IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NEW JERSEY CHAPTER, on behalf of its members; Michael DiRAIMONDO; Brian O'NEILL; and Elizabeth TRINIDAD, Plaintiffs, v. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; William BARR, in his official capacity as Attorney General of the United States; James McHENRY, in his official capacity as Director of the Executive Office for Immigration Review; and David CHENG, in his official capacity as Assistant Chief Immigration Judge for the Newark Immigration Court, Defendants.	**Case No. 20-cv-9748-JMV-JBC**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges the Government's dangerous, reckless, and completely unexplained decision to reopen the Newark Immigration Court for in-person proceedings despite the continued risks of the COVID-19 pandemic. The novel coronavirus has ravaged New Jersey, the United States, and the world, causing illness and death on an unprecedented scale. Because the virus is so readily transmissible from person to person, and so virulent, governments throughout the nation and world have shut down public gatherings, including in-person court proceedings, to stop the virus's spread. To this day, public health officials warn against the risk of resuming in-person group activities, and in many jurisdictions that have done so, COVID-19 infections have spiked dramatically. Even in the few days since Plaintiffs filed their Complaint in this action, New Jersey has seen a rise in COVID-19 cases and transmission rates, traceable to crowded indoor gatherings.

The Newark Immigration Court is no stranger to the devastating effects of COVID-19. The coronavirus spread through the court before it closed in March, and COVID-19 illnesses tragically caused the deaths of both a longtime private immigration attorney and a staffer at the immigration prosecutor's office, as well as the serious illness of a senior immigration prosecutor and a court translator. Yet, despite the risks posed by the spread of COVID-19, and the actual illness and death it has already caused to people involved with the Newark Immigration Court, that

court was recently reopened for in-person immigration hearings for cases of persons who are not detained (the so-called "non-detained docket").

Moreover, even though immigration law and regulations provide for immigration hearings to take place by videoconference—and Defendant Executive Office of Immigration Review ("EOIR"), which operates the nation's immigration courts, has touted its use of such videoconference hearings—the Newark Immigration Court inexplicably fails to provide this option for attorneys or others for cases on the non-detained docket. Indeed, many other courts, including federal and state courts in New Jersey, have successfully conducted hearings entirely by videoconference—including bench trials and other evidentiary hearings, which mirror the types of proceedings conducted in immigration courts. Yet the Newark Immigration Court has instead insisted on compelling in-person appearances from attorneys and other court participants, and attorneys even face potential disciplinary action should they fail to appear.

Accordingly, Plaintiffs American Immigration Lawyers Association, New Jersey Chapter ("NJ-AILA"), along with three individual immigration attorneys, Michael DiRaimondo, Brian O'Neill, and Elizabeth Trinidad, brought this action seeking an injunction against attorneys' compelled in-person appearances at the Newark Immigration Court. Indeed, Defendants' actions in reopening the non-detained docket, while denying motions to adjourn matters and failing to permit

appearance by videoconference, require immigration attorneys to risk their health and lives by appearing in-person at the court. Defendants have thus acted arbitrarily and capriciously in violation of the Administrative Procedure Act, and have also violated the Due Process Clause by foisting a state-created danger upon Plaintiffs with deliberate indifference to their health and lives. Because, as described below, Plaintiffs can establish a likelihood of success on the merits and irreparable harm resulting from having to appear in-person at the Newark Immigration Court, and because the public interest in halting the spread of COVID-19 weighs against compelled in-person immigration proceedings, this Court should grant the preliminary injunction here sought.

FACTUAL BACKGROUND

I. The COVID-19 Pandemic.

COVID-19 is the name assigned by the World Health Organization ("WHO") to the severe respiratory tract disease caused by a novel coronavirus, SARS-CoV-2, that was first discovered in China in late 2019 and has rapidly spread worldwide.[1] On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a

[1] *See* Naming the coronavirus disease (COVID-19) and the virus that causes it, World Health Org. (last visited Aug. 7, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it; World Map, Ctrs. for Disease Control & Prevention (updated July 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/world-map.html.

global "pandemic."[2] The White House and the State of New Jersey have each declared ongoing states of emergency related to the COVID-19 pandemic; New Jersey recently extended its public health emergency declaration.[3] And COVID-19 infections and deaths rise precipitously nationwide and worldwide every day.[4]

According to the Centers for Disease Control and Prevention (CDC), the virus that causes COVID-19 "is thought to spread mainly from person-to-person," between people who are in close contact with one another, within about six feet, or for an extended period of time, through respiratory droplets that form when someone talks, coughs, or sneezes.[5] The virus can spread from people who are infected but do not appear ill, either because they are "pre-symptomatic" (infected with the virus,

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[2] WHO Director-General's opening remarks at the media briefing on COVID-19, World Health Org. (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[3] *See* Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, The White House (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/; N.J. Exec. Order No. 103 (Mar. 9, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf; N.J. Exec. Order No. 171 (Aug. 1, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-171.pdf.

[4] *See* Coronavirus Resource Ctr., Johns Hopkins Univ. & Med. (last visited Aug. 7, 2020), https://coronavirus.jhu.edu/map.html (showing over 19 million infections worldwide, over 4.8 million from the United States; and over 715,000 deaths worldwide, over 160,000 of which occurred in the United States).

[5] How COVID-19 Spreads, Ctrs. for Disease Control & Prevention (updated June 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

but not yet presenting symptoms) or "asymptomatic" (infected with the virus but never presenting symptoms).[6] Indoor areas pose particular risks for the spread of COVID-19: as the United States Environmental Protection Agency (EPA) has stated, "[t]here is growing evidence that the SARS-CoV-2 virus remains airborne in indoor environments for hours, potentially increasing in concentration over time."[7]

COVID-19 can cause severe illness and death, particularly among those who are considered medically vulnerable due to age or preexisting medical conditions.[8]

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[6] *See* Holly Yan, *Fauci says the WHO's comment on asymptomatic spread is wrong. Here's the difference between asymptomatic and pre-symptomatic spread*, CNN, June 10, 2020, https://www.cnn.com/2020/06/09/health/asymptomatic-presymptomatic-coronavirus-spread-explained-wellness/index.html (quoting Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, as stating that "we know from epidemiological studies they can transmit to someone who is uninfected even when they're without symptoms"); Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. Times, Jul. 9 , 2020 (quoting WHO as stating that "[i]nfected people can transmit the virus both when they have symptoms and when they don't have symptoms").

[7] Science and Technical Resources related to Indoor Air and Coronavirus (COVID-19), U.S. Envtl. Prot. Agency (last visited Aug. 7, 2020), https://www.epa.gov/coronavirus/science-and-technical-resources-related-indoor-air-and-coronavirus-covid-19; *see also* Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. Times, Jul. 9 , 2020 (reporting that "mounting evidence has suggested that in crowded indoor spaces, the virus can stay aloft for hours and infect others, and may even seed so-called superspreader events").

[8] People with Certain Medical Conditions, Ctrs. for Disease Control & Prevention (updated July 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html; COVID-19: vulnerable and high risk groups, World Health Organization (last visited Aug. 7, 2020), https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups.

