UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, *et al.*, Plaintiffs, v. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *et al.*, Defendants.	Civil Action No. 1:20-cv-00852-CJN

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

For the reasons discussed in the Government's Opposition to Plaintiffs' TRO Motion, this Court should deny Plaintiffs' extraordinary request to have this Court broadly suspend all in-person immigration-court hearings and assume oversight over the immigration-detention system. Nothing in Plaintiffs' Supplemental Brief or their new declarations—which describe only a handful of the hundreds of thousands of immigration hearings that occur every year—supports a different result. To the contrary, Plaintiffs' declarations confirm that the Executive Office for Immigration Review (EOIR) and U.S. Immigration and Customs Enforcement (ICE) are acting reasonably and responsibly to allow detained aliens' proceedings to safely continue. And none of the declarations show that this Court should issue nationwide relief when the Organizational Plaintiffs do not have standing to assert claims on behalf of individual aliens, Plaintiffs do not raise class claims, and the Immigration and Nationality Act (INA) prohibits courts from granting injunctive relief to anyone but the Individual Plaintiffs.

ARGUMENT

I. Neither the APA Nor the Individual Plaintiffs' Rights to Counsel or Procedural Due Process Are Violated.

Plaintiffs couch much of their supplemental brief as an "update" on the Individual Plaintiffs' immigration proceedings. Supp. Br. 4 (ECF No. 29-1) (capitalization altered); *see also id.* at 4–7. But Plaintiffs' update does not show that EOIR or ICE has acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA) or that Defendants have denied or will deny the Individual Plaintiffs their statutory right to counsel or their right to procedural due process. Plaintiffs fail again to carry their heavy burden of "showing clearly" that they are entitled to indiscriminate, nationwide preliminary injunctive relief. *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997)

(quotation makes and citation omitted), *aff'd*, 159 F.3d 636 (D.C. Cir 1998).

As the government explained, *see* TRO Opp. 29–39 (ECF No. 19), Plaintiffs fail to demonstrate a likelihood of success on their claims that EOIR's and ICE's alleged actions violate the APA or the Individual Plaintiffs' rights to counsel or procedural due process. As to their APA claim, Plaintiffs must identify a reviewable final agency action and demonstrate that the action is arbitrary and capricious by showing a strong likelihood that "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see* TRO Opp. 29–36. As to their statutory right-to-counsel claim, Plaintiffs must show that the conditions of confinement at ICE facilities or the circumstances of their future immigration hearings are "tantamount to denial of counsel." *Biwot v. Gonzalez*, 403 F.3d 1094, 1098 (9th Cir. 2005); *see* TRO Opp. 4, 36–39. And as to their procedural-due-process claim, Plaintiffs must show that they were "denied a full and fair opportunity to present [their] claims" or that "the IJ or BIA otherwise deprive[d] [them] of fundamental fairness." *Jin Li v. Sessions*, 700 F. App'x 49, 51–52 (2d Cir. 2017) (internal citations, quotation marks, and alterations omitted); *see* TRO Opp. 4, 36–39. They must also "allege some cognizable prejudice fairly attributable to the challenged process." *Id.* "An error in the removal proceedings does not necessarily implicate the Fifth Amendment. Rather, ... a defect must have been such as might have led to a denial of justice to trigger due process concerns." *Garza-Moreno v. Gonzales*, 489 F.3d 239, 241 (6th Cir. 2007) (quotation marks and citation omitted).

The Supplemental Brief falls far short of showing that the Individual Plaintiffs are likely

to succeed on any of these claims. Plaintiff Guerrero Cornejo's hearing is currently scheduled for April 24, 2020, at the Tucson Immigration Court, where "[d]etainees regularly appear by [video teleconference]" (VTC), Gov't Ex. 16, Second Decl. of Acting Chief Immigration Judge Christopher Santoro ¶ 11, and where Plaintiffs admit that attorneys may appear telephonically as a matter of course, Compl. App. 8; *see also* Supp. Br. 5. Since April 6, 2020, Guerrero Cornejo has twice used the telephones in the La Palma Correctional Center to call his attorney Monika Sud-Devaraj. Pls.' Ex. 58, Second Sud-Devaraj Decl. ¶ 6 (ECF No. 29-10). Sud-Devaraj states without elaboration that these calls were "unsuccessful[]," *id.*, but the fact remains that she and her client had opportunities to consult by phone as authorized by the INA. Sud-Devaraj admits that she expects Guerrero Cornejo's hearing to proceed remotely on April 24, with the immigration judge and the interpreter together in the Tucson Immigration Court, Guerrero Cornejo appearing by VTC from the La Palma Correctional Center, the DHS attorney appearing by VTC, and with Sud-Devaraj appearing by telephone. *Id.* ¶ 7; Supp. Br. 5. In other words, Guerrero Cornejo's hearing is expected to proceed entirely remotely following at least two opportunities for him to consult with his attorney. And there is no evidence that Guerrero Cornejo ever requested a continuance of the hearing or that a continuance was denied. *See* Gov't Ex. 17, Decl. of Elizabeth Burgus ¶ 3. There is no need for this Court to intervene.

