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**UNITED STATES DISTRICT COURT
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

**DECLARATION OF DAVID CHENG
ASSISTANT CHIEF
IMMIGRATION JUDGE**

I, David Cheng, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I serve as an Assistant Chief Immigration Judge (“ACIJ”) for the Executive Office for Immigration Review (“EOIR”). As ACIJ, I currently have oversight responsibility for the Newark Immigration Court, as well as the Elizabeth Immigration Court. I am a managing official for all EOIR personnel at the courts, including the immigration judges (“IJs”), the court administrators, law clerks, and clerical staff. I have served as an ACIJ since April 2020.

2. From 2017 to 2020, I served as an IJ at the Newark Immigration Court. From 2007 to 2017, I served as a senior attorney with the U.S. Department of Homeland Security

1 (“DHS”), Immigration and Customs Enforcement (“ICE”), Office of Chief Counsel
2 (“OCC”), in Newark, New Jersey. From 2002 to 2007, I served as an assistant chief
3 counsel with OCC in Newark. From 2000 to 2002, I served as an administrative law
4 judge for the New York City Department of Finance. From 1997 to 2000, I was a general
5 partner at Cheng and Cheng, PC, in New York, New York. I earned a Bachelor of Arts in
6 1992 from the State University of New York at Albany and a Juris Doctor in 1997 from
7 St. John’s University School of Law. I am a member of the New York State Bar.

8 3. As an ACIJ, I work for EOIR’s Office of the Chief Immigration Judge (“OCIJ”),
9 which provides overall program direction, articulates policies and procedures, and
10 establishes priorities for the sixty-nine immigration courts and immigration adjudication
11 centers.

12 4. This declaration is submitted in connection with the Government’s response to the
13 above captioned lawsuit. I understand that the Plaintiffs in this litigation are challenging
14 certain aspects of the Newark Immigration Court’s handling of non-detained cases during
15 the COVID-19 pandemic and, in particular, the decision to resume in-person hearings in
16 non-detained cases on July 13, 2020 without allegedly providing a videoconference
17 option. I further understand that Plaintiffs seek to immediately enjoin the Newark
18 Immigration Court from compelling attorneys to attend in-person proceedings at that
19 court. *See* Plaintiffs’ Proposed Preliminary Injunction Order, ECF No. 6-10.

20 5. EOIR takes seriously the risk posed by COVID-19 and, like many courts across the
21 country, is grappling with how to continue to achieve its mission of fairly, efficiently, and
22 effectively adjudicating immigration matters while also protecting the health of EOIR
23 employees and all of those appearing or having business before the immigration courts.
24 The purpose of this declaration is to explain the practices and policies being implemented
25 at the Newark Immigration Court, particularly with respect to the non-detained docket.
26 Those practices and policies attempt to ensure that adjudicatory functions continue while
27 simultaneously minimizing the risk posed to aliens (whom are known as “respondents” in
28 immigration court), family members and witnesses, practitioners (both respondents’
counsel as well as the attorneys that represent DHS in immigration court proceedings),

1 and EOIR employees.

2 6. From my supervisory role as ACIJ of these courts, I have personal knowledge of
3 the facts stated in this declaration.

4 **I. The Newark Immigration Court and Overview of Removal Proceedings**

5 7. The Newark Immigration Court is located at 970 Broad Street, Room 1200,
6 Newark, New Jersey 07102. The Newark Immigration Court is a non-detained court,
7 where respondents are not in detention. By contrast, a detained court hears cases where
8 respondents are detained. The Newark Immigration Court currently occupies the twelfth
9 floor of a 16-story building. The Newark Immigration Court currently has 8 courtrooms,
10 as well as office and administrative space for court personnel. There are 13 IJs, including
11 myself, assigned to the court who preside over removal proceedings, withholding-only
12 proceedings, credible fear and reasonable fear reviews, as well as other types of
13 proceedings specified under various provisions of the Immigration and Nationality Act
14 (“INA”) and its implementing regulations. The most common type of case adjudicated by
15 IJs presiding over the non-detained docket are removal proceedings held pursuant to INA
16 § 240, 8 U.S.C. § 1229a. As of August 24, 2020, Newark has a pending caseload of
17 approximately 67,500 removal cases on the non-detained docket.¹

18 8. The immigration court process begins when DHS initiates removal proceedings
19 against an alien by serving him/her with a Notice to Appear (“NTA”). *See* 8 C.F.R. §§
20 287.3(b); 1239.1(a). Immigration courts acquire jurisdiction over a removal case when
21 DHS files the NTA with the appropriate court. 8 C.F.R. § 1003.14(a).

22 9. During removal proceedings, an IJ will first determine “removability”—*i.e.* whether
23 the respondent is removable under the INA as charged by DHS in the NTA. If the
24 respondent is not removable, the IJ may terminate removal proceedings. If the respondent
25 is removable, the IJ will then determine whether the respondent is eligible for relief or
26 protection from removal. *See generally* 8 U.S.C. § 1229a; 8 C.F.R. § 1240.1-15.

27 10. There are generally two types of hearings in removal proceedings: master calendar

28 ¹ This information was obtained from EOIR’s case management system, CASE.