Even "mild" cases of COVID-19 can have lingering long-term effects such as blood clots, strokes, and recurring symptoms.[9] There is no vaccine for COVID-19; nor is there a known cure.[10] The director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, has opined that even if a vaccine were to be developed by the end of this year, it would likely be several months into next year before the vaccine might become widely distributed within the United States.[11]

II. New Jersey's Response to the COVID-19 Pandemic.

"Limiting close face-to-face contact with others"—also known as "social distancing"—"is the best way to reduce the spread of" COVID-19.[12] Social distancing requires people who are not in the same household to remain at least six

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[9] Chia-Yi Hou, *'Mild' cases of coronavirus may have serious long-term and recurring effects*, The Hill, July 10, 2020, https://thehill.com/changing-america/well-being/prevention-cures/506752-mild-cases-of-coronavirus-may-not-be-as-mild-as; Ryan Prior, *I can't shake Covid-19: Warnings from young survivors still suffering*, CNN, July 19, 2020, https://www.cnn.com/2020/07/18/health/long-term-effects-young-people-covid-wellness/index.html.

[10] *See* Jonathan Corum, Katherine J. Wu, & Carl Zimmer, *Coronavirus Drug and Treatment Tracker*, N.Y. Times, updated Aug. 6, 2020, https://www.nytimes.com/interactive/2020/science/coronavirus-drugs-treatments.html ("There is no cure yet for Covid-19. And even the most promising treatments to date only help certain groups of patients, and await validation from further trials.").

[11] Gisela Crespo, *et al.*, *US gets reality checks on Covid-19 vaccine, duration of symptoms*, CNN, July 24, 2020, https://www.cnn.com/2020/07/24/health/us-coronavirus-friday/index.html.

[12] Social Distancing, Ctrs. for Disease Control & Prevention (updated July 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

feet apart from each other whenever possible.[13] New Jersey Governor Phil Murphy has noted that the new virus poses particularly lethal risk in indoor settings.[14] New Jersey, along with many other state and local governments, has therefore taken unprecedented measures to ensure that its residents practice social distancing in order to mitigate the spread of COVID-19.

On March 21, Governor Murphy ordered all New Jersey residents to stay in their homes or their places of residence and ordered all but essential businesses to close, while also mandating that "individuals must practice social distancing and stay six feet apart whenever practicable."[15] On May 18, Governor Murphy "unveiled a multi-stage approach" to gradually lift the restrictions imposed due to COVID-19, based on "data that demonstrates improvements in public health and the capacity to safeguard the public."[16] Importantly, the plan provides that at all stages of that plan,

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[13] *Id.*

[14] Summer Concepcion, *NJ Governor Urges National Mask Requirement: 'Not Debatable,'* Talking Points Memo, July 5, 2020, http://talkingpointsmemo.com/news/new-jersey-governor-murphy-national-mask-requirement-not-debatable (quoting Governor Murphy as stating that "this virus is a lot more lethal inside than outside").

[15] N.J. Exec. Order No. 107 (Mar. 21, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf.

[16] When and how is New Jersey lifting restrictions?, N.J. Dep't of Health (updated Aug. 3, 2020), https://covid19.nj.gov/faqs/nj-information/reopening-guidance/when-and-how-is-new-jersey-lifting-restrictions-what-does-a-responsible-and-strategic-restart-of-new-jerseys-economy-look-like.

"[w]ork that can be done from home should continue to be done from home."[17]

Even with these measures, New Jersey has been particularly affected by the novel coronavirus, with over 183,000 confirmed cases, over 14,000 confirmed deaths, and another almost 2,000 "probable deaths" attributed to COVID-19.[18] Throughout the reopening process, Governor Murphy has emphasized the dangers of lifting restrictions too soon, and has "stressed [that] 'we're trying to stay one step ahead of this virus.'"[19] Thus, for example, on June 29, Governor Murphy, in part due to "recognition by public health experts that indoor environments present significantly increased risks of transmission as compared to outdoor environments," abruptly paused the planned resumption of indoor dining in New Jersey because public officials and public health experts "have attributed the rise in [COVID-19] cases to activities in indoor food and beverage establishments."[20] And this past Monday, August 3, in response to clusters of coronavirus cases attributed to indoor gatherings, Governor Murphy "tightened restrictions on indoor gatherings," limiting

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[17] *Id.*

[18] New Jersey COVID-19 Information Hub, State of N.J. (last visited Aug. 7, 2020), https://covid19.nj.gov/.

[19] Brent Johnson, *Gov. Murphy defends canceling N.J. indoor dining reopening. 'We're trying to stay one step ahead of this virus.'*, N.J. Advance Media, June 30, 2020, https://www.nj.com/coronavirus/2020/06/gov-murphy-defends-canceling-nj-indoor-dining-reopening-were-trying-to-stay-one-step-ahead-of-this-virus.html

[20] N.J. Exec. Order No. 158 (June 29, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-158.pdf.

them to no more than 25 people per event.[21] Even then, the state's COVID-19 "transmission rate," which measures how many additional cases result from each new infection, was at 1.32 as of August 5, which, Governor Murphy stated, "means that this virus continues to spread too quickly and too widely across our state."[22]

National public health officials have also warned that lifting restrictions related to COVID-19 too soon will exacerbate the outbreak of the disease. In March, Dr. Fauci warned that "easing lockdown restrictions could lead to a 'big spike' in new coronavirus cases."[23] Dr. Fauci's warning proved prescient: after some states, particularly in the south and west, lifted their own lockdown restrictions, they subsequently suffered significant COVID-19 outbreaks, which Dr. Fauci has attributed in part to those states' failure to follow science-based federal guidelines

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[21] Matt Arco, *Murphy reverses indoor gathering rules in N.J. after a spike in the spread of coronavirus*, N.J. Advance Media, Aug. 3, 2020, https://www.nj.com/coronavirus/2020/08/murphy-reverses-indoor-gathering-rules-in-nj-after-a-spike-in-the-spread-of-coronavirus.html; N.J. Exec. Order No. 173 (Aug. 3, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-173.pdf.

[22] Matt Arco & Brent Johnson, *N.J. reports 378 new coronavirus cases as rate of transmission drops again but remains above key mark*, N.J. Advance Media, Aug. 5, 2020, https://www.nj.com/coronavirus/2020/08/nj-reports-378-new-coronavirus-cases-as-rate-of-transmission-drops-again-but-remains-above-key-mark.html.

