15-16 (speculating incorrectly that Ms. Stump filed her motion in the wrong court, speculating without grounds that Mr. Hollithron is incorrect about telephonic participation at the Aurora Immigration Court, and arguing that the inability of courts to remotely hear from witnesses is unimportant as long as written statements were submitted).[12]

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emergency. That certain detained persons might be willing to proceed with a hearing even under the current circumstances thus does not negate the need for the relief Plaintiffs' seek.

[11] Although Defendants challenge Mr. Hollithron's assertion that the Aurora Immigration Court cannot connect both an interpreter and an attorney, they cite only a general statement from Mr. Santoro that immigration judges have access to a service called OpenVoice. Defs. Supp. Resp. at 15. They do not address Mr. Hollthron's specific assertion that, in practice, either he or the interpreter would be forced to appear in person. In other words, that OpenVoice is available does not prove that it is being used.

[12] Defendants also speculated that maybe Ms. Weiner's clients' hearing did not go forward after Ms. Weiner was forced to submit an incomplete asylum application on behalf of her client due to an inability to contact her client. Defs. Supp. Resp. at 11. While it happens that the hearing did not go forward because the court closed unexpectedly the day of the hearing due to COVID-19

Defendants also wrongly argue that if – for any reason or no reason – a hearing ultimately did not go forward as scheduled, it should not matter that a request to continue that hearing or appear remotely was denied. On this thin ground, Defendants dismiss the experiences of Ms. Lingat and Mr. Bennion, in which Ms. Lingat's motion to continue was denied despite an inability to contact her client and her COVID-19 diagnosis and Mr. Bennion's motion to appear telephonically was denied. Defs. Supp. Resp. at 11, 15. Likewise, Defendants suggest there was no harm when Ms. Ford was not called for her client's hearing because the judge simply rescheduled the hearing. Defs. Supp. Resp. at 15. Defendants' position is disingenuous at best. As Ms. Ford explains, her client's first master calendar hearing was called without her, despite having submitted her notice of appearance and taking the appropriate steps to appear telephonically. Ex. 39, Ford Decl. ¶¶ 4-5. Her client reportedly was able to persuade the immigration judge that he had counsel, and the hearing was rescheduled to April 22. *Id.* On April 22, Ms. Ford *again* was not called at the appointed time. However, this time, her client was able to convince the immigration judge to call Ms. Ford, even though the court did not have a record of her appearance. Pls. Ex. 66, Ford Supp. Decl. ¶ 4. This is especially problematic because it was her client's second appearance without counsel and without having articulated a claim for relief. Ms. Ford believes, based on her prior experience, that a less sympathetic judge might have been ordered her client deported at that hearing without any further delay. *Id.* ¶ 5.

concerns, the hearing proceeded on April 20, and the court admitted the incomplete asylum application that Ms. Weiner had previously been forced to submit after her motion for continuance was denied, rather than afford her a continuance to complete the application. Pls. Ex. 65, Weiner Supp. Decl. ¶ 5.

Defendants' arguments underscore the need for a uniform policy that prevents the chaos described by these and other declarants.[13]

3. Defendants Ignore The Important Information Submitted By *Amicus* NAIJ

The National Association of Immigration Judges ("NAIJ") felt compelled to submit a brief *amicus curiae* in this matter to address EOIR's "failure to take appropriate steps with respect to detained hearings" and "strongly advocate[] for a temporary suspension of all in-person hearings for detained persons." NAIJ Amicus Br. at 3, 9. In particular, NAIJ chose to highlight (1) the close contact required among judges, court staff, detained persons, and members of the public to operate immigration courts, (2) the strict quotas that "make immigration judges balance job security against public health," and (3) that Defendants' refusal to suspend in-person hearings is inexcusable in light of the ability to conduct essential court work using telephonic and digital means. *See generally id.*