1 hearings and merits hearings. Master calendar hearings are hearings where an IJ will
2 handle preliminary matters. *See* Ex. 1, Immigration Court Practice Manual (“ICPM”) at
3 Ch. 4.15 (2016), *available at* <https://www.justice.gov/eoir/page/file/1258536/download>.
4 At the initial master calendar hearing, the IJ will provide an explanation of the
5 respondent’s rights and responsibilities in removal proceedings (through an interpreter if
6 necessary), advise the respondent of his or her opportunity to obtain counsel at no expense
7 to the government and provide a list of pro bono legal service providers to unrepresented
8 respondents, explain the charges and allegations in the NTA, and address other
9 preliminary matters. *See* 8 C.F.R. § 1240.10(a); Ex. 1, ICPM at Ch. 4.15. The IJ may
10 also take pleadings, determine removability, and ascertain apparent eligibility for relief or
11 protection provided for by law. *Id.* At the conclusion of the initial master calendar
12 hearing, the IJ will ordinarily continue the case for a further hearing. For example, the IJ
13 might schedule a “continued master calendar hearing” if the alien requests time to obtain
14 or meet with an attorney, or if an attorney requests time to prepare an application for relief
15 from removal on behalf of his or her client. *See* Ex. 1, ICPM at Ch. 4.15.

16 11. Once the case is ready, it will proceed to a merits hearing (also known as an
17 individual hearing), during which the IJ will hold a hearing (including taking testimony)
18 on any application for relief or protection from removal. *See* 8 U.S.C. § 1229a(b)(1), (4);
19 *see also* Ex. 1, ICPM at Ch. 4.16. At the conclusion of the merits hearing, the IJ will
20 render an oral or written decision and enter an order of removal or an order granting relief
21 or protection from removal. 8 U.S.C. § 1229a(c)(1), 8 C.F.R. § 1240.12. Either DHS or
22 the respondent may appeal the IJ’s decision to the Board of Immigration Appeals (“BIA”).
23 *See* 8 C.F.R. § 1003.1(b). After exhaustion of any appeal with the BIA, a respondent may
24 also file a petition for review of the administratively final removal order with the
25 appropriate circuit court of appeals. 8 U.S.C. § 1252(b)(9).

26 12. IJs have independent discretion to regulate the course of removal proceedings, *see*
27 8 C.F.R. § 1240.1(c), so long as they do so in accordance with the INA, the regulations,
28 and any applicable BIA and Attorney General precedent or federal case law.

13. During the course of removal proceedings, IJs have broad authority to set filing

1 deadlines for submissions necessary to the adjudication of the case, including for example,
2 applications for relief, motions, responses to motions, briefs, pre-trial statements, exhibits
3 (including evidentiary submissions), and witness lists. *See* Ex. 1, ICPM at Ch. 3.1(b). For
4 non-detained cases, the ICPM sets a general filing deadline of 15 days prior to an
5 individual or merits hearings. *See* Ex. 1, ICPM Ch. 3.1(b)(ii)(A), *available at*
6 <https://www.justice.gov/eoir/page/file/1258536/download>. However, IJs retain discretion
7 to set their own deadlines, and some IJs at the Newark Immigration Court exercise this
8 option. IJs also have authority to grant extensions of filing deadlines in advance of the
9 deadline or to grant motions to excuse untimely filings after the deadline has passed.

10 14. Similarly, IJs have authority to continue a hearing for “good cause shown.” 8
11 C.F.R. § 1003.29; *see also Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018)
12 (“continuances are a legitimate and appropriate case-management tool for immigration
13 judges Yet the regulation authorizing continuances, 8 C.F.R. § 1003.29, limits their
14 use by imposing a good-cause standard.”). Whether good cause exists depends on the
15 specific facts of each case. IJs also have authority to *sua sponte* adjourn cases. 8 C.F.R. §
16 1240.6.

17 15. In regulating the course of removal proceedings and deciding individual cases
18 before them, IJs “shall exercise their independent judgment and discretion and may take
19 any action consistent with their authorities under the [INA] and regulations that it is
20 necessary and appropriate for the disposition of such cases.” 8 C.F.R. § 1003.10(b). Only
21 the BIA, when adjudicating an appeal from a decision of an IJ, may direct the result of an
22 adjudication assigned to an IJ. *See* 8 C.F.R. § 1003.9 (stating that “the Chief Immigration
23 Judge shall have no authority to direct the result of an adjudication assigned to another
24 immigration judge”); *compare* 8 C.F.R. § 1003.1(b)(3), (d)(1) (authority of the BIA).

25 **II. Newark Operations during the COVID-19 Pandemic**

26 16. Since the onset of the pandemic, OCIJ has been actively monitoring the situation
27 and working to implement policies, practices, and guidance set by EOIR’s Office of the
28 Director in conjunction with OCIJ leadership to ensure that critical functions continue

1 while working to mitigate the risks presented by COVID-19 to those within EOIR space.

2 17. It is my understanding that those policies, practices, and guidance were informed
3 by multiple sources, including the Department of Justice (“DOJ”), the Office of
4 Management and Budget (“OMB”), the Office of Personnel Management (“OPM”), the
5 Centers for Disease Control and Prevention (“CDC”), the General Services
6 Administration (“GSA”), and the operations of other court systems.

7 18. EOIR has not adopted a “one size fits all” policy for every immigration court,
8 though it has issued generally-applicable guidance regarding access to EOIR space, the
9 promotion of practices that reduce the need for hearings, and the maximization of
10 telephonic and video teleconferencing (“VTC”) means through which to hold hearings.
11 *See* Ex. 2, EOIR, Policy Memorandum (“PM”) 20-10: Immigration Court Practices
12 During the Declared National Emergency Related to the COVID-19 Outbreak (Mar. 18,
13 2020), *available at* <https://www.justice.gov/eoir/file/1259226/download>; *see also* Ex. 3,
14 EOIR, PM 20-13: Updating Practices Relating to the COVID-19 Outbreak (June 11,
15 2020), *available at* <https://www.justice.gov/eoir/page/file/1284706/download>.