[23] Jason Lemon, *Dr. Fauci Says Easing Lockdown Measures Too Soon Will Lead to "Big Spike" in Coronavirus Cases: "It's Gonna Backfire"*, Newsweek, Apr. 20, 2020, https://www.newsweek.com/dr-fauci-says-easing-lockdown-measures-too-soon-will-lead-big-spike-coronavirus-cases-its-1498944.

regarding reopenings.[24]

III. COVID-19 in the Newark Immigration Court.

Since March, EOIR in Newark has responded to the COVID-19 pandemic haphazardly, with inconsistent notice to litigants, attorneys, and the public, regarding its continuing operations. *See* Declaration of Cesar Estela ("Estela Decl.") ¶ 9, attached as Exhibit 1. This began at least as early as March 6, when the waiting room for the Newark Immigration Court—which (along with the courtrooms) is located on the 12th Floor of the Rodino Federal Building at 970 Broad Street, Newark—was evacuated due to a potential COVID-19 exposure. *Id.* ¶ 4; Declaration of John Leschak ("Leschak Decl."), ¶¶ 2-3, attached as Exhibit 5. Even then, attorneys received inconsistent instructions: Cesar Estela, President of NJ-AILA, was required to remain in court and finish his case, while attorney John Leschak, another NJ-AILA member, was able to adjourn his case to a later date. Estela Decl. ¶ 4; Leschak Decl. ¶¶ 5-6.

Confusion and inconsistency continued in the Newark Immigration Court the next week. For example, Plaintiff Trinidad had appearances with clients in the Newark Immigration Court on Tuesday, March 10 and Wednesday, March 11. Declaration of Elizabeth Trinidad ("Trinidad Decl."), ¶ 5, attached as Exhibit 4. On

[24] Peter Sullivan, *Fauci says hard-hit states should be 'pausing' the reopening process*, The Hill, July 9, 2020, https://thehill.com/policy/healthcare/public-global-health/506566-fauci-says-hard-hit-states-should-be-pausing-the.

March 10, Ms. Trinidad's client woke up ill with a high fever and a cough, so Ms. Trinidad attended court without her client present, fearing the risk to her own health and the health of others if the client was infected with COVID-19. *Id.* ¶¶ 6-8. As a result, Ms. Trinidad was castigated by an immigration judge for appearing without her client, and the judge very nearly entered an order of removal against Plaintiff Trinidad's client for failure to appear. *Id.* ¶¶ 8-9. Accordingly, on the next day, March 11, Trinidad came to court with a different client, who was also ill—except this time, she was castigated by a different immigration judge for appearing in court with an ill client. *Id.* ¶ 15.

The continued operation of the Newark Immigration Court during this time had severe, tragic consequences for the people who appeared there. Thus, on March 24, EOIR informed NJ-AILA that on March 11, there had been potential exposure to COVID-19 through someone who had appeared in a courtroom at the Newark Immigration Court that day. Estela Decl. ¶ 5. EOIR provided NJ-AILA with a list of seventy-one cases, involving over sixty attorneys, in which participants may have been exposed to the coronavirus, so that NJ-AILA could notify members who may have been present of their potential exposure and need to self-quarantine. *Id.* One of those members was Raymond D'Uva, a longtime Newark immigration attorney, NJ-AILA member, and mentor to many in the Newark immigration bar. *Id.* ¶ 6. Mr. D'Uva contracted COVID-19, and passed away from it on June 3. *Id.*

¶ 7. Additionally, a senior immigration prosecutor who was present in the same courtroom on March 11 became seriously ill reportedly was in a coma on a ventilator for weeks, and nearly died of COVID-19; he survived, but has not returned to work. *Id.* ¶ 8; Trinidad Decl. ¶ 22. NJ-AILA members also learned that a clerk in the immigration prosecutor's office died of COVID-19, and a court interpreter contracted the disease and is still battling its effects. *See* Declaration of Brian O'Neill ("O'Neill Decl."), ¶ 11, attached as Exhibit 3; Trinidad Decl. ¶ 23.

On March 14, EOIR issued a press release announcing the closure of the Seattle immigration court, and the suspension of master calendar hearings[25] for non-detained respondents at Newark and several other immigration courts (including the three immigration courts in New York City), through April 10. Estela Decl. Ex. A. Then, in the late evening of March 17 and early morning of March 18, EOIR announced via Twitter and in a press advisory that it was suspending all hearings for non-detained respondents at Newark and several other immigration courts through April 10. Estela Decl. ¶ 9 & Ex. B. Thereafter, EOIR periodically extended closures of the immigration courts for non-detained cases around the nation, until announcing on May 29 that the Honolulu immigration court would reopen. Estela

[25] A master calendar hearing generally serves as an initial appearance for the purposes of reviewing procedural issues and scheduling future proceedings. On the other hand, a merits hearing generally involves presentation of evidence, including a respondent's evidence in support of a claim for relief from removal.

Decl. Ex. C.

As EOIR announced reopenings of other immigration courts (not including Newark), AILA's national office and other groups sent a letter to Defendant James McHenry, Director of EOIR, on June 15 criticizing EOIR's reopening plans; requesting that non-detained hearings either be suspended or, alternatively, conducted by videoconference; and asking for a meeting with McHenry to discuss these issues.[26] Similarly, on June 23, 2020, a group of twelve senators, including both of New Jersey's senators, Robert Menendez and Cory Booker, wrote to McHenry with numerous questions regarding the reopening of immigration courts, including questions about what factors were involved in EOIR's decisions about which immigration courts to open, and how the reopening plans would ensure social distancing and protect vulnerable participants in the immigration court process.[27] EOIR never, at any time, responded to the letters from AILA or the senators.[28]

Then, on the afternoon of June 24, without advance notice to immigration

[26] Letter from Am. Immigration Council, *et al.*, to James McHenry (June 15, 2020), https://www.aila.org/File/DownloadEmbeddedFile/85133 (Exhibit A to Declaration of Michael R. Noveck ("Noveck Decl."), attached as Exhibit 8).

[27] Letter from Senator Elizabeth Warren, et al., to James McHenry (June 23, 2020), https://www.warren.senate.gov/imo/media/doc/Letter%20to%20EOIR%20re.%20reopening%20-%20final%20-%206.23.2020.pdf (Noveck Decl. Ex. B).

[28] Shannon Dooling, *After Increasing Its Caseload, Attorneys Say Boston's Immigration Court Is In 'Disarray,'* WBUR, July 24, 2020, https://amp.wbur.org/news/2020/07/24/boston-immigration-court-disarray.

lawyers, EOIR announced via Twitter that it would reopen the Newark Immigration Court on July 13.[29] The Twitter post vaguely stated that the court would "resume hearings in non-detained cases" and that "additional important information" would be provided "in the coming days."[30] ACIJ Cheng also issued a Standing Order, dated June 19, 2020, governing appearances at the Newark Immigration Court, which provides, among other things, that: (1) for telephonic merits hearings, the respondent must file "a sworn affidavit or declaration . . . indicating that he or she has been advised of the right to proceed in person and waives that right"; (2) "[a]ny party appearing telephonically waives the right to object to the admissibility of any documents offered in Court on the sole basis that they are unable to examine the document"; (3) if counsel is unavailable by telephone at the time of the hearing, he or she "will thereafter be required to appear in person at any rescheduled hearing"; and (4) "[a]n Immigration Judge may, in his or her discretion, halt any telephonic hearing, and the parties may be required to attend a future in-person hearing on a date to be determined."[31]

Due to the absence of meaningful guidance regarding the court's reopening,

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[29] @DOJ_EOIR, Twitter (June 24, 2020, 12:06PM), https://twitter.com/DOJ_EOIR/status/1275822667275341829.