[13] Defendants also argue that concerns over detained persons' due process rights are not yet ripe and only become ripe upon issuance of a final order of removal. Defs. Supplemental Resp. at 10, 14, 16. This is plainly not true. Access to counsel issues can be addressed outside the context of an individual immigration proceeding. *See Torres v. DHS*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019) (finding due process violation sufficiently alleged where claims are "based on a right protecting the attorney-client relationship from undue burden or interference" and "do not hinge on events at any particular [immigration] proceeding" because the detained persons "assert rights that can be violated without reference to the effect on their underlying [immigration] proceeding."). By contrast, the cases Defendants cite in their response are all cases particular to the removal proceeding, and the analyses address actions or approaches taken by the plaintiff that contributed to the outcome on the merits. *See, e.g., Alianza v. Ashcroft*, 110 F. App'x 768, 769-70 (9th Cir. 2004) (no due process violation where restricted expert witness testimony "would not have provided any evidence specific to [plaintiff's] case" and plaintiff "has not demonstrated prima facie eligibility for the requested relief"); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (no due process violation for denying untimely request for cumulative witness testimony); *Monterroso v. Session*, 695 Fed. App'x 226, 226-27 (9th Cir. 2017) (no due process violation where plaintiff requested a continuance to present a witness on day witness was scheduled to testify, after having been previously granted nine month continuance, and still failed to provide proper witness qualifications).

Defendants' response to NAIJ's brief relies on arguments about what their policies allegedly make "possible." *See* Defs. NAIJ Amicus Resp. at 2 (quoting Defs. Ex. 1, McHenry Declaration ¶ 47 about use of VTC or telephone hearings "to the maximum extent practicable consistent with law"); *see also* Hr'g Tr. 43:7-19 (same). But Defendants fail to address NAIJ's observations, based on consistent reports from its members, that this policy is not stopping in-person hearings or providing hearings consistent with social distancing mandates. A policy that generically permits (but does not require) that continuances be granted is meaningless in the face of metrics that require immigration judges to deny continuances or face serious professional consequences, including potentially termination.

For example, NAIJ's brief describes the strict quotas imposed by EOIR, which have not been relaxed to accommodate COVID-19-related case management decisions. NAIJ Amicus Br. at 6.[14] "Judges who do not meet these deadlines risk being found unsuccessful in their performance appraisals, which may lead to them losing their jobs." *Id*. This risk is particularly acute for the "approximately a quarter of all immigration judges [who] are still on probation, meaning that they can be fired *without cause* or simply not kept on as permanent hires due to failure to produce these arbitrary number of case completions." *Id*. at 6-7 (footnote omitted).[15]

[14] Citing the Memorandum from James R. McHenry III to all Immigration Judges and Staff, Case Priorities and Immigration Court Performance Measures App. A (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download, and EOIR Performance Plan, ABA Journal, https:/ /www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf..

[15] While Plaintiffs' claims concern Defendant's agency action and not those of individual judges, Plaintiffs contacted the declarants who provided evidence of a request for adjournment being denied or not decided, as well as those who had "remote" hearings conducted or scheduled to be conducted in the future without protecting health or due process, as shown in Exhibit 60. There were twenty-two instances in total. Declarants provided information for twenty instances and fourteen of the twenty instances were before probationary judges. *See* Pls. Ex. 62, Immigration Judge Probationary Status Chart; *see also* Pls. Ex. 60, Declaration Summary Chart.

As NAIJ observes, these policies, and Defendants' failure to relax them to accommodate the pandemic, "creates a warped incentive structure in which immigration judges . . . must weigh protection of the public health against their own job security." *Id*. at 7. Defendants have no response.