16 19. On March 18, 2020, in response to the COVID-19 pandemic, EOIR postponed all
17 removal hearings in non-detained cases throughout the United States through April 10,
18 2020. In a series of subsequent announcements, EOIR further postponed all removal
19 hearings in non-detained cases until June 15, 2020, when the Honolulu Immigration Court
20 resumed hearing non-detained cases. EOIR maintains an operational status website, and
21 notice of all postponements are posted to the website as well as to EOIR’s social media
22 pages. *See* EOIR Operational Status During Coronavirus Pandemic, *available at*
23 <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>.

24 20. On April 1, 2020, to facilitate filings while minimizing the risk of COVID-19,
25 EOIR began accepting email filings at the immigration courts. *See generally*, EOIR,
26 Filing by Email – Immigration Courts, *available at* [https://www.justice.gov/eoir/filing-](https://www.justice.gov/eoir/filing-email)
27 [email](https://www.justice.gov/eoir/filing-email). Two days later, EOIR issued a Policy Memorandum explaining that it would allow
28 electronic signatures on filings. *See* Ex. 4, EOIR, PM 20-11: Filings and Signatures (Apr.

1 3, 2020) *available at* <https://www.justice.gov/eoir/page/file/1266411/download>.

2 21. On April 22, 2020, I issued a Standing Order applicable to the Newark
3 Immigration Court imposing a three-month temporal filing limit and a 50-page limit on all
4 documents filed by email, with the exception of applications for asylum and related
5 protection. The Standing Order is available on the court's website at
6 <https://www.justice.gov/eoir/page/file/1270531/download>. The Standing Order explained
7 that those wishing to file documents more than three months in advance of their next
8 hearing date or in excess of 50 pages may still do so; however, they must be sent to the
9 court via the U.S. Postal Service or an overnight delivery service, not by email.

10 22. On June 11, 2020, EOIR issued a Policy Memorandum updating its guidance
11 related to COVID-19. *See* Ex. 3, EOIR, PM 20-13:EOIR Practices Related to the COVID-
12 19 Outbreak, *available at* <https://www.justice.gov/eoir/page/file/1284706/download>. In it,
13 EOIR's Director explained that "[a]s most of the country, including the federal
14 government, moves toward restarting activities limited by COVID-19, EOIR, too, is
15 moving toward reengaging its operations that have been postponed, including the
16 resumption of non-detained hearings." *Id.* Among other things, the Director explained
17 that EOIR would no longer accept email filings as non-detained hearings resume and
18 would deactivate the email address for filing 60 days after an immigration court resumed
19 hearing non-detained cases. *Id.* The Director also issued updated guidance regarding
20 access to EOIR space such as requiring visitors to wear face coverings except for children
21 under two years of age and individuals with medical conditions that prevent them from
22 wearing a face covering, and barring entry to individuals with a diagnosis or symptoms of
23 COVID-19. *Id.* The Director also issued updated guidance promoting practices that
24 reduce the need for in-person hearings, such as waiving appearances, allowing telephonic
25 appearances, granting continuances, issuing standing orders, encouraging the parties to
26 resolve cases through written filings, and maximizing the use of telephonic and VTC
hearings. *Id.*

27 23. On June 19, 2020, in the interest of public health and safety, I issued a Standing
28 Order regarding telephonic appearances for master calendar and merits hearings. The

1 Standing Order, attached as Ex. 5, is available on the Newark Immigration Court's
2 website at <https://www.justice.gov/eoir/page/file/1287336/download>. This Standing Order
3 was intended to provide information relevant to telephonic hearings only, and was not
4 intended to provide all procedures related to COVID-19.

5 24 The Standing Order provides that all master calendar hearings for represented
6 respondents will be conducted telephonically without the need for a motion for telephonic
7 appearance. It further waives the presence of all represented respondents for master
8 calendar hearings in accordance with 8 C.F.R. § 1003.25(a). The Standing Order also
9 provides that counsel or accredited representatives for respondents are to file written
10 pleadings at least 15 calendar days before the master calendar hearing. In addition, unless
11 otherwise ordered by an individual IJ, all filings, including applications, pretrial motions,
12 briefs, and supplemental documents, must be filed at least 15 calendar days before the
13 telephonic master calendar hearing.

14 25. The Standing Order further provides that an individual IJ, in his or her discretion,
15 and upon consent of the respondent, may conduct a telephonic merits hearing in
16 accordance with 8 C.F.R. § 1003.25(a). For any merits hearing, a timely motion for
17 telephonic appearance is required in advance of the hearing and must include a sworn
18 affidavit or declaration from the respondent indicating that he or she has been advised of
19 the right to proceed in person and waives that right. *See* 8 C.F.R. § 1003.25(c). The
20 Standing Order provides that, unless otherwise ordered by an individual IJ, all filings,
21 including applications, pretrial motions, briefs, and supplemental documents, must be
22 filed at least 15 calendar days before the telephonic merits hearing.

23 26. For all filings before the immigration court, a party must serve an identical copy on
24 the opposing party (or, if the party is represented, the party's representative), except for
25 filings served during a hearing (or jointly filed motions). *See* Ex. 1, ICPM at Ch. 3.2.
26 Thus, all filings, except for filings served during a hearing, are generally available in
27 advance to parties and their representatives, whether participating in-person, by VTC, or
28 by telephone, and the parties and their representatives should be aware of their contents
when they are offered.

1 27. Under the Standing Order, parties appearing telephonically waive the right to
2 object to the admissibility of any document on the *sole* basis that they are unable to
3 examine the document. This provision applies to respondents and DHS alike. This
4 provision is meant to foreclose objections to filings served during a telephonic hearing on
5 the *sole* basis that the document is unavailable for examination. The Standing Order does
6 not require parties to generally waive any right to object to evidence. Parties appearing
7 telephonically may raise any other objection, including an objection that filings served
8 during a telephonic hearing are untimely.