[30] *Id.*

[31] Standing Order Regarding Telephonic Appearances for Master and Merits Hearing, U.S. Immigration Court, Newark, N.J. (June 19, 2020), https://www.justice.gov/eoir/page/file/1287336/download (Noveck Decl. Ex. C).

as well as numerous concerns about immigration lawyers' health and their ability to properly litigate cases during the pandemic, NJ-AILA wrote to Chief Immigration Judge Tracy Short on July 6, 2020 to request reconsideration of the decision to reopen the Newark Immigration Court. Estela Decl. Ex D. NJ-AILA's letter noted its concerns about congregating judges, prosecutors, court staff, attorneys, litigants, family members, and interpreters in a confined indoor space, particularly in light of the risk of COVID-19 spreading indoors, as recognized by Governor Murphy's decision to suspend the reopening of indoor dining. *Id.* Furthermore, NJ-AILA identified logistical concerns about maintaining social distancing in the court's security line; in the small elevators used to access the courtrooms on the 12th floor of the building; outside the courtrooms while waiting for cases to be called; and in small courtrooms with numerous people (judges, attorneys, litigants, translators, and witnesses) who must be there at the same time. *Id.* EOIR, again, did not respond to that letter. Instead, on July 8, EOIR issued a "Notice" reaffirming that the Newark Immigration Court (along with courts in Baltimore and Detroit) would reopen on July 13 for both master calendar hearings and merits hearings in non-detained cases. Estela Decl. Ex. E.

IV. The Newark Immigration Court Has Failed to Provide the Option to Appear by Videoconference, as Other Courts Have Done.

Most significantly, EOIR has not provided any opportunity for judges, attorneys, litigants, witnesses, and others to appear at Newark Immigration Court

hearings for non-detained respondents via videoconferencing. Estela Decl. ¶ 15. The Standing Order dated June 19, 2020, is notably silent on that issue. But videoconferencing is, by both statute and regulation, a permissible mechanism to hold an immigration court hearing. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii) (noting that removal proceedings "may take place . . . through video conference"); 8 C.F.R. § 1003.25(c) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

Indeed, the Newark Immigration Court, as well as the nearby immigration court in Elizabeth, New Jersey, both use videoconferencing technology to conduct immigration hearings for individuals who are detained pending their removal proceedings. Estela Decl. ¶ 15. And EOIR's own guidance regarding proceedings during the pandemic, memorialized in a Memorandum from Director McHenry, states that "[i]mmigration judges may conduct any hearing by video teleconferencing (VTC) where operationally feasible," and notes that "EOIR has used VTC for hearings for three decades[.]"[32] However, EOIR has not made that same option available for non-detained hearings.

Yet, numerous other courts in New Jersey and around the country have

[32] Memorandum from James R. McHenry III, Director, to All of EOIR (June 11, 2020), https://www.justice.gov/eoir/page/file/1284706/download (Noveck Decl. Ex. D).

successfully utilized videoconferencing technology (usually for the first time ever) to conduct court hearings and even bench trials in an effective, safe manner for the duration of the COVID-19 pandemic. For example, on March 15, the New Jersey state judiciary announced a "rapid shift" to "video and phone conferencing options for attorneys, litigants, and the public" in all but a select few matters.[33] The state judiciary quickly "switch[ed] all court functions . . . to remote operations" through virtual courtrooms that allowed "[j]ustices, judges and staff [to] handle all types of motions, conferences, and hearings by telephone and with Zoom, Scopia, and Teams virtual platforms."[34] Among other proceedings, New Jersey judges have successfully conducted several bench trials using virtual platforms.[35] New Jersey is now in "Phase 2" of its reopening process, under which "[m]ost court hearings are still being held by phone and video conference," and in-person appearances are almost exclusively limited to cases in which the parties do not consent to remote

[33] Notice, New Jersey Court Operations – COVID-19 Coronavirus, N.J. Courts (Mar. 15, 2020), https://www.njcourts.gov/notices/2020/n200315a.pdf (Noveck Decl. Ex. E).

[34] Press release, N.J. Courts, 'A Monumental Task': How New Jersey Courts Balanced Public Safety and Access to Justice During a Worldwide Pandemic (Apr. 14, 2020), https://njcourts.gov/pressrel/2020/pr041420a.pdf?c=ncM (Noveck Decl. Ex. F).

[35] *Id.*

proceedings.[36]

This Court has also moved its operations to be almost entirely virtual. On March 16, Chief Judge Freda L. Wolfson issued Standing Order 20-02, which, among other things, "encouraged [judicial officers] to conduct proceedings by telephone or videoconferencing where practicable and as permitted by law."[37] The court is currently in "Phase II" of its COVID-19 Recovery Guidelines, which provides that "[t]o the extent the parties consent, all proceedings should continue to be held by video and teleconference."[38]

Other courts throughout the country have also conducted remote proceedings, including bench trials. In Florida, a federal district court used Zoom to hold a two-day trial involving claims of international child abduction under the Hague Convention, with litigants, witnesses, and interpreters participating not only from Florida, but from Guatemala as well, with documentary evidence provided to the

[36] COVID-19 One Stop, Scheduled Court Hearings, N.J. Courts (last visited Aug. 7, 2020), https://njcourts.gov/public/covid19_one-stop.html#court_hearings.

[37] *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Standing Order 20-02, ¶ 8 (D.N.J. Mar. 16, 2020), https://www.njd.uscourts.gov/sites/njd/files/StandingOrder2.pdf (Noveck Decl. Ex. G).

[38] District of New Jersey COVID-19 Recovery Guidelines Phase II, U.S. Dist. Ct. Dist. of N.J. at 7 (last visited Aug. 7, 2020), https://www.njd.uscourts.gov/sites/njd/files/DNJ%20COVID%20RECOVERY%20PHASE%20II%20FINAL.pdf (Noveck Decl. Ex. H).

court and witnesses in electronic form.[39] Another Florida federal district court held a week-long bench trial in a major voting rights case entirely by videoconference.[40] Other federal district courts have authorized bench trials to be conducted by videoconference, and Circuit Courts of Appeals have conducted videoconference oral arguments as well.[41]

V. The Newark Immigration Courts Deny Adjournment Requests and Compel Attorneys to Appear In-Person.

Nonetheless, and despite the risks to attorneys, litigants, court staff, and others posed by in-person proceedings, the Newark Immigration Court has insisted on holding such in-person proceedings, and has arbitrarily refused to postpone the proceedings when requested. For example, Plaintiffs Trinidad and O'Neill jointly represent a respondent in an immigration proceeding that was scheduled for an individual hearing on July 27. Trinidad Decl. ¶ 31; O'Neill Decl. ¶¶ 13-14. They

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[39] Catherine Wilson, *It Can be Done! Far-Flung Zoom Trial Accomplished With Strong Wi-Fi, Willingness*, Daily Business Review, Apr. 20, 2020, https://www.law.com/dailybusinessreview/2020/04/20/it-can-be-done-far-flung-zoom-trial-accomplished-with-strong-wi-fi-willingness/.