Sud-Devaraj states that she "understand[s]" that some witnesses will "have to" appear in person at the Tucson Immigration Court, *see* Second Sud-Devaraj Decl. ¶ 7, but she does not explain the basis for her understanding, nor does she state that she filed a motion to allow the witnesses to appear remotely in Guerrero Cornejo's case or any other. Sud-Devaraj also claims that her appearance by telephone might impair her ability to learn from Guerrero Cornejo's "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 questions, etc." Supp. Br. 5–6 (quoting Second Sud-Devaraj Decl. ¶ 8). But Sud-Devaraj never moved to continue the hearing, and an attorney's speculation that a telephonic hearing may make it difficult to read her client's body language and facial expressions is no basis to find that appearing by phone is tantamount to denial of counsel or denies Guerrero Cornejo a full and fair opportunity to present his claims. Indeed, the courts of appeals—the only courts with jurisdiction to review such claims, 8 U.S.C. §§ 1252(b)(9), (a)(5); TRO Opp. 20–26—have concluded that such claims without more do not violate due process. *See*, *e.g.*, *United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997) (no due-process violation where "no attorney was physically present to represent [the alien] at the deportation hearing"); *cf. Barrera-Quintero v. Holder*, 699 F.3d 1239, 1248 (10th Cir. 2012) ("[T]he nonlawful resident was given the opportunity for a full and thorough examination of the witness [by telephone], and his right to procedural due process was not violated here by the taking of telephonic testimony."). And such a claim requires Guerrero Cornejo to allege that the telephonic appearance caused substantial prejudice, which he cannot show until the hearing occurs. *See Rodriguez-Rojas v. U.S. Atty. General*, 564 F. App'x 561, 563 (11th Cir. 2014) (no due-process violation when alien "cannot show that the outcome of the proceedings would have been different had the witness testified in person or via televideo"); TRO Opp. 36–39.

Plaintiff Napoles Vaillant's hearing is still scheduled for June 22, 2020. Supp. Br. 6. Plaintiff Rodriguez Cedeno's hearing is still scheduled for August 5, 2020. *Id.* Both will appear by VTC before the Tucson Immigration Court. Second Santoro Decl. ¶ 11. Plaintiff Aliaga-Cobas's hearing is still scheduled for June 2, 2020. Supp. Br. 6. The hearing will occur by VTC before the Eloy Immigration Court. Second Santoro Decl. ¶ 9. Plaintiff Velasquez Quiala's hearing is still scheduled for May 19, 2020, Supp. Br. 6–7, and he will appear by VTC before the Oakdale

Immigration Court, *see* Second Santoro Decl. ¶ 10. Velasquez Quiala's attorney Homero López, Jr. admits that the continuance of Velasquez Quiala's hearing from April 30 to May 19 was "due to the travel restrictions put in place by Louisiana's stay at home order as well as the extreme limitations on meeting with clients at [the Pine Prairie ICE Processing Center] due to the COVID-19 outbreak." Pls.' Ex. 56, Second López Decl. ¶ 3 (ECF No. 29-8). López's admission further underscores that individual immigration courts can and do account for the effect of COVID-19 in their jurisdictions when considering how to proceed with hearings for detained aliens.

Because the Individual Plaintiffs' hearings are not imminent and their alleged injuries are speculative, Plaintiffs fail to demonstrate that this Court should intervene in their proceedings. And Plaintiffs' update fails to show why a nationwide TRO is warranted, since any alleged potential harm is confined to the Individual Plaintiffs' proceedings and is subject to administrative and judicial review. *See* 8 U.S.C. §§ 1252(b)(9), (a)(5); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029, 1033, 1035 (9th Cir. 2016); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 76 (D.DC. 2018).