Similarly, Defendants fail to respond to the experiences that NAIJ members, and other declarants in this case, are actually having in courtrooms across the country. NAIJ asserts that Defendants' failure to suspend all in-person hearings causes "immigration judges and court staff to continue to travel to detained courtroom settings and to work shoulder-to-shoulder in offices and hearings" because "[t]he design of [the] courtrooms and common workspace in the vast number of [court] locations simply does not allow for social distancing." NAIJ Amicus Br. at 3. Additionally, "detainees are frequently brought to court in large groups, or are required to wait outside courtrooms in large groups," and there is "tremendous concern" for "the lack of sufficient cleaning and protective supplies for staff and all who come to court." *Id*. at 4-5. Even where courts have been exposed to test-confirmed COVID-19 individuals, EOIR "close[s] courts only on an ad hoc basis" and fails to "effectively and efficiently communicate the closures" or timely communicate the risk to others who have been possibly exposed, "resulting in risk of imminent injury to all court participants." *Id*. at 8.

Lastly, EOIR's claim to use VTC and OpenVoice conference call technology, which does not impose a limit to the number of individuals who can participate in a hearing, simply proves that the relief Plaintiffs seek is feasible.[16] NAIJ views these technologies as a viable "alternative

[16] Plaintiffs note that despite the approval of these technologies, courts have failed to consistently implement them, still relying on outdated technology and in one instance denying a request for telephonic appearance due to the inability to conference more than two individuals on a call. *See, e.g.*, Standing Order: Telephonic Appearance due to COVID-19 in detained cases before Judge Mark Jebson in the Detroit Immigration Court (Detroit Immigration Ct. Mar. 26, 2020) (stating

to in-court hearings," and supports the suspension of all in-court proceedings for the duration of the pandemic, which is consistent with the relief requested by Plaintiffs. *See id*. at 9.[17] Defendants have therefore failed to refute the evidence of Defendants' arbitrary and capricious agency actions, which have led to chaos in immigration courts and exposed all participants in the immigration court system to irreparable harm.

B. The Requested Relief Would Cause No Harm To Defendants

Defendants make much of the fact that *some* immigration judges in *some* immigration courts have proceeded with hearings remotely or have granted continuances. *See, e.g.,* Defs. Supp. Resp. at 8 (arguing that immigration judges do not "refus[e] to respond to reasonable requests for continuances"); *id.* at 9 (arguing that immigration judges do not "refuse to allow attorneys to participate by telephone"). But Plaintiffs need not prove that *no* hearings proceed remotely or that *all* continuances are denied to demonstrate an intolerable risk of irreparable injury, which they have amply shown through concrete evidence of a consistent pattern of action that impairs health and basic rights. In fact, as noted above, Defendants' argument that what Plaintiffs seek is permissible (but not mandatory) and occurs in some instances disproves their argument that Plaintiffs' proposed relief would have a "disruptive effect" on the operations of the immigration courts. *See* Defs. TRO Opp. at 40. Indeed, it is not clear what "burden and attendant harm" Defendants would suffer, *id.*, given that Defendants have never specified it

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that because "the Court can only accommodate two telephonic appearances at one time," if a respondent requests a non-Spanish interpreter, "the respondent will have to appear in person to allow" room on the line for a telephonic interpreter). Thus, the relief requested by Plaintiffs remains urgently necessary.

[17] At the hearing, Defendants noted that "the director has . . . directed all the immigration courts to . . . use remote means as much as possible." Hr'g Tr. at 34:22-24, 35:10-12. Plaintiffs therefore simply request to hold Defendants to their word and ensure that these remote methods promoted by Defendants are actually utilized and implemented nationwide, which would eliminate the need for in-person hearings but still preserve due process rights.

beyond vague references to "flexibility," Hr'g Tr. 32:4-6, the need for which has never been explained. Defendants have never justified why any COVID-19-related continuance of an in-person hearing should be denied before the emergency is over. Instead, Plaintiffs seek here to convert the ad hoc decisions of individual immigration judges and courts into a systematic temporary solution which immigration judges themselves have endorsed. *See* NAIJ Amicus Br. at 9.