[40] *Fla. Ex-Cons Who Can't Pay Fines Set For Voting Rights Win*, Law360, May 6, 2020, https://www.law360.com/articles/1270061/fla-ex-cons-who-can-t-pay-fines-set-for-voting-rights-win; Patricia Mazzei, *A Major Trial for Voting Rights in Florida Is Happening on Video Chat*, N.Y. Times, Apr. 27, 2020, https://www.nytimes.com/2020/04/27/us/florida-felons-voting-trial.html.

[41] *See* U.S. Court Closings, Cancellations and Restrictions Due to COVID-19, Paul Hastings (last visited Aug. 7, 2020), https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19.

filed a timely motion with EOIR on July 10 seeking adjournment of the proceeding—or an appearance by videoconferencing software—based, among other reasons, on the attorneys' personal and public health concerns about appearing in-person. Trinidad Decl. ¶ 32; O'Neill Decl. ¶ 14. That motion was denied in an order dated July 20, although the order was not received until it arrived in Mr. O'Neill's mailbox on July 25. O'Neill Decl. ¶ 16 & Ex. A.

Ms. Trinidad and Mr. O'Neill filed a motion for reconsideration and appeared by telephone on July 27. The merits hearing did not proceeding on that date because the respondent did not consent to a telephonic hearing on the merits (as is his right), so the immigration judge ordered the two attorneys and their client to appear in-person on August 3. Trinidad Decl. ¶¶ 36-39; O'Neill Decl. ¶ 14. After the hearing, the judge's clerk called Mr. O'Neill, reiterating to him that the judge was requiring the attorneys to appear in-person at the August 3 hearing, and also followed up with a confirming written notice. O'Neill Decl. ¶ 19 & Ex. C. Simultaneously, however, the immigration judge granted the ICE prosecutor's request to appear telephonically, rather than in person, based the prosecutor's concerns about COVID-19 exposure. *Id.* ¶ 20 & Ex. C.

O'Neill and Trinidad concluded that they could face EOIR disciplinary sanctions if they failed to appear for this in-person proceeding. *Id.* ¶ 19. Indeed, EOIR regulates the conduct of immigration attorneys, who, like all attorneys, are

bound by the ethical responsibility to represent their clients as zealous, effective advocates. Specifically, the Code of Federal Regulations authorizes EOIR to sanction immigration attorneys for misconduct, including public or private censure, suspension, or disbarment from practice before immigration courts. *See* 8 C.F.R. § 1003.101(a); *see also* 8 C.F.R. § 1003.102 (listing grounds for discipline); Complaint, ECF No. 1, ¶ 53 (detailing several relevant grounds for discipline). Still, fearing the serious health risks of appearing at the courthouse, Trinidad and O'Neill did not appear in-person on August 3, instead participating by telephone; during the hearing, the immigration judge rejected their arguments and ordered the respondent removed *in absentia*. Trinidad Decl. ¶ 48; O'Neill Decl. ¶ 23.

Other attorneys also face the prospect of compelled in-person proceedings at the Newark Immigration Court in the coming days and weeks. Plaintiff Michael DiRaimondo, for example, had an in-person individual hearing scheduled for Friday, August 7. Declaration of Michael DiRaimondo ("DiRaimondo Decl.") ¶ 4, attached as Exhibit 2. He filed a motion to adjourn the hearing due to his concerns about appearing in-person during the COVID-19 pandemic. *Id.* On August 3, Mr. DiRaimondo received an order from Defendant Cheng, the immigration judge assigned to the matter, denying his motion. *Id.* ¶ 4 & Ex. A. While that matter was adjourned due to the unavailability of an interpreter, *id.* ¶ 4, Mr. DiRaimondo has another in-person hearing scheduled for Monday, August 24, for which his

adjournment motion, based on health risk, is still pending. *Id.* ¶ 5. And Plaintiff O'Neill also has matters scheduled for in-person appearances on August 13 and August 24, which have not yet been formally adjourned. O'Neill Decl. ¶ 24.

In the absence of a videoconferencing option for these proceedings—which, as discussed, EOIR has not provided—immigration attorneys must, then, choose between risking their health by appearing in-person, or sacrificing their ethical obligations (and facing related disciplinary proceedings) to appear in court and represent their clients. And the risk of appearing in-person in the Newark Immigration Court is exacerbated by EOIR's failure to ensure safe practices at the courthouse. Thus, at least one immigration attorney who has appeared for an in-person proceeding since the court reopened reports observing immigration judges and others without face masks, contrary to EOIR guidance and public health advice. *See* Declaration of Monica Kazemi ("Kazemi Decl.") ¶¶ 5-6, attached as Exhibit 6. The attorney also reported that no temperature checks or other health screenings were done at the building entrance, and that no one monitored the building elevators to ensure that they were not overcrowded. *Id.* ¶¶ 3-4.

LEGAL STANDARD

This is a motion for a preliminary injunction under Federal Rule of Civil Procedure 65. In deciding whether to grant the relief sought, "courts consider: (1) the likelihood of success on the merits; (2) irreparable harm if the injunction is

denied; (3) harm to the nonmoving party; and (4) the public interest." *Doe v. Governor of Pa.*, 790 F. App'x 398, 402 (3d Cir. 2019) (citing *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)). The moving party "must meet the threshold" for the first two factors by "demonstrat[ing] that it can win on the merits . . . and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). If the moving party meets that burden, "a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

ARGUMENT

I. Plaintiffs Have a Likelihood of Success on Both Counts of Their Complaint.

Plaintiffs' Complaint alleges violations of the Administrative Procedure Act (Count One) and the Due Process Clause of the Fifth Amendment to the Constitution by virtue of a state-created danger (Count Two). Plaintiffs must demonstrate "only . . . a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011); *see also Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974) (holding that party moving for preliminary injunction must show "a reasonable probability of eventual

success in the litigation"). As described below, Plaintiffs' proofs meet that burden on both counts of the Complaint.[42]

A. Count One: Violation of Administrative Procedure Act.

The Administrative Procedure Act (APA) creates a right of judicial review of "final agency action for which there is no other adequate remedy in court," 5 U.S.C. § 704, and of agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). An agency action is "final" under two conditions: "[f]irst, the