II. EOIR and ICE Continue to Reasonably Exercise Their Authority to Conduct Immigration Proceedings and Oversee Immigration Detention Centers.

Plaintiffs also submit declarations from non-party attorneys relating to anonymous aliens in an effort to show that "in-person hearings continue to take place for a variety of reasons." Supp. Br. 2; *see also id.* at 2–3. As explained, *see* TRO Opp. 16–20, these attorneys do not have standing to complain about any alleged denials of the right to counsel or procedural due process because those rights belong to aliens, not attorneys. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017); *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000) (rejecting third-party standing "to raise claims, whether statutory or constitutional, on behalf of aliens," noting "the judicial presumption against suits seeking relief for a large and diffuse group of individuals, none of whom are party to the lawsuit"). Moreover, the attorneys do not identify

their clients, and Plaintiffs identified only a few of the anonymous clients when Defendants asked, *see* Decl. of Alexander J. Halaska ¶¶ 2–4 (filed concurrently), ensuring that Defendants could not investigate most of Plaintiffs' claims. The declarations therefore have little probative value. *See, e.g.*, *Advance America v. FDIC*, No. 14-cv-953, 2017 WL 2672741, at *8 (D.D.C. Feb. 23, 2017) ("Much of Plaintiffs' evidence is problematic. Some of it is hearsay—indeed anonymous double hearsay—which the Court considers unreliable and of little persuasive value."); *Young America's Foundation v. Gates*, 560 F. Supp. 2d 39, 50 (D.D.C. 2008) (noting the "difficulties" of relying on "anonymous student members" because there was no way of knowing whether the individuals were still students whose injuries would be remedied by a favorable decision). That is particularly true in this preliminary context, where Plaintiffs' standing claims "must be evaluated under the heightened standard for evaluating a motion for summary judgment in determining whether or not to grant the motion for preliminary injunction." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95, 104 (D.C. Cir. 2019) (quotation marks and citation omitted); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912 (D.C. Cir. 2015).

But even taking the declarations at face value, none of Plaintiffs' belated allegations relating to a handful of non-parties, other immigration courts, or other detention centers show that EOIR or ICE are acting arbitrarily and capriciously or denying aliens their statutory rights to counsel or procedural due process. To the contrary, the allegations on their face confirm that EOIR and ICE are acting reasonably and responsibly in light of the constraints imposed by COVID-19.

First, Plaintiffs claim that their evidence about only four immigration attorneys' clients—out of the hundreds of thousands of hearings that occur each year, *see* Gov't Ex. 18, EOIR Adjudication Statistics (628,874 hearings conducted in the first quarter of FY 2020, 34,965 of which were by VTC)—shows 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." Supp. Br. 2. But even as to these four attorneys' clients, Plaintiffs' declarations do not support that assertion. For example, the hearing of one of attorney George Terezakis's clients was rescheduled on the date of the hearing after Terezakis withheld his consent to allow the hearing to proceed by telephone and refused to show up for the hearing. Pls' Ex. 9, Terezakis Decl. ¶ 33 (ECF No. 7-10). (And another of Terezakis's clients has been released from detention since the date Terezakis signed his declaration, *see* Halaska Decl. ¶ 3, showing that much of Plaintiffs' information is potentially outdated.) Attorney Nicholas Steiner alleges that an immigration judge's clerk in the Baltimore Immigration Court "advised that [the judge] was inclined to deny all motions for continuance made on the basis of COVID-19," Pls.' Ex. 31, Steiner Decl. ¶ 5 (ECF No. 7-32), but his allegation pre-dates the issuance of EOIR Policy Memorandum 20-10, which among other recommendations encourages the use of VTC "to the maximum extent practicable in accordance with the law," Gov't Ex. 2, EOIR Memo 2–4. Attorney Allison Boyle claims that an immigration judge in the San Antonio Annex Immigration Court denied her request for a continuance of her client's April 7, 2020 hearing to allow her to obtain her client's medical records. Pls' Ex. 35, Boyle Decl. ¶¶ 7–9 (ECF No. 22-2). Defendants were unable to investigate this allegation because Boyle does not identify her client in the declaration and Plaintiffs did not identify the client when asked. *See* Halaska Decl. ¶¶ 2–4. Regardless, the Court cannot say that the denial of the continuance was unreasonable because Boyle does not explain, for example, how long the hearing had been scheduled before she requested a continuance, that she was diligent in attempting to gather this evidence before the COVID-19 pandemic began, or that she was unable to obtain the evidence before the pandemic began. Attorney Veronica Semino claims that an immigration judge at the