9 28. The Standing Order also provides that, to ensure the quality of the record, parties
10 appearing telephonically must be in a quiet private location. The call may never be placed
11 on hold. The use of cellular phones or phones in public places is prohibited. And failure
12 to respond when the case is called may result in the conclusion that counsel has failed to
13 appear. If counsel fails to respond when the case is called, counsel will thereafter be
14 required to appear in person at any rescheduled hearing. The Standing Order also
15 provides that an IJ may, in his or her discretion, halt any telephonic hearing, and the
16 parties may be required to attend a future in-person hearing on a date to be determined.
17 The Standing Order does not require that a respondent and his or her counsel be in the
18 same physical location. To the contrary, the Standing Order warns that scheduling
19 simultaneous appearances in multiple locations does not excuse a failure to appear. *See*
20 <https://www.justice.gov/eoir/page/file/1287336/download>.

21 29. The Standing Order also provides that where the parties have agreed that the court
22 should issue a decision solely on the sworn application(s) and documentary evidence, the
23 parties must file a Joint or Unopposed Motion to Adjudicate Application Without
24 Evidentiary Hearing on the Merits that meets certain minimum requirements.

25 30. On June 24, 2020, EOIR announced on Twitter that the Newark Immigration Court
26 would resume hearings in non-detained cases on July 13, 2020, and advised interested
27 parties to monitor the court's web page and public messaging for additional information.
28 *See* https://twitter.com/DOJ_EOIR/status/1275822667275341829

1 31. On July 8, 2020, EOIR's Office of Policy, Communications and Legislative Affairs
2 Division, announced that it would resume non-detained master calendar and merits
3 hearings at the Newark Immigration Court, as well as at the Baltimore and Detroit
4 Immigration Courts on July 13, 2020. *See* EOIR, Notice: EOIR to Resume Hearings in
5 Non-Detained Cases at the Baltimore, Detroit, and Newark Immigration Courts, *available*
6 *at* <https://www.justice.gov/eoir/page/file/1292881/download>. In so doing, the Newark
7 Immigration Court, along with the Baltimore and Detroit Immigration Courts, joined the
8 Honolulu Immigration Court, which reopened on June 15, 2020; the Boston, Buffalo,
9 Hartford, Las Vegas, and New Orleans Immigration Courts, which reopened on June 29,
10 2020;² and the Chicago, Cleveland, Philadelphia, and Saipan Immigration Courts, which
11 reopened on July 6, 2020. *See* [https://www.justice.gov/eoir/eoir-operational-status-](https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic)
12 [during-coronavirus-pandemic](https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic). Since the Newark Immigration Court has resumed hearing
13 non-detained cases, the Arlington and Omaha Immigration Courts have also resumed
14 hearing non-detained cases. *See id.*

15 32. In its announcement that the Newark Immigration Court would resume hearing
16 non-detained cases on July 13, 2020, EOIR advised that all persons working in or visiting
17 the common spaces of the immigration courts – including waiting rooms, corridors,
18 courtrooms, and other spaces generally open to the public – are required to wear face
19 coverings and should become familiar with the CDC's guidance about COVID-19 posted
20 *at* <https://www.cdc.gov/coronavirus/2019-ncov/index.html>. *See* [https://www.justice.gov/](https://www.justice.gov/eoir/page/file/1292881/download)
21 [/eoir/page/file/1292881/download](https://www.justice.gov/eoir/page/file/1292881/download). EOIR further advised that an exception to the face
22 covering requirement would be made for children under the age of two and individuals
23 with medical conditions that prevent them from wearing a face covering. *Id.* EOIR also
24 noted that other requirements may apply and urged persons with business before the
25 immigration court to check the court's webpage prior to arrival.

26 33. EOIR also directed persons working in or visiting EOIR spaces to review EOIR's

27 ² Although the Dallas Immigration Court also resumed hearing non-detained cases on June 29,
28 2020, it subsequently closed on July 6, 2020, and all non-detained cases are currently postponed
through September 4, 2020.

1 Public Health Notice, attached as Ex. 6, posted at [https://www.justice.gov/eoir/public-](https://www.justice.gov/eoir/public-health-notice)
2 [health-notice](https://www.justice.gov/eoir/public-health-notice). The Public Health Notice advises that: (1) face coverings are required to
3 enter and remain in EOIR space, and other building requirements may apply; (2)
4 individuals with symptoms or a diagnosis of COVID-19 should not enter EOIR space, and
5 represented respondents should call their attorney or representative, while attorneys,
6 representatives, and unrepresented respondents should call the immigration court for
7 further instructions; (3) individuals should practice social distancing, staying six feet (or
8 two arm lengths) away from others; and (4) individuals should practice proper hygiene by
9 washing hands with soap and water or using alcohol-based sanitizer. *Id.* Soap and water
10 are available in the restrooms at the Newark Immigration Court and alcohol-based
11 sanitizer is available in the waiting areas and in the courtrooms.

12 34. In its July 8, 2020 announcement that the Newark Immigration Court would
13 resume hearing non-detained cases on July 13, 2020, EOIR also noted that the email filing
14 option at the court would end on September 13, 2020, and that emails sent after that date
15 would be deleted without review. *Id.*

16 35. Before resuming hearings in non-detained cases on July 13, 2020, the Newark
17 Immigration Court posted additional guidance on its website to promote the health and
18 safety of respondents, practitioners, and EOIR employees, as well as the efficient
19 operation of the court. *See* Ex. 7, <https://www.justice.gov/eoir/newark-immigration-court>.
20 In addition to reiterating the guidance in EOIR's Public Health Notice regarding face
21 coverings, a diagnosis or symptoms of COVID-19, social distancing, and proper hygiene,
22 the Newark Immigration Court's website advises that waiting times to enter the building
23 and EOIR space may be significantly longer than usual and suggested that persons with
24 business before the court allow extra time. *Id.* The website also advises that elevator wait
25 times may be significantly longer than usual in order to comply with social distancing
26 requirements. *Id.* The website further advises that staff or signs may direct individuals to
27 a seat and not to switch seats if instructed to sit in a particular seat. *Id.* Lastly, the
28 website advises that the court may limit entry and not to bring individuals to EOIR space
unless they are required to be present for a hearing. *Id.*