[42] Defendants may argue that the INA restricts jurisdiction over Plaintiffs' Complaint, but that argument would be without merit. The jurisdiction-stripping provisions of the INA prohibit this Court only from engaging in "judicial review of an order of removal," 8 U.S.C. § 1252(a)(5), or claims "arising from any action taken or proceeding brought to remove an alien from the United States," *id.* § 1252(b)(9). Those provisions do not "refer[] to all claims arising from deportation proceedings." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 840-41 (2018) (rejecting jurisdictional challenge to claims that "are not asking for review of an order of removal," "not challenging the decision to . . . seek removal," and "not . . . challenging any part of the process by which . . . removability will be determined"). Accordingly, "only challenges that directly implicate the order of removal" are outside of the district court's jurisdiction. *Nnadika v. Att'y Gen. of U.S.*, 484 F.3d 626, 632 (3d Cir. 2007); *see also Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1907 (2020) (holding that 8 U.S.C. § 1252(b)(9) "is certainly not a bar where, as here, the parties are not challenging any removal proceedings"). This case does not challenge any order of removal. Even more fundamentally, because Plaintiffs—who, as attorneys, are obviously not themselves subject to removal proceedings—"do[] not bring a challenge to [an] order of removal," this Court does not lack jurisdiction over the claim. *De Jesus Martinez v. Nielsen*, 341 F. Supp. 3d 400, 408 (D.N.J. 2018); *see also Nat'l Immigration Project of Nat'l Lawyers Guild v. Exec. Office for Immigration Review*, --- F. Supp. 3d ---, 2020 WL 2026971, at *9 n.7 (D.D.C. Apr. 28, 2020) ("The INA, however, does not appear to foreclose Plaintiffs' claims based on the increased risk of contracting COVID-19 as a result of being forced to appear for in-person hearings[.]").

action must mark the consummation of the agency's decisionmaking process," rather than "be[ing] of a merely tentative or interlocutory nature"; "[a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The Supreme Court has taken a "pragmatic approach" to the question of agency finality, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (internal quotation makers omitted), and courts should "focus[] on whether judicial review at the time will disrupt the administrative process." *Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envir. Prot.*, 870 F.3d 171, 176 (3d Cir. 2017) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779 (1983)).

Here, EOIR's decision to require in-person hearings at the Newark Immigration Court, and Defendant Cheng's Standing Order, are final agency actions subject to appeal under the APA. First, having reopened the courthouse and resumed in-person hearings subject to the rules set forth in the Standing Order, "[t]here is nothing left for the agency to do." *Id.* at 178.[43] And second, there are certainly legal consequences that will flow from the decisions, including potential disciplinary

[43] While EOIR could of course revisit this decision at any time and close the Newark Immigration Court, such reconsideration "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814 (citing *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012)).

action against attorneys for failure to appear or comply with court orders. *See* 8 C.F.R. § 1003.102 (describing reasons for disciplinary sanctions, including ineffective assistance of counsel, failure to appear, and failure to carry client matters through to conclusion); O'Neill Decl. ¶ 21 (describing Plaintiff O'Neill's concern over risk of disciplinary sanctions); *see also Las Americas v. Trump*, Case No. 3:19-cv-02051-IM, 2020 WL 4431682, at *14 (D. Or. July 31, 2020) (finding agency actions final because they "change the way immigration judges run their dockets and their courtrooms," which "has practical consequence for parties or their attorneys").

A court can set aside an agency's action, or compel an agency to act, where the agency action or inaction is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While the arbitrary and capricious standard of review is deferential, it is still the case that agencies must "engage in 'reasoned decisionmaking.'" *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). Thus, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Because a court must consider the agency's rationales for its action, "in order to permit meaningful judicial review, an

agency must 'disclose the basis' of its action." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Burlington Truck Lines*, 371 U.S. at 167); *see also Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002) (applying arbitrary and capricious standard of review to immigration court decision and reversing for lack of reasoned decision-making).

Here, it was arbitrary and capricious, as an initial matter, for EOIR to reopen the Newark Immigration Court for in-person proceedings without disclosing the basis for its belief that doing so was justified. To the contrary, EOIR has repeatedly failed to disclose the basis for its decision despite requests for that information from senators, press, and AILA (both the national organization and Plaintiff NJ-AILA). *See* Noveck Decl. Exs. A, B; Estela Decl. Ex. D. Indeed, EOIR has declined even to acknowledge making the determination at issue, stating that such decisions are made by the United States Attorney's Offices, notwithstanding that the EOIR has announced the decision and that U.S. Attorney's Offices have no statutory authority to make decisions regarding the operations of immigration courts. Estela Decl. ¶ 17; *see* 28 U.S.C. § 547 (listing statutory powers of a United States Attorney, which do not include decisions regarding operation of immigration courts). The arbitrariness of EOIR's decision-making process is further reflected by the fact that the immigration courts in New York City—which are only a few miles away—remain

closed except for filings and detained hearings.[44] The failure to disclose the basis for opening up the non-detained docket at the Newark Immigration Court, but not the same docket in New York City, renders EOIR's decision patently arbitrary and capricious. *See Nat'l Parks Conservation Ass'n v. E.P.A.*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious."); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (*per curiam*) (finding agency action arbitrary and capricious because it was "internally inconsistent and inadequately explained").

More fundamentally, though, EOIR's decision to reopen the Newark Immigration Court simply cannot be squared with the public health emergency that continues to exist in New Jersey. Indeed, federal and state public health emergency declarations from March remain in effect. *See supra* n.3. And public health experts continue to warn against the risk of the resuming group gatherings before the end of the pandemic, as evidenced by spikes in COVID-19 diagnoses in places where previous restrictions have been relaxed. *See supra* n.23. The risk of spreading COVID-19 is particularly acute in indoor locations like the Newark Immigration Court. *See supra* n.7 (citing EPA statements). And New Jersey is no exception to

[44] *See* EOIR Operational Status During Coronavirus Pandemic, U.S. Dep't of Justice, https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic (last visited Aug. 7, 2020).

this concern: coronavirus case numbers continue to rise, and just this past week, Governor Murphy attributed increased cases to groups congregating indoors. *See supra* nn.21-22. The public health evidence is thus plainly irreconcilable with EOIR's decision to reopen the Newark Immigration Court, and this inconsistency cannot survive the requirement for "a rational connection between the facts found and the choice made" that is necessary to survive the arbitrary and capricious standard of review. *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

Finally, and perhaps most clearly, the reopening of the Newark Immigration Court for in-person proceedings is particularly unjustified in light of the viable alternative of holding hearings by videoconference. *See Comite' De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 190 (3d Cir. 2014) (finding action arbitrary and capricious where agency could not show "that it had made a 'reasoned choice among the various alternatives presented.'" (quoting *Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 700 (3d Cir. 1979)). Not only are such hearings authorized by statute and regulation, *see* 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c), but EOIR has touted their use and effectiveness, particularly under the circumstances wrought by the COVID-19 pandemic. Noveck Decl. Ex. D (McHenry Memorandum). Outside of EOIR, this Court, the New Jersey state courts, and others have also made effective use of videoconferencing technology during the pandemic, including for bench trials that mirror immigration court hearings. *See supra* nn.33-

41. Thus, EOIR's the failure to consider the statutory and regulatory authority it has to conduct immigration court proceedings by video, and to apply that authority to permit hearings to proceed in a safe and effective manner during this pandemic, is unlawfully arbitrary and capricious.

In sum, Plaintiffs have established a likelihood of success on the merits of their APA claim. Accordingly a preliminary injunction is appropriate and, as set forth below, necessary in order to avoid truly irreparable harm.