Buffalo Immigration Court denied her request for a continuance, but Semino's declaration shows that all parties appeared remotely, that the immigration judge ultimately continued the hearing to a later date, and that the judge has not denied Semino's client's claims for relief. Pls.' Ex. 55, Semino Decl. ¶¶ 4–7, 9 (ECF No. 29-7). In other words, none of the declarations show that immigration judges are refusing to respond to reasonable requests for continuances in a manner that endangers attorneys or aliens or deprives aliens of their rights to counsel or due process.

Second, Plaintiffs argue that evidence submitted by only six immigration attorneys shows 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." Supp. Br. 2. But the declarations do not support this allegation, and at points refute it: Attorney Michelle Edstrom admits that since she submitted her first declaration in this case, her motion to appear by telephone before an immigration judge in Dallas—a judge whom Edstrom previously claimed "almost never grants telephonic hearings," Pls.' Ex. 28, First Edstrom Decl. ¶ 7 (ECF No. 7-29)—was granted. Pls.' Ex. 54, Second Edstrom Decl. ¶ 4 (ECF No. 29-6). Attorney Susan Church states that she "did not feel comfortable letting [her] clients go to court without appearing personally," Pls.' Ex. 3, Church Decl. ¶ 9 (ECF No. 7-4), not that an immigration judge denied a request to appear by telephone. Attorney George Terezakis states that he withheld his consent to allow his client's immigration hearing to proceed by telephone, not that his request to participate telephonically was denied. Terezakis Decl. ¶ 33. Attorney Nicholas Steiner alleges that a single immigration judge at the Baltimore Immigration Court denied two requests for continuances in separate proceedings, *see* Steiner Decl. ¶ 5, but Steiner's allegation pre-dates the issuance of EOIR's Policy Memorandum reminding judges of their authority to grant continuances for good cause and establishing a policy

of conducting remote immigration proceedings to the maximum extent allowed by law, *see* EOIR Memo 2–4; Gov't Ex. 1, Decl. of EOIR Director James McHenry ¶ 47 (ECF No. 19-2). Attorney Eduardo Beckett states that an immigration judge at the Otero Immigration Court declined to allow him to appear by telephone because "the court lacked the technological capability to have [Beckett], [his] client, and the interpreter all participate in the hearing remotely," Pls.' Ex. 51, Beckett Decl. ¶ 6 (ECF No. 29-3), but Beckett also admits that the detention center screened him for COVID-19 before permitting him to enter by taking his temperature, *see id.* ¶ 9, consistent with both EOIR and ICE guidance. Attorney Kelli Stump states that no action was taken on a motion that she submitted to the Dallas Immigration Court to appear telephonically for a hearing scheduled at the Falls Church Immigration Adjudication Center in Virginia, but Stump does not explain why she would submit the motion to the Dallas Immigration Court instead of the Falls Church location where the case was pending. *See* Pls.' Ex. 52, Stump Decl. ¶¶ 4–5, 8 (ECF No. 29-4); *see also* Second Santoro Decl. ¶ 16. And although attorney Matthew J. Hartnett states that his motion to appear telephonically before the York Immigration Court was denied, it appears from Hartnett's declaration (which, because of Plaintiffs' failure to identify Hartnett's client, Defendants were unable to investigate) that his client's case was transferred to a different docket. Pls.' Ex. 53, Hartnett Decl. ¶¶ 4–5, 7–8 (ECF No. 29-5). It makes sense, then, that Hartnett's motion to appear telephonically at the York Immigration Court would not have been granted, as the case was apparently transferred to a different court. In sum, these few declarations do not show that immigration judges refuse to allow attorneys to participate by telephone and do not support indiscriminate nationwide relief.