1 36. Before resuming hearings in non-detained cases, IJs at the Newark Immigration
2 Court were reminded, as they were at the outset of the pandemic, of the well-established
3 practices and procedures that could help minimize the risk of COVID-19, such as waiving
4 appearances, allowing telephonic appearances, granting continuances, limiting physical
5 presence in courtrooms, issuing standing orders, encouraging the parties to resolve cases
6 through written filings, and conducting hearings by telephone and VTC. *See* Ex. 3, EOIR,
7 PM 20-13, <https://www.justice.gov/eoir/page/file/1284706/download>; *see also* Ex. 2,
8 EOIR PM 20-10, <https://www.Justice.gov/eoir/file/1259226/download>.

9 37. In particular, IJs at the Newark Immigration Court were specifically encouraged to
10 use alternative hearing mediums — such as hearings by telephone or VTC — “to the
11 maximum extent practicable in accordance with the law” to further minimize in-person
12 interaction and reduce the risk of the spread of COVID-19. *See id.*; *see also* 8 U.S.C. §
13 1229a(b)(2); 8 C.F.R. § 1003.25(c).

14 38. On August 20, 2020, the Newark Immigration Court was closed after an EOIR
15 employee reported possible symptoms of COVID-19. In accordance with CDC guidance,
16 the Newark Immigration Court was closed for cleaning and reopened on August 24, 2020.
17 To date, no EOIR employee has tested positive for COVID-19.

18 **III. VTC Hearings**

19 39. Historically, removal proceedings were conducted in-person. However, EOIR has
20 used VTC since the 1990s, and its use was expressly authorized by statute in 1996. *See* 8
21 U.S.C. § 1229a(b)(2)(A)(iii) (“The proceeding may take place . . . through video
22 conference.”). An individual’s consent is not necessary to conduct a hearing by VTC. *Id.*
23 In that regard, VTC hearings are treated similarly to in-person hearings (as compared to
24 telephonic hearings, to which an individual must consent). *See* 8 U.S.C. § 1229a(b)(2)(B)
25 (“An evidentiary hearing on the merits may only be conducted through a telephone
26 conference with the consent of the [respondent] after the [respondent] has been advised of
27 the right to proceed in person or through video conference.”).

28 40. All courtrooms at the Newark Immigration Court have secure VTC terminals with

1 proprietary technology installed and maintained by EOIR's Office of Information
2 Technology ("OIT"). These secure VTC terminals are integrated with EOIR's Digital
3 Audio Recording ("DAR") system, a recording tool that utilizes multiple microphones
4 throughout each courtroom to record the respondent, interpreter, practitioners, witnesses,
5 and EOIR employees. Because EOIR does not employ court reporters, the DAR system
6 allows for the recording and transcription of immigration court hearings.

7 41. EOIR's secure VTC system is distinct from commercial videoconferencing
8 programs such as Zoom, Skype, and Teams. EOIR's VTC system addresses a variety of
9 concerns unique to immigration proceedings. For example, because EOIR does not
10 employ court reporters, EOIR's VTC system is integrated with EOIR's DAR system,
11 which allows for the recording and transcription of immigration proceedings. In addition,
12 EOIR's VTC system is meant to address the strict confidentiality provisions governing
13 certain applications for relief and protection from removal. *See, e.g.*, 8 C.F.R. § 1208.6.

14 42. VTC terminals are also located in at the Elizabeth Detention Center, as well as at
15 the Bergen, Hudson, and Essex County Jails. Detainees at these locations and their
16 representatives may participate in VTC hearings using these VTC terminals.

17 43. Parties who are unable go to location with a secure VTC terminal, such as the
18 Newark Immigration Court, or a detention facility maintained, leased, or operated by
19 DHS, can participate in an immigration hearing by telephone. A party who is unable or
20 unwilling to go to a location with a secure VTC terminal or participate in an immigration
21 hearing by telephone must appear in person.

22 44. VTC is frequently used for detained hearings. At the Newark Immigration Court,
23 however, VTC is also used for non-detained hearings. Before the onset of the pandemic,
24 non-detained cases were occasionally heard by VTC. In those cases, the parties, including
25 the non-detained respondent, appeared together in person in a single courtroom at the
26 Newark Immigration Court, while an IJ, from other Immigration Courts, conducted the
27 hearing by VTC from his or her home court. The Newark Immigration Court has
28 expanded its use of VTC since the onset of the pandemic. Since resuming non-detained

1 hearings on July 13, 2020, the Newark Immigration Court has encouraged the use of VTC
2 to the maximum extent practicable in accordance with the law, and in accordance with
3 PM 20-13. *See* 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c); *see also* Ex. 3, EOIR, PM
4 20-13, <https://www.justice.gov/eoir/page/file/1284706/download>;

5 45. When conducting hearings by telephone or VTC, respondents, practitioners,
6 witnesses, and EOIR employees do not need to be present in the same physical location.
7 This promotes social distancing and reduces the risk of COVID-19. At the Newark
8 Immigration Court, there are currently two empty courtrooms, among eight total
9 courtrooms, available for VTC hearings. Since resuming non-detained hearings on July
10 13, 2020, the IJ and the interpreter have been located in one VTC courtroom, while the
11 respondent and his or her attorney or representative have been located in another VTC
12 courtroom. If the respondent and his or her attorney or representative do not wish to be in
13 the same courtroom, the respondent's attorney or representative may participate in the
14 hearing by telephone. DHS attorneys generally appear by telephone after filing a motion
15 for telephonic appearance and the IJ grants the motion. As an alternative to VTC or
16 telephonic hearings, the parties may appear for an in-person hearing before an IJ, which
17 generally requires all participants to be in the same room, as described below. However,
18 EOIR has no policy requiring any attorney or representative to appear in-person in any
19 case. The method of an attorney or representative's appearance is subject to the discretion
20 of the IJ.