B. Count Two: State Created Danger.

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the federal government from "depriv[ing]" any person "of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The Supreme Court has recognized that due process "imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199 (1989). Courts have thus recognized that the government is liable under the Due Process Clause for conduct that "affirmatively place[s] [a] plaintiff in a position of danger," with "knowledge of the danger." *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (internal quotation marks omitted).[45]

[45] Although *DeShaney* arose out of the Fourteenth Amendment Due Process Clause's restriction on state action, its rationale applies equally under the Fifth Amendment's parallel provisions that apply to federal action. *See Juliana v. United States*, 217 F.

The Third Circuit has identified the four elements of a state-created danger claim:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Kaucher v. Cnty. of Bucks, 455 F.3d 418, 431 (3d Cir. 2006) (quoting *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)).

All four elements are met in this case. First, there is a foreseeable and direct risk of harm to Plaintiffs from the resumption of in-person proceedings at the Newark Immigration Court. This is not only because of the indisputable public health evidence that group gatherings such as those that would occur at the Newark Immigration Court risk the spread of COVID-19, especially indoors. *See supra* n.7 (citing EPA statements); *supra* nn.19-22 (citing Governor Murphy statements and orders). Rather, and even more specifically, the risk is beyond foreseeable and is

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Supp. 3d 1224, 1252 (D. Or. 2016) (applying *DeShaney* to federal actions under Fifth Amendment Due Process Clause), *rev'd on other grounds*, 947 F.3d 1159 (9th Cir. 2020).

clearly direct because the Newark Immigration Court has *already* been forced to shut down several times, including a prolonged closure starting on March 18, due to concerns about coronavirus infections spreading at the courthouse. Estela Decl. ¶ 9. And coronavirus exposures that were linked to the Newark Immigration Court prior to its closure have resulted in at least two deaths, including one of an NJ-AILA member, and two serious, prolonged illnesses (one of which almost resulted in the death of a senior immigration prosecutor). *Id.* ¶¶ 5-8; O'Neill Decl. ¶¶ 10-11. Defendants thus know that compelling Plaintiffs' presence at the courthouse poses a risk to their health and lives. *See L.W. v. Grubbs*, 974 F.2d 119, 122 (9th Cir. 1992) (finding that plaintiff stated cause of action that was "seek[ing] to make Defendants answer for their acts that independently created the opportunity for and facilitated" assault on plaintiff).

Second, Defendants have acted with the requisite culpability to justify a finding of liability for a state-created danger. Where, as here, a governmental actor "has time to make an 'unhurried judgment[ ],' a plaintiff need only allege facts supporting an inference that the official acted with a mental state of 'deliberate indifference.'" *Kedra v. Schroeter*, 876 F.3d 424, 437 (3d Cir. 2017) (quoiting *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006) (*per curiam*)). The standard is "described variously as a conscious disregard of a substantial risk of serious harm, or willful disregard demonstrated by actions that evince a willingness to ignore a

foreseeable danger or risk." *Id.* (internal citations and quotation marks omitted). Here, in light of the clear, known risk to Plaintiffs' health and lives from in-person appearances at the Newark Immigration Court, and the communications from public officials, attorneys, and other groups protesting the re-opening of the Immigration Court, Defendants have nonetheless compelled attorney appearances under threat of disciplinary action. Moreover, they have done so without permitting Plaintiffs to avail themselves of the reasonable, viable alternative of a videoconference proceeding. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c). These actions plainly constitute disregard of a known risk of harm to Plaintiffs sufficient to establish liability. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 238 (3d Cir. 2008) (finding foreseeability element met through pleading of facts demonstrating "awareness on the part of the state actors that rises to level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm"); *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 246 (3d Cir. 2016) (finding sufficient evidence of culpability for conduct that was "inherently dangerous"). At the very least, Plaintiffs have shown that Defendants' conduct is objectively unreasonable, which is all that is required to prove a violation based on a state-created danger. *See Kedra*, 876 F.3d at 438-39 (holding that culpability for a state-created danger is measured by an objective standard).

Plaintiffs have made the requisite showing with respect to the final two

elements as well. With respect to the third element, because attorneys are compelled to appear in court under penalty of disciplinary action instituted by EOIR, *see* 8 C.F.R. §§ 1003.101, 1003.102, they are within a particular, identifiable category of persons who are foreseeably affected by the governmental action of reopening the Newark Immigration Court for in-person proceedings, separate from the public at large. *See Kneipp v. Tedder*, 95 F.3d 1199, 1209 n.22 (1996) ("The relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense."); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 914 (3d Cir. 1997) ("The ultimate test is one of foreseeability."). And regarding the fourth and final element, Plaintiffs face the harm of compelled in-person appearances at the immigration court only because of Defendants' actions in reopening the court for in-person proceedings. *See Phillips*, 515 F.3d at 237 (finding fourth element met through allegations that defendants "undertook affirmative actions which worked to [plaintiff's] detriment by exposing him to danger").

Plaintiffs have thus shown the required a likelihood of success on their state-created danger claim to support a preliminary injunction.

II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

To obtain a preliminary injunction, a party must show "that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Reilly*, 858

F.3d at 179. The Third Circuit has held that the threat of an immediate risk of harm or death constitutes irreparable injury for purposes of obtaining injunctive relief. *See Sullivan v. City of Pittsburgh*, 811 F.2d 171, 183 (3d Cir. 1987) (upholding finding of irreparable harm where "the evidence strongly suggested that at least some appellees would be seriously injured" absent injunctive relief); *see also LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55 (2d Cir. 2004) (upholding finding of irreparable harm based on the "substantial risk to plaintiffs' health").

Plaintiffs have thus met their burden of showing irreparable harm through the risk of contracting COVID-19 at the Newark Immigration Court. The virus that causes COVID-19 is highly transmissible from person-to-person, particularly in crowded indoor settings like the Newark Immigration Court. *See supra* nn.5-7. And the disease is well-known to cause serious harms to those who contract it, including death. *See supra* n.8. While people who are elderly or suffer from underlying medical conditions are particularly at risk, the virus can cause serious, lasting harm or death to otherwise healthy people as well. *See supra* n.9. As noted, one NJ-AILA member has already died from the coronavirus (after possibly being infected at the Newark Immigration Court); another woman who worked for the immigration prosecutor's office has also died of COVID-19; and a senior ICE prosecutor and court interpreter have both suffered serious, lengthy illnesses after contracting the virus. Estela Decl. ¶¶ 5-8; O'Neill Decl. ¶¶ 10-11; Trinidad Decl. ¶¶ 22-23. Yet

despite this clear evidence of the public health threat posed by in-person appearances at the Newark Immigration Court, EOIR has resumed in-person proceedings and denied at least two motions for continuances made by the individual plaintiffs in this action. *See* O'Neill Decl. Ex. A; DiRaimondo Decl. Ex. A.[46]