Third, Plaintiffs argue that their limited evidence from two immigration attorneys shows that "immigration court actions frequently result in other limitations of the right to counsel or due

process rights," such as "the ability to obtain evidence due to the COVID-19 pandemic, and the exclusion of a necessary person from participating in the proceeding." Supp. Br. 3. But the declarations' support for this claim is weak, and that spotty support does not come close to showing that this is true in all 69 immigration courts nationwide. Attorney Michelle Edstrom claims that the immigration judge "did not permit [] witnesses to appear telephonically or in person" at an April 2, 2020 hearing, and "[her] client was forced to proceed with the hearing without the benefit of the witnesses' testimony." Second Edstrom Decl. ¶ 4. But she fails to inform the Court that she submitted the witnesses' testimony through declarations. *See* Gov't Ex. 19, Decl. of Phillip Rimmer ¶ 3. That does not amount to a due-process violation absent an actual demonstration of prejudice after the fact. *See, e.g.*, *Alianza v. Ashcroft*, 110 F. App'x 768, 769 (9th Cir. 2004) (no denial of due process where immigration judge "restrict[ed] the breadth of [the alien's] direct testimony and refus[ed] to permit [the alien's] expert witness to testify" because the alien "d[id] not demonstrate that he was prejudiced by the IJ's conduct"); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (IJ's decision to "exclud[e] the telephonic testimony of three witnesses" did not violate due process "because, in addition to the untimeliness of the request, there were other witnesses present and prepared to testify in person as to the same character evidence"); *Monterroso v. Sessions*, 695 F. App'x 226, 226–27 (9th Cir. 2017) (no denial of due process where immigration judge refused to grant alien's request "for a further continuance to present testimony from an expert witness where it was made on the day the witness was scheduled to testify" and alien "had previously been granted a nine-month continuance to present the witness"). Attorney Allison Boyle claims that an immigration judge denied a continuance to allow her to obtain her client's medical records from "various hospitals" that were unable to provide them by the hearing date because of COVID-19, Boyle Decl. ¶¶ 3, 8, 10, but because Boyle does not say, for example, how

long the hearing had been scheduled, whether she was diligent in attempting to procure these records, or that she could not have procured them before the COVID-19 pandemic began, the Court cannot say that the denial of the continuance was unreasonable and warrants a nationwide TRO.

Fourth, Plaintiffs list five additional "[e]xamples" in their "accompanying table" (Pls.' Ex. 60 (ECF No. 29-12)) that they do not address in their brief, *see* Supp. Br. 3, likely because those declarations also lack any evidence to support Plaintiffs' claims. Laura Rivera, the director of the Southeast Immigrant Freedom Initiative of the Southern Poverty Law Center (SIFI), alleges that an anonymous "SIFI attorney" "felt compelled to attend two court hearings" at the Folkston ICE Processing Center, despite acknowledging the court's standing order allowing attorneys to appear telephonically. Pls.' Ex. 6, Rivera Decl. ¶ 23 (ECF No. 7-7). Similarly, attorney Kelly Morgan says that she "felt it necessary to appear in person" for a hearing at the Boston Immigration Court "[d]espite being permitted to appear telephonically." Pls.' Ex. 10, Morgan Decl. ¶ 4 (ECF No. 7-11). Attorney Stephanie Marzouk attended a hearing at the Boston Immigration Court without even requesting a telephonic appearance, apparently "because of [her] prior unsuccessful effort to appear telephonically," in which she had missed the court's telephone call. Pls.' Ex. 48, Marzouk Decl. ¶¶ 4, 6 (ECF No. 22-15). Attorney Joelle Eliza M. Lingat alleges that a motion to continue a hearing at the Elizabeth Immigration Court was denied, but she admits that the hearing later was continued because the court was closed that day. Pls.' Ex. 41, Lingat Decl. ¶¶ 14, 17 (ECF No. 22-8). And although attorney Jordan Weiner alleges that his motion to continue a hearing to submit an asylum application at the Elizabeth Immigration Court was denied, he admits that he simply mailed the asylum application to the court instead, and he does not say that the hearing still went forward. Pls.' Ex. 42, Weiner Decl. ¶¶ 7, 9 (ECF No. 22-9). None of these or Plaintiffs' other declarations come close to demonstrating that EOIR or ICE have acted arbitrarily and capriciously

and that emergency nationwide relief is warranted.

III. Remote Hearings Adequately Protect Health and Due Process.

Plaintiffs next argue that their new evidence shows that "'remote' hearings often fail to protect health or due process," and claim that the declarations discussed above "demonstrate[] that the availability of discretion, without clear direction to exercise it, is insufficient to prevent irreparable injury." Supp. Br. 3 (some capitalization altered); *see also id.* at 3–4. They are wrong.