21 46. If the respondent and his or her attorney or representative arrive at the Newark
22 Immigration Court together, they can proceed directly to an empty courtroom for their
23 VTC hearing, without having to wait in the waiting area. If the respondent has to wait for
24 his or her attorney or representative, or vice versa, they are advised by security personnel
25 to wait in the reception area to promote social distancing and reduce the risk of exposure
26 to COVID-19.

27 47. Currently, no one other than the respondent and his or her attorney or
28 representative is permitted to enter the courtroom during a VTC hearing. The only
exception might be if a witness is testifying in the proceeding. Witnesses are sequestered

1 until it is time to present their testimony. They then give their testimony in the same VTC
2 courtroom as the respondent and his or her attorney or representative.

3 48. By contrast, during an in-person hearing, which resumed on July 13, 2020, all or
4 most of the participants, including the respondents, practitioners, and EOIR employees,
5 appear together in one courtroom. While in-person hearings resumed on July 13, 2020,
6 IJs at the Newark Immigration Court are encouraged to use alternative hearing mediums
7 — such as hearings by telephone or VTC — “to the maximum extent practicable in
8 accordance with the law” to reduce the risk of the spread of COVID-19. *See* Ex. 3, EOIR,
9 PM 20-13, <https://www.justice.gov/eoir/page/file/1284706/download>; *see also* 8 U.S.C. §
10 1229a(b)(2); 8 C.F.R. § 1003.25(c);).

11 49. I am continuing to monitor the situation at the Newark Immigration Court,
12 including challenges posed by COVID-19, and, in coordination with the court
13 administrator and IJs, will continue to ensure that the court takes appropriate action to
14 ensure that court processes remain accessible to those having business before the courts,
15 while attempting to minimize the risk to everyone involved in matters before the Newark
16 Immigration Court, including respondents, practitioners, witnesses, family members and
17 EOIR employees.

18 50. EOIR’s secure VTC system is the only videoconferencing technology available at
19 the Newark Immigration Court. In addition to the concerns discussed above, which are
20 specific to immigration proceedings, including EOIR’s unique DAR system and the
21 confidentiality provisions that govern certain applications for relief and protection from
22 removal, none of the desktop computers at the Newark Immigration Court are currently
23 equipped with web cameras. Asking EOIR to abandon or retrofit its already robust,
24 secure VTC program, in which it has invested heavily over three decades, in favor of
25 commercial videoconferencing software, such as Zoom, Skype, or Teams, is not a viable
26 alternative.

27 51. Plaintiffs contend that the “Newark Immigration Court inexplicably “fails to
28 provide” video conferencing as an “option for attorneys or others for cases on the non-

1 detained docket.” Pls.’ Mem. of Law in Support of Mot. for Prelim Inj., ECF No. 6-1;
2 *see also id.* at 15-16, 29-30. This is inaccurate. Both before and since the onset of the
3 pandemic, the Newark Immigration Court has used VTC for non-detained hearings. Since
4 resuming non-detained hearings on July 13, 2020, the Newark Immigration Court has
5 encouraged the use of VTC to the maximum extent practicable in accordance with the
6 law, and in accordance with PM 20-13.

7 52. Plaintiffs further contend that “many other courts, including federal and state courts
8 in New Jersey, have successfully conducted hearings entirely by videoconference—
9 including bench trials and other evidentiary hearings, which mirror the types of
10 proceedings conducted in immigration courts.” *See* ECF No. 6-1, at 2, 16-19. EOIR has
11 used VTC since the 1990s, and its use was expressly authorized by statute in 1996. *See* 8
12 U.S.C. § 1229a(b)(2)(A)(iii). All courtrooms at the Newark Immigration Court have
13 secure VTC terminals with proprietary technology installed and maintained by EOIR’s
14 Office of Information Technology. These VTC terminals are integrated with EOIR’s
15 Digital Audio Recording system, which utilizes multiple microphones throughout each
16 courtroom to record the respondent, interpreter, practitioners, witnesses, and EOIR
17 employees to improve the quality and facilitate the transcription of immigration court
18 hearings.

19 53. Plaintiffs contend that my June 19, 2020 Standing Order “is notably silent” on the
20 question of whether video conferencing is available in non-detained cases at the Newark
21 Immigration Court. To be clear, that Standing Order was not meant to address all
22 measures the Newark Immigration Court is taking in response to the COVID-19
23 pandemic. It merely clarifies the court’s specific policies and procedures governing
24 telephonic appearances. Moreover, as discussed, the Newark Immigration Court has used
25 VTC in non-detained cases since before the onset of the pandemic and has subsequently
26 expanded its use, consistent with PM 20-10 and PM 20-13, to the maximum extent
27 practicable in accordance with the law.

28 54. Plaintiffs contend that the “Newark Immigration Court has insisted on holding such
in-person proceedings, and has arbitrarily refused to postpone the proceedings when

1 requested.” See ECF No. 6-1, at 19-21. Their claim is based on isolated anecdotes
2 relating to just two cases among approximately 67,500 pending cases at the Newark
3 Immigration Court.