Indeed, courts around the country, including this Court and others in this District, have already concluded that irreparable harm results from the risk of catching the coronavirus in detention. *See Rafael L.O. v. Tsoukaris*, Civil Action No. 20-3481 (JMV), 2020 WL 1808843, at *8 (D.N.J. Apr. 9, 2020) (Vazquez, J.) (finding irreparable harm in light of "serious concerns about the ability to stop transmission of the virus"); *Jose B.R. v. Tsoukaris*, --- F. Supp. 3d ---, 2020 WL 2744586, at *12 (D.N.J. May 27, 2020) (Arleo, J.) (same); *Thakker v. Doll*, --- F. Supp. 3d ---, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020) ("Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more

[46] This case is therefore different from other cases previously filed against EOIR regarding the continued operation of the immigration courts during the pandemic, because those cases did not involve allegations that the courts had failed to grant continuance motions. *See Ali v. Barr*, --- F. Supp. 3d ---, 2020 WL 2986692, at *8 (S.D.N.Y. June 3, 2020) (finding no irreparable harm because of "the absence of any outright denial of a continuance motion filed by the Attorney Plaintiffs"); *Nat'l Immigration Project of Nat'l Lawyers Guild*, 2020 WL 2026971, at *12 (acknowledging "the *possibility* that an individual immigration judge might require, in an individual case, a detainee or her counsel to appear in-person for a hearing," but finding no irreparable harm because "there is no actual evidence in the record of that having occurred").

irreparable."); *Basank v. Decker*, --- F. Supp. 3d ---, 2020 WL 1953847, at *4 (S.D.N.Y. Apr. 23, 2020) ("Petitioners have shown irreparable injury by establishing the risk of harm to their health and constitutional rights."). The same conclusion holds true for Plaintiffs' risk of infection from attending in-person court proceedings. Plaintiffs have thus very obviously met their burden of showing irreparable harm.

III. The Public Interest, Particularly in Preventing the Spread of COVID-19, Weighs in Plaintiffs' Favor.

Because Plaintiffs have made the requisite showing of likelihood of success on the merits and irreparable harm, the Court must "assess[] the harm to the opposing party and weigh[] the public interest" in determining whether a preliminary injunction is appropriate. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Highmark, Inc. v. UPMC Health Plan, Inc.* 276 F.3d 160, 171 (3d Cir. 2001) (requiring consideration of "whether there will be greater harm to the nonmoving party if the injunction is granted" and "whether granting the injunction is in the public interest"). "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435; *accord Osorio-Martinez v. Att'y Gen.*, 893 F.3d 153, 178 (3d Cir. 2018).

Here, the public interest overwhelmingly supports Plaintiffs' position. First, this case challenges unlawful agency action, and "[i]t is evident that '[t]here is generally no public interest in the perpetuation of unlawful agency action.'" *Planned Parenthood of N.Y.C., Inc. v. Dep't of Health & Human Servs.*, 337 F. Supp.

3d 308, 343 (S.D.N.Y. 2018) (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). And, on the other side of the same coin, "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (quoting *Newby*, 838 F.3d at 12) (internal quotation marks omitted). Thus, an injunction against Defendants' unlawful actions in compelling in-person appearance in the Newark Immigration Court is itself in the public interest.

More fundamentally, an injunction against compelled in-person appearances will serve to mitigate the spread of COVID-19. It is well-known that the virus is highly transmissible from person to person, *see supra* n.5, and an attorney who contracts COVID-19 at the Newark Immigration Court could easily spread it to their own families and communities. Similarly, an attorney who unwittingly attends a Newark Immigration Court proceeding after contracting COVID-19, while not displaying symptoms or otherwise knowing that he or she is contagious, could then spread the virus to others at the court, who in turn could spread it through their communities. *See supra* n.6. Preventing this potentially fatal spread of COVID-19 is in furtherance of public health, and thus an injunction against compelled in-person proceedings is in furtherance of the public interest. *See Rafael L.O.*, 2020 WL 1808843, at *9 ("Clearly the public has an interest in preventing the further spread of COVID-19. Prevention, among other things, preserves critical medical resources

necessary to combat the pandemic.").

Finally, an injunction does not undermine Defendants' interests in ensuring the lawful operations of the Newark Immigration Court. *Cf. Nken*, 556 U.S. at 436 (describing Government's interest in executing lawful removal orders). Thus, Plaintiffs do not seek to hinder, prevent, or obstruct the Newark Immigration Court's operations in any way. Rather, Plaintiffs propose that hearings could proceed by videoconference, which is authorized by statute and regulation. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c). Moreover, an immigration respondent could still consent to a telephonic hearing, in which case the hearing could proceed without the need for an in-person appearance.[47] As the experience of many other courts shows, the public interest in continued court operations can be served by

[47] The option for a telephonic hearing, however, does not obviate the harm alleged by Plaintiffs. First, attorneys such as Plaintiffs do not control the decision to consent to a telephonic form of merits hearing, because it is their clients' decision alone to consent to such a proceeding in accordance with specific procedural safeguards. *See* 8 U.S.C. § 1229a(b)(2)(B); 8 C.F.R. § 1003.25(c). Second, even where a respondent consents to a telephonic trial, the Newark Immigration Court has required the respondent to be in the same location as their attorney, thus placing Plaintiffs at risk of contracting COVID-19 from their clients. *See* Declaration of Jayson DiMaria, attached as Exhibit 7. Third, Plaintiffs are unlikely to be able to fulfill their professional obligations to their clients by forcing them to waive, *e.g.*, the right to cross-examine witnesses, *see* 8 U.S.C. § 1229a(b)(4)(B), or the right to object to evidence, *see* Noveck Decl. Ex. C (Judge Cheng's Standing Order). Finally, the Newark Immigration Court has not even guaranteed the availability of telephonic hearings, as Judge Cheng's Standing Order gives an immigration judge discretion to require in-person appearances in any case. *See id.*

videoconference hearings during this pandemic, while also preserving the health and safety of attorneys and the public. *See supra* n. 32-40.[48] In sum, granting an injunction against compelled in-person proceedings at the Newark Immigration Court is in the public interest, a factor that also weighs in Plaintiffs' favor.

CONCLUSION

EOIR's reopening of the Newark Immigration Court for non-detained proceedings, and its efforts to compel in-person attorney appearances, requires immigration attorneys to make an impossible choice between violating their ethical responsibilities under risk of disciplinary sanction, or risking their health, and lives, by attending court in-person. Because Plaintiffs have shown a likelihood of success on their claims that this agency action is unlawful; that it causes irreparable harm; and that it is not in the public interest, the Court should grant a preliminary injunction against compelled in-person proceedings.

[48] It should be noted that Plaintiffs' claims are limited to the non-detained docket, which involves immigration proceedings against people whom the Government has determined do not pose a risk of danger to the community or a risk of flight. *See* 8 C.F.R. § 1236.1(c)(8) (stating that ICE can release a person subject to removal proceedings only if the alien can "demonstrate to the satisfaction of [ICE] that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding"). Some delay in immigration proceedings against such persons, who are not detained and do not pose a risk of danger, is a small price to pay for protecting the public health in the middle of this unprecedented pandemic.

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Respectfully submitted,

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