First, remote hearings protect individual and community health because they facilitate social distancing, which in turn prevents or reduces the risk of COVID-19 transmission. Remote proceedings are consistent with CDC guidance for detention settings, which recommends that detention facilities "[i]dentify lawful alternatives to in-person court appearances, *such as virtual court*, as a social distancing measure to reduce the risk of COVID-19 transmission." Gov't Ex. 20, U.S. Ctrs. for Disease Control and Prevention, Interim Guidance on Management of Coronavirus 2019 in Correctional and Detention Facilities 6 (emphasis added) (cited at TRO Mot. 3 n.4). Indeed, that is why Plaintiffs' TRO Motion asks this Court to suspend in-person hearings and permit only remote proceedings. *See* Mot. 2–3 & n.4.

Second, the use of remote technology furthers due process here because it allows immigration proceedings to continue during a public-health emergency that otherwise might delay those proceedings and increase the attendant time that an alien spends in immigration detention. As EOIR Director McHenry explains, "for detained aliens, both bond proceedings and removal proceedings provide a potential mechanism for release from custody, and the blanket postponement of all detained cases would deprive aliens of the opportunity to avail themselves of that mechanism." McHenry Decl. ¶ 31. "Between March 17 and April 9, 2020, for example, IJs either terminated proceedings or granted an application for relief or protection from removal for approximately 334 detained aliens, who may now be amenable to release from detention, but who

would not necessarily have had that opportunity if their proceedings had been postponed." *Id.* Indeed, Plaintiffs' own declarations show that aliens want their proceedings to go forward. *See, e.g.*, Pls.' Ex. 22, Hollithron Decl. ¶ 13 (ECF No. 7-23) ("I asked one of my clients who has an upcoming final hearing whether he would allow me to ask for a continuance based on the Coronavirus ... and he emphatically rejected the idea because he has already been detained for seven months."); Pls.' Ex. 26, Green Decl. ¶ 5 (ECF No. 22-3) ("My client was very upset after his hearing was rescheduled."). And Plaintiffs' evidence certainly does not show that the use of remote technology categorically denies aliens due process. Nor could it, since the question "[w]hether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice suffered by the petitioner." *Vilchez v. Holder*, 682 F.3d 1195, 1199–1200 (9th Cir. 2012).

Third, Plaintiffs rely heavily on the declaration of attorney Veronica Semino, whose request to continue her client's immigration hearing before the Buffalo Immigration Court was denied, to support their claim that remote hearings are not safe and do not ensure due process. *See* Supp. Br. 3–4 (citing Semino Decl. ¶¶ 5–9). But Plaintiffs' assertion that this "nominally remote hearing ... was not, and could not have been, conducted safely and in accordance with due process" is wrong. *Id.* at 3. None of the parties were in the same room: The immigration judge appeared from Buffalo. *See* Semino Decl. ¶ 7. Semino appeared by telephone from North Carolina. *Id.* Semino's client appeared by VTC from Louisiana. *Id.* And the guard who accompanied Semino's client to the VTC room already works in the detention center. There is no factual basis to conclude that conducting Semino's client's hearing remotely increased any participant's risk of exposure to COVID-19, and the declaration provides no grounds to enjoin EOIR and ICE nationwide in all

jurisdictions.

Nor was there a right-to-counsel or procedural-due-process violation. Semino appeared by telephone, so her client had the benefit of counsel. And the immigration judge did not deny Semino's client's claims for relief, *see* Semino Decl. ¶ 9, so there is no basis to conclude that the use of VTC substantially prejudiced those proceedings and denied Semino's client "a full and fair opportunity to present his claims" or "otherwise deprive[d] him of fundamental fairness." *Jin Li*, 700 F. App'x at 51–52; *see Vilchez*, 682 F.3d at 1199–1200. Plaintiffs assert that the hearing took place "without the benefit of meaningful participation by the detained person, who was too ill to speak." Supp. Br. 4; Semino Decl. ¶ 7. That does not show a due-process violation because Semino points to no prejudice in the proceedings. *See, e.g.*, *Rusu v. INS*, 296 F.3d 316, 319, 324 (4th Cir. 2002) (no due-process violation based on the use of VTC where alien's "damaged mouth and missing teeth [made him] ... unable to speak clearly," court reporter wrote "indiscernible" 132 times on transcript, and alien had difficulty comprehending his counsel's questions, because "the IJ concluded that she could glean the asserted factual basis" of the application). Moreover, the hearing was only a preliminary hearing on a "pending motion to terminate and/or continue the removal proceedings." Semino Decl. ¶ 9. This means that there was little chance that Semino's client would be denied immigration relief, but a very real possibility that the hearing would culminate in the termination of Semino's client's proceedings and potentially result in his release. And after considering this preliminary issue, the immigration continued the hearing on the claims for relief. *Id.* Due process was served by expeditiously proceeding with this hearing.