4 55. Upon review of the case proceedings, it is my understanding that the IJ assigned to
5 the matter referenced by Plaintiffs O’Neill and Trinidad found no good cause to continue
6 the respondent’s merits hearing scheduled for July 27, 2020, where the motion for a
7 continuance raised only general concerns about the pandemic without identifying any
8 concerns specific to either the respondent or Plaintiffs O’Neill and Trinidad. It is also my
9 understanding that when the IJ attempted to conduct a telephonic hearing on July 27,
10 2020, the respondent declined to consent to a telephonic hearing, as is his right under 8
11 U.S.C. § 1229a(b)(2)(B). It is my understanding that the IJ then scheduled the non-
12 detained respondent for a VTC hearing on August 3, 2020. It is my understanding that
13 Plaintiffs O’Neill and Trinidad appeared by telephone, without the respondent, on August
14 3, 2020, rather than appear at the Newark Immigration Court. It is my understanding that
15 the respondent did not appear either for his scheduled VTC hearing or for a telephonic
16 hearing scheduled later that same morning. It is my understanding that Plaintiffs O’Neill
17 and Trinidad instructed the respondent to not appear and provided no explanation for the
18 respondent’s failure to appear. The IJ accordingly ordered the respondent removed *in*
19 *absentia*, while also noting that due to the respondent’s extensive criminal history, she
20 would have denied the respondent’s request for relief from removal as a matter of
21 discretion.

22 56. IJs have independent authority to adjudicate motions for continuances, and how an
23 IJ adjudicates a request for a continuance depends on the individual facts of the case and
24 reasons for the request. Continuance requests are not a mere formality but are governed
25 by regulations and case law. IJs must make independent determinations as to whether
26 there is “good cause shown” to grant a continuance on a case-by-case basis consistent
27 with the law and the facts of that case. See 8 C.F.R. § 1003.29; *Matter of L-A-B-R-*, 27 I.
28 & N. Dec. 405 (A.G. 2018). Accordingly, a one-size-fits-all order prohibiting all in-
person hearings regardless of the facts and circumstances of the case and the reasons for a

1 continuance request would be antithetical to the case-by-case analysis that IJs must
2 conduct to determine whether a continuance is warranted.

3 57. I am not aware of any IJ at the Newark Immigration Court denying a properly
4 supported motion for a continuance or request for telephonic or VTC appearance.
5 Moreover, the law and any EOIR policies on filing and appearances generally apply
6 equally to both parties in an immigration proceeding. Thus, standards for continuances
7 and telephonic or VTC appearances apply equally to both respondents and DHS. I am
8 unaware of any IJ at the Newark Immigration Court treating these issues differently for
9 DHS than for respondents.

10 58. However, to the extent any issue related to an IJ's ruling on a request for a
11 continuance or a waiver of appearance may arise, a respondent (or DHS attorney) may file
12 an appeal with the BIA, including an interlocutory appeal. Such an appeal may be filed in
13 any case that the party believes an IJ made a legal error in denying a continuance or
14 request for a telephonic or VTC appearance due to circumstances related to the pandemic.
15 8 C.F.R. 1003.1(b).

16 59. Plaintiffs further contend that two other attorneys "also face the prospect of
17 compelled in-person proceedings at the Newark Immigration Court in the coming days
18 and weeks." *See* ECF No. 6-1, at 21-22. While they contend that Plaintiff DiRaimondo
19 was scheduled for a hearing on August 24, 2020, that hearing has been postponed until
20 April 7, 2021. Similarly, Plaintiffs contend that Plaintiff O'Neill was scheduled for
21 hearings before the Newark Immigration Court on August 13, 2020 and August 24, 2020.
22 But, the August 13, 2020 hearing has been taken off the docket, and the August 24, 2020
23 hearing has been postponed until August 26, 2021. Moreover, to the extent Plaintiffs
24 contend there is no videoconferencing option for these proceedings, *see* ECF No. 6-1, at
25 22, they are mistaken. As discussed, VTC is available in both detained and non-detained
26 cases at the Newark Immigration Court.

27 60. Plaintiffs also contend that "the risk of appearing in-person in the Newark
28 Immigration Court is exacerbated by EOIR's failure to ensure safe practices at the

1 courthouse.” ECF No. 6-1, at 22. However, Plaintiffs’ claims do not provide specific
2 enough information for me to investigate the veracity of their allegations. To the extent
3 that Plaintiffs contend that a non-party attorney observed that no temperature checks or
4 other health screenings were performed at the building entrance, *see id.*, EOIR’s Public
5 Health Notice, as well as the Newark Immigration Court website, both advise that
6 individuals with symptoms or a diagnosis of COVID-19 should not enter EOIR space.
7 EOIR does not, however, conduct temperature checks or health screenings; rather that
8 responsibility lies with the party having business before the court.

9 61. Plaintiffs also contend that the Newark Immigration Court failed to disclose the
10 basis for its belief that resuming non-detained hearings was justified. *See* ECF No. 6-1, at
11 27-28; *see also id.* at 1, 13-15. To the contrary, when issuing PM 20-13, EOIR explained
12 that “[a]s most of the country, including the federal government, moves toward restarting
13 activities limited by COVID-19, EOIR, too, is moving toward reengaging its operations
14 that have been postponed, including the resumption of non-detained hearings.” *See*
15 <https://www.justice.gov/eoir/page/file/1284706/download>. In so doing, EOIR explained
16 that its policies, practices, and guidance were informed by multiple sources, including the
17 DOJ, OMB, OPM, CDC, GSA, and the operations of other court systems. *Id.*

18 62. Plaintiffs additionally contend that “the reopening of the Newark Immigration
19 Court for in-person proceedings is particularly unjustified in light of the viable alternative
20 of holding hearings by videoconference.” ECF No. 6-1, at 29, 33. As discussed, EOIR
21 has used VTC since the 1990s, and it is and has been available in both detained and non-
22 detained cases at the Newark Immigration Court. To the extent Plaintiffs contend that off-
23 the-shelf videoconferencing software, such as Zoom, Skype, and Teams, is a “viable
24 alternative,” they are mistaken. EOIR’s VTC system addresses a variety of concerns
25 specific to immigration proceedings. As discussed, because EOIR does not employ court
26 reporters, EOIR’s VTC system is integrated with EOIR’s DAR system, which allows for
27 the recording and transcription of immigration proceedings. In addition, EOIR’s VTC
28 system contains security features meant to address the strict confidentiality provisions
governing certain applications for relief and protection from removal. *See, e.g.,* 8 C.F.R.