C. Plaintiffs Have Standing

Defendants' arguments that Organizational Plaintiffs lack standing are based on incorrect applications of both law and fact. Defendants' reliance on third-party standing cases, Defs. Supp. Resp. at 5, are inapposite because that is not the basis for the claim to a TRO.[18] Defendants' arguments against standing to seek injunctive relief are similarly misplaced. They cite *Summers v. Earth Island Institute*, Defs. TRO Opp. at 42, but in that case, unlike here, the organizational plaintiff had not established "that at least one identified member had suffered or would suffer harm." 555 U.S. 488, 494-500 (2009). Their citation to *Monsanto Co. v. Geertson Seed Farms*, TRO Opp. at 42, is similarly inexplicable, as the Supreme Court there found that the

[18] If Plaintiffs were asserting third-party standing, both cases would support Plaintiffs. In *Morales-Santana*, the Supreme Court found that the plaintiff satisfied third-party standing to "vindicate his father's right to the equal protection of the laws" and noted that while a party must generally "assert his own legal rights," there is an exception where "the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessors' ability to protect his own interests." 137 S. Ct. 1678, 1689 (2017) (internal quotation marks and citations omitted). Similarly, the discussion in *American Immigration Lawyers* cites to the Supreme Court's decision in *Singleton v. Wulff*, noting the "Supreme Court has also recognized third party standing when a law, though not punishing the litigant, directly interferes with a protected relationship between the litigant and third party." 199 F.3d 1352, 1360-61 (D.C. Cir. 2000). Plaintiffs here would pass both tests for third-party standing because detained persons' lack of access to counsel and due process makes them unable to assert their own legal rights and interferes with their protected right to counsel.

plaintiffs had standing to seek injunctive relief for harms to themselves stemming from agency action, 561 U.S. 139, 156-57, 163-65 (2010), which is what Plaintiffs seek here.

Defendants confuse the relevant standing requirements and base their arguments on issues not present in the case, effectively failing to dispute Plaintiffs' actual standing arguments. Here, Organizational Plaintiffs meet the associational standing requirements directly, because their members would otherwise have standing to sue in their own right. *See* Pls. TRO Reply at 13-15. Each Organizational Plaintiff submitted a declaration providing the names of members who submitted their own declarations as part of this litigation. *See* Pls. Ex. 57, Tolchin Decl. (on behalf of NIPNLG); Pls. Ex. 59, Voigt Decl. (on behalf of AILA); Pls. Ex. 61, Greenstein Decl. (on behalf of IJC). The direct and first-person support they have provided far surpasses the requirement that "at least one member" of the organization has "suffered or imminently will suffer, an injury-in-fact. *See Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006). In their declarations, individual members describe the concrete and particularized harm they face as a result of Defendants' arbitrary and capricious agency action when they are required to appear in person for immigration hearings, putting them at imminent risk of contracting COVID-19. The declarations additionally describe the injuries they face as a result of being prevented access to clients and potential clients, which interferes with their ability to provide adequate legal representation.[19] Organizational Plaintiffs have therefore sufficiently

[19] To the extent Defendants conflate the zone-of-interest analysis with standing, the Supreme Court in *Lexmark International, Inc. v. Static Control Components, Inc.* clarified that "prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons has a right to sue under this substantive statute." 572 U.S. 118, 127 (2014) (internal quotation marks and citations omitted). For the reasons stated in Plaintiffs' TRO reply brief, they fall within the zone of interest to establish a statutory cause under the APA. Pls. TRO Reply at 16-17.

established injury in fact as a direct result of Defendants' agency action, as well as traceability to Defendants and the redressability of Plaintiffs' injuries if the relief sought is granted.

D. The Requested Relief Is Necessary And Proportional To Plaintiffs' Injuries and Claims

Plaintiffs ask for limited relief to address risks and injuries resulting from EOIR's "chaotic, inconsistent, and confusing" policy of leaving its COVID-19 response in the hands of individual immigration judges who are bound by EOIR's performance metrics. *See Amici* Former Fed. Immig. Judges and Members of Bd. of Immig. App. Br. at 3 (ECF No. 20). Plaintiffs seek a TRO requiring EOIR to suspend in-person non-bond hearings, convert bond hearings into remote hearings, and permit COVID-19-related continuances as of right. Plaintiffs further ask that EOIR be directed to develop and promulgate policies that ensure remote hearings are conducted in a minimally adequate manner. In order to ensure this relief is effective, Plaintiffs ask that ICE be required to promulgate policies facilitating remote communication, both with counsel and with immigration courts.