Fourth, Plaintiffs claim that their limited evidence shows that "immigration courts and detention facilities frequently do not have the capacity to connect all necessary parties remotely." Supp. Br. 4. But their declarations do not support that claim. As noted, attorney Kelli Stump's in-

person appearance at the Dallas Immigration Court does not appear to be EOIR's fault, since Stump inexplicably submitted a motion to appear telephonically to the Dallas Immigration Court, not the Falls Church Immigration Adjudication Center where her client's case was pending. *See* Stump Decl. ¶ 4. Attorney Michelle Edstrom's assertions that witnesses were not permitted to appear telephonically or in person do not show a due-process violation, since the witnesses submitted their testimony by declaration. Rimmer Decl. ¶ 3. Attorney David Bennion claims that ICE did not permit his client's son to enter the detention center to testify, but he also admits that the hearing did not go forward on that date. Pls.' Ex. 38, Bennion Decl. ¶ 4 (ECF No. 22-5). And although attorney Henry Hollithron states that the Aurora Immigration Court only has one telephone line that can be used either by an attorney or an interpreter, *see* Hollithron Decl. ¶ 13, EOIR in fact uses a service called OpenVoice that allows immigration judges to "conference call attorneys, the alien, witnesses, and interpreters from the bench simultaneously," Gov't Ex. 5, First Santoro Decl. ¶ 9 (ECF No. 19-6). In any event, Hollithron does not say that any of his clients' hearings have actually been prejudiced by the setup he describes at the Aurora Immigration Court.

Fifth, Plaintiffs assert that there are "numerous examples in the record of attorneys being prepared to appear telephonically, but never receiving calls at the appointed time." Supp. Br. 4. But the declarations do not show APA, right-to-counsel, or due-process violations. Attorney Charles Green says that the immigration court did not call him at the anticipated time, but that was simply because the immigration judge did not reach his client's case that day. Green Decl. ¶ 4. Attorney Elizabeth Ford states that she did not receive a call at the scheduled time, but she also concedes that the judge simply rescheduled the hearing after Ford did not appear. Pls.' Ex. 39, Ford Decl. ¶ 6 (ECF No. 22-6). The evidence does not show that aliens are even potentially deprived of counsel or due process because none of the aliens were required to participate in

hearings without their attorneys on the line or suffered any other negative consequences. *See, e.g.*, *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2017) ("When an immigrant has engaged counsel and the IJ is aware of the representation, if counsel fails to appear, the IJ must take *reasonable* steps to ensure that the immigrant's statutory right to counsel is honored." (emphasis added)); *Njoroge v. Holder*, 753 F.3d 809, 812–13 (8th Cir. 2014) ("Assuming, without deciding, that the IJ violated Njoroge's statutory right to counsel by not at least calling Njoroge's counsel ... , Njoroge cannot prove prejudice" because "neither Njoroge nor her counsel has set forth, either before the IJ or on appeal, what evidence affirmatively proves that she is entitled to the relief that she seeks."). And in any event, the two examples Plaintiffs offer do not support nationwide relief. If anything, they show that EOIR's approach of maintaining individual immigration courts' flexibility protects aliens' rights to counsel and due process.