1 § 1208.6 It is unclear whether commercial videoconferencing software can address these
2 concerns. In addition, none of the desktop computers at the Newark Immigration Court
3 are currently equipped with web cameras. Asking EOIR to abandon or retrofit its already
4 robust, secure VTC system, in which it has invested heavily over three decades, in favor
5 of commercial videoconferencing software, such as Zoom, Skype, or Teams, is not a
6 “viable alternative.”

7 63. Plaintiffs also contend that “the Newark Immigration Court has required the
8 respondent to be in the same location as their attorney, thus placing Plaintiffs at risk of
9 contracting COVID-19 from their clients.” *See* ECF No. 6-1, at 39 n.47. While the
10 Newark Immigration Court prefers that respondents and their attorneys or representatives
11 be in the same location so that the attorney or representative can confirm the respondent’s
12 identity, this is a *preference* rather than a *requirement*. Indeed, my June 19, 2020
13 Standing Order contemplates that respondents and their attorneys or representatives may
14 not be in the same location when it cautions that “[s]cheduling simultaneous appearances
15 in multiple locations does not excuse a failure to appear.” *See* [https://www.justice.gov/
16 eoir/page/file/1287336/download](https://www.justice.gov/eoir/page/file/1287336/download).

17 64. Plaintiffs contend that an unknown IJ refused to conference-in an unknown
18 respondent during a telephonic hearing on an unknown date, *see* ECF No. 6-1, at 39 n.47;
19 *see also* ECF No. 6-8 (DiMaria Decl.). However, Plaintiffs’ filings do not provide specific
20 enough information for me to look into their allegations, such as A numbers for the aliens,
21 the dates and times of the hearings, the names of the IJs and any other relevant
22 information. Nevertheless, I acknowledge that there were technical difficulties with
23 telephonic hearings during the early days of the pandemic. I further acknowledge that it is
24 possible that an IJ may not have been able to conference-in a particular respondent during
25 a particular hearing. But being unable to conference-in a particular respondent due to
26 technical difficulties is not the same as refusing to conference-in a respondent. Moreover,
27 these initial technical issues have been resolved.

28 65. EOIR has an interest in completing cases, including non-detained cases, in a timely

1 manner consistent with due process. *See* 8 C.F.R. § 1003.10(b) (“In all cases [IJs] shall
2 seek to resolve the questions before them in a timely and impartial manner consistent with
3 the Act and regulations.”). There are approximately 67,500 pending cases on the non-
4 detained docket at the Newark Immigration Court, and individuals on the non-detained
5 docket sometimes have to wait two or more years to obtain an individual or merits hearing
6 date. The interest in timely adjudication of matters is shared by respondents — who may
7 be seeking relief from removal and the benefits and status that come with certain forms of
8 relief — and by DHS, which is charged with initiating and litigating removal proceedings
9 against respondents who are allegedly subject to removal from the United States under the
10 INA.

11 66. Although I cannot anticipate how an IJ will rule in a specific case, IJs are required
12 to exercise sound judgment in adjudicating cases, including requests for continuances and
13 telephonic or VTC appearances. *See* 8 C.F.R. § 1003.10(b); *see also* 8 C.F.R. § 1003.29.
14 The IJs at the Newark Immigration Court are dedicated public servants and are committed
15 to adjudicating cases efficiently and effectively and consistent with due process and the
16 immigration laws and regulations. Additionally, under the applicable law and regulations,
17 any party that receives an adverse decision in a removal proceeding may appeal the
18 decision to the BIA, and if necessary to a circuit court of appeals. 8 U.S.C. § 1252(a); 8
19 C.F.R. § 1003.1(b).

20 67. Plaintiffs’ request for a preliminary injunction, if granted, would impinge on the
21 Newark Immigration Court’s authority to manage its dockets and on the independent
22 adjudicatory authority of IJs. It would also substantially impact the Court’s ability to
23 resolve cases in a timely manner consistent with due process, and instead would
24 exacerbate the existing backlog of approximately 67,500 removal cases pending on the
25 non-detained docket at the Newark Immigration Court.

26 68. To the extent Plaintiffs refer to VTC hearings as “in person” hearings, the relief
27 they seek would enjoin the Newark Immigration Court from completing any cases unless
28 the respondents consent to a telephonic hearing. This could lead to an even greater
backlog. Accordingly, Plaintiffs’ request for relief would have the practical effect of

1 stopping most hearings from occurring.

2 69. To the extent Plaintiffs seek to compel EOIR to provide video conferencing other
3 than VTC, this is not possible for the reasons set forth above and would likely be an
4 enormous cost and require an entire overhaul of how video conferencing is conducted. It
5 would also exacerbate the already significant backlog.

6 I declare under penalty of perjury that the foregoing is true and correct.
7

8 Executed this 25th Day of August, 2020 in Newark, New Jersey.
9

10
11 DAVID CHENG Digitally signed by DAVID CHENG
Date: 2020.08.25 16:23:24 -04'00'

12 David Cheng

13 Assistant Chief Immigration Judge
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