Piecemeal relief would be no relief at all. And Plaintiffs are entitled to the full relief they seek: uniform agency action. First, plaintiffs bring claims under the APA because EOIR and ICE have adopted an arbitrary, capricious, and unlawful policy in response to the global COVID-19 pandemic. *See* Pls. TRO Br. at 32-24. When an agency has promulgated an unlawful policy, the appropriate relief is vacatur of the policy itself. *See Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 67 (D.D.C. 2019).

Second, requiring EOIR to suspend in-person hearings for detained persons pending the promulgation of appropriate COVID-19 policies is necessary to halt ongoing injury to Plaintiffs and members of Organizational Plaintiffs. Plaintiffs' declarations prove that immigration courts continue to deny, or constructively deny, requests for continuances or remote hearings, despite

the risks of COVID-19 infection. *See* Pls. Ex. 3, Church Decl. ¶ 11; Pls. Ex. 9, Terezakis Decl. ¶¶ 36-41; Pls. Ex. 31, Steiner Decl. ¶¶ 5, 10; Pls. Ex. 35, Boyle Decl. ¶¶ 7-8; Pls. Ex. 51, Beckett Decl. ¶¶ 4-6; Pls. Ex. 52, Stump Decl. ¶¶ 5-8; Pls. Ex. 53, Hartness Decl. ¶¶ 4-6; Pls. Ex. 55, Semino Decl. ¶¶ 5-7. Defendants' policy of leaving COVID-19 accommodations in the hands of individual immigration judges, which "breached the plaintiff[s'] (and the public's) entitlement to non-arbitrary decision making," *Make the Road*, 405 F. Supp. 3d at 72, has exposed immigration lawyers and their clients across the country (as well as the public) to the risk of infection, illness, and death. Moreover, such a suspension would do no more than put detained persons and their counsel on the same footing as non-detained persons and their counsel. Indeed, demonstrating that variations in local conditions are no bar to a consistent nationwide policy, EOIR recently extended through May 15 its suspension of all hearings for non-detained persons.[20]

Third, requiring ICE to promulgate policies ensuring remote hearings can be effectively conducted from their detention centers is a necessary supplement to the above relief, without which immigration lawyers and detained persons will either be unable to effectively prosecute their cases or be required to risk COVID-19 infection by appearing in-person. *See, e.g.*, Ex. 52, Stump Decl. ¶¶ 5-7; Ex. 54, Edstrom Supp. Decl. ¶¶ 3-4; Ex. 38, Bennion Decl ¶¶ 2-3 (noting immigration courts and detention centers' lack of capacity to hold fully remote hearings). The same applies to the requirement that ICE ensure detained persons can communicate remotely with their counsel and with the court when requesting continuances, without which requirement the above equitable relief would be a dead letter.

[20] EOIR, @DOJ_EOIR, Twitter (April 21, 2020, 8:30 A.M.), https://twitter.com/DOJ_EOIR/status/1252575545595965440.

E. Update On Reynaldo Guerrero-Cornejo

As requested by the Court at the April 15 hearing, the following update is provided concerning plaintiff Reynaldo Guerrero-Cornejo. Mr. Guerrero-Cornejo's individual merits hearing proceeded as scheduled today, April 24, 2020. Pls. Ex. 67, Sud-Devaraj Decl. ¶ 4. At the hearing, the immigration judge ordered cancellation of Mr. Guerrero-Cornejo's removal and his immediate release from detention. *Id.*

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 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 24, 2020
Washington, D.C.

Respectfully submitted,

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