Sixth, Plaintiffs cite four additional examples of "injuries" allegedly caused by remote hearings in their "accompanying table" that they do not address in their brief. Supp. Br. 4 (citing Pls.' Ex. 60). None of these declarations demonstrate any increased health risk or due-process violation caused by the remote hearings. Attorney David Ehrlich asserts that a video hearing "would be far superior to a telephonic conference call-type hearing," but does not say that a telephonic hearing is not possible. Pls.' Ex. 2, Ehrlich Decl. ¶ 7 (ECF No. 7-3). Attorney Amy Melissa Bittner says that she experienced feedback when she appeared telephonically at the Cleveland Immigration Court for "closing arguments and oral decision," but she acknowledges that "the Court indicated that it could still hear [her]." Pls.' Ex. 13, Bittner Decl. ¶ 27 (ECF No. 7-14). She also complains that interpretation of the hearing was unavailable for her client, *id*. ¶ 28, but she does not explain why contemporaneous interpretation of her closing arguments or the judge's oral decision would be necessary, let alone violate due process. Attorney Chawnta Durham

alleges that she did not receive advance notice of a bond hearing, although she admits that she appeared telephonically, and her client requested an order of removal. Pls.' Ex. 49, Durham Decl. ¶ 6 (ECF No. 22-16). It is unclear where an alleged violation even purportedly occurred, given that her client received the order of removal that he requested. And attorney Homero López, Jr. concedes that he has been able to communicate with his detained client, Plaintiff Velazquez Quiala, multiple times. Second López Decl. ¶¶ 5–6.

In any event, this Court lacks jurisdiction over Plaintiffs' APA, right-to-counsel, and due-process challenges to the use of VTC or other remote technology in immigration proceedings. Such claims can only be raised in a petition for review under 8 U.S.C. §§ 1252(b)(9) and (a)(5). *See, e.g.*, *P.L. v. ICE*, No. 19-cv-1336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019); *Flores Valle v. ICE*, No. 19-cv-2254, 2019 WL 7756069, at *4 (N.D. Tex. Oct. 8, 2019), *report and recommendation adopted*, 2019 WL 7207201 (N.D. Tex. Dec. 27, 2019); *Rivas Rosales v. Barr*, No. 20-cv-888, 2020 WL 1505682, at *4–7 (N.D. Cal. Mar. 30, 2020); *see also* TRO Opp. 20–26.

Plaintiffs' declarations provide no basis to conclude that aliens are in danger of losing their rights to counsel or due process.

IV. An Indiscriminate, Nationwide TRO is Not Warranted.

Plaintiffs finally argue that their new evidence warrants a nationwide suspension of in-person immigration hearings. Supp. Br. 7–9. That is wrong. Such an order would delay detained aliens' hearings and prolong their attendant detention against many of those aliens' wishes. *See* McHenry Decl. ¶ 31; Hollithron Decl. ¶ 13; Green Decl. ¶ 5. EOIR and ICE have enacted reasonable policies that allow individual immigration courts and individual detention centers to respond to an ongoing public health emergency in a tailored manner. The public interest and the balance of the equities are best served by allowing those individualized procedures to be used and to resolve any claimed violations of the APA or the rights to counsel and procedural due process

through the administrative and judicial review process, as the law requires.

Moreover, Plaintiffs' belated evidence certainly does not justify nationwide relief. Notwithstanding that the handful of immigration proceedings described in the declarations fail to show that EOIR and ICE have acted arbitrarily and capriciously or that the Individual Plaintiffs are substantially likely to be deprived of their rights to counsel or due process, the evidence falls far short of demonstrating the need for an order delaying immigration proceedings *everywhere*. This is especially true because the Organizational Plaintiffs do not have standing to assert claims on behalf of individual aliens, Plaintiffs do not raise class claims, and the INA (8 U.S.C. § 1252(f)(1)) prohibits courts from granting injunctive relief to anyone but the Individual Plaintiffs. *See Padilla v. ICE*, 953 F.3d 1134, 1151 (9th Cir. 2020) ("Congress intended § 1252(f)(1) to restrict courts' power to impede the new congressional removal scheme on the basis of suits brought by organizational plaintiffs and noncitizens not yet facing proceedings under 8 U.S.C. §§ 1221–1232."). If this Court does issue preliminary relief, it should be sharply limited to the Individual Plaintiffs and the Organizational Plaintiffs' members' clients whom they can identify as having imminent immigration court hearings. *See* TRO Opp. 42–45.

CONCLUSION

This Court should deny Plaintiffs' Motion for a Temporary Restraining Order.

Dated: April 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

NIPNLG v. EOIR, No. 1:20-cv-00852-CJN (D.D.C.)

I certify that on April 23, 2020, I served a copy of the foregoing document and its attachments on all parties of record by causing them to be filed with the Clerk of the Court through the CM/ECF system, which will provide electronic notice to all attorneys of record.

Dated: April 23, 2020

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