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

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

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INTRODUCTION

The Government's opposition brief ("Gov't Br.," ECF No. 13) is notable for how much of what Plaintiffs allege it does not address, let alone contest.[1] Thus, the Government does not challenge the bedrock facts undergirding the Plaintiffs' Complaint and Motion for a Preliminary Injunction: the COVID-19 pandemic is a continuing public health emergency that requires strict adherence to safety protocols, including avoiding group gatherings (particularly indoors) and practicing social distancing, in order to abate its spread and prevent the risk of serious illness or death. The Government also does not attempt to dispute the facts of multiple potential COVID-19 exposures at the Newark Immigration Court in March, and that multiple people who appeared at the courthouse that month either died or faced serious, lasting illnesses from their COVID-19 infections. And the Government does not seriously contend that the risk of COVID-19 contamination at the courthouse has disappeared—indeed, EOIR abruptly closed the courthouse on the morning of August 20 due to the presence of an EOIR employee with COVID-19 symptoms, showing its awareness of the continuing threat from this unprecedented pandemic.

Instead, the Government's argument against a preliminary injunction largely boils down to its claim that it cannot provide the option for attorneys to appear by

[1] Abbreviated terms not defined herein have the same definitions as contained in the Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction ("Pls.' Br."), ECF No. 6-1.

remote videoconference, for "logistical and cost reasons." Gov't Br. at 2 n.3. But this claim is baseless, and the Government's failure in this regard is arbitrary and capricious—a conclusion compelled by the fact that numerous other courts have successfully used remote videoconferencing software to hold proceedings during the pandemic. Indeed, the Government does not address or dispute Plaintiffs' claims regarding the successes of other courts, and the reasons it provides for not using remote videoconferencing software—including creating an accurate record, providing appropriate security, and installing the proper equipment on its computers—are all issues that can be easily addressed, and that other courts have readily overcome. The Government's failure to apply these same procedures to the Newark Immigration Court simply cannot withstand the scrutiny that the law requires this Court to apply to administrative agency action.

The Government thus attempts two further, equally unavailing arguments to support its opposition to an injunction. The first one is semantic: the Government claims that it has complied with Plaintiffs' demands by providing a videoconferencing option through its "VTC" software, while simultaneously admitting that it permits the use of the VTC system only if an attorney physically appears at the Newark Immigration Court and uses the system there. Of course, Plaintiffs' Complaint is targeted directly at EOIR's practice of compelling them to attend hearings in-person at that courthouse, where attorneys face the risk of

exposure to COVID-19 in security lines, elevators, waiting rooms, restrooms, courtrooms, hallways, and other public spaces. This VTC option thus does not provide a *remote* videoconferencing option, or render the failure to do so lawful.

The Government further argues that it has established reasonable policies and procedures governing the Newark Immigration Court that are designed to lessen the risk of the spread of COVID-19. But Plaintiffs have already provided evidence that those procedures are not being followed, and they provide additional such evidence here. Indeed, the Government's closure of the courthouse on August 20 after an EOIR employee displayed symptoms of COVID-19 is effectively an admission that these steps do not work. Moreover, the fact that EOIR has undertaken *some* arguably reasonable actions does not excuse its arbitrary and capricious failure to take the additional, significant, straightforward step of providing a remote videoconferencing option for Newark Immigration Court proceedings.

Perhaps because it cannot successfully rebut the substance of Plaintiffs' claims, the Government resorts to a laundry list of procedural arguments about jurisdiction, standing, mootness, and finality. But those arguments are more numerous than meritorious. Thus, the Government's jurisdictional arguments fail largely because the jurisdiction-stripping provisions upon which they rely apply to "aliens" (*i.e.*, Plaintiffs' clients), but not to Plaintiffs themselves as attorneys. And the Government's standing and mootness arguments are undercut by the facts

regarding Plaintiffs' upcoming immigration court proceedings—information that was available to the Government through its electronic case management system, yet ignored in its opposition brief.

In sum, this Court should reach the merits of Plaintiffs' claims and hold that the Government's action in reopening the Newark Immigration Court for in-person proceedings, without a remote videoconferencing option, and in compelling attorneys to attend the Newark Immigration Court during this pandemic constitutes arbitrary and capricious agency action and amounts to an unconstitutional state-created danger. For these reasons, and because an injunction will prevent irreparable harm as well as protect the public interest, the Court should grant Plaintiffs' Motion for a Preliminary Injunction.

ARGUMENT

I. The Government's Procedural Objections to Jurisdiction, Standing, Mootness, and Finality Are Meritless.

The Government argues that this Court should not reach the substance of Plaintiffs' Complaint and Motion for a bevy of procedural reasons, including jurisdictional limitations in the Immigration and Nationality Act (INA), standing, mootness, and finality under the Administrative Procedure Act (APA). As is further described below, the Government's procedural arguments should all be rejected under the applicable facts and law.

A. 8 U.S.C. §§ 1252(a)(5), (b)(9), and (g) all apply to immigration court respondents, not to Plaintiffs, and are otherwise inapplicable.

The Government relies on several provisions of the INA that channel to circuit courts of appeals jurisdiction over challenges to an order of removal issued against an immigration court respondent (referred to in the statute as an "alien"). Thus, aliens cannot challenge immigration proceedings in the district court. But this case, of course, is not brought by or on behalf of an alien, but instead concerns the Government's arbitrary and capricious actions against attorneys. Thus, these statutes simply do not apply to this case.

Indeed, as Plaintiffs explained in their opening brief, "'only challenges that directly implicate the order of removal' are outside of the district court's jurisdiction." Pls. Br. at 24 n.42 (quoting *Nnadika v. Att'y Gen. of U.S.*, 484 F.3d 626, 632 (3d Cir. 2007)). Thus a person who "is not seeking review of any order of removal" is not barred by the INA from raising his or her claim in the district court. *Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d 118, 133 (3d Cir. 2012). To the contrary, as the Third Circuit has held, any "relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal" is not barred by 8 U.S.C. § 1252(b)(9). *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 180 (3d Cir. 2020). The same result holds for § 1252(a)(5), which, by its plain terms, only limits "judicial review of an *order of removal* entered or issued" under the INA,

8 U.S.C. § 1252(a)(5) (emphasis added), and for § 1252(g), which applies only to "any cause or claim by or on behalf of any alien," 8 U.S.C. § 1252(g).[2]

As courts have explained, the Government's contrary reading would run afoul of the purposes of the INA and judicial review. Because of "the presumption favoring judicial review of administrative action," the INA will bar jurisdiction only upon "a showing of clear and convincing evidence . . . that Congress intended to preclude judicial review." *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 158 (3d Cir. 2004) (internal quotation marks omitted). Courts should thus avoid a reading of the statute that would result in "certain administrative actions . . . effectively be[ing] beyond judicial review." *E.O.H.C.*, 950 F.3d at 180. Here, the purpose of the INA

[2] The Supreme Court has squarely held that § 1252(g) is narrower than § 1252(b)(9). *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (explaining that § 1252(g) "channels judicial review of only *some* decisions and actions," while § 1252(b)(9) "channels review of *all* of them"). As the *Reno* court explained, § 1252(g) was primarily designed to apply to cases pending at the time of passage of the statute, as opposed to § 1252(b)(9), which applied only prospectively. *Id.* at 483. Thus, because § 1252(b)(9) does not bar Plaintiffs' claims, the narrower reading of § 1252(g) in *Reno*—the only case cited by the Government—does not, *a fortiori*, support its position. Nor does the Government's reference to the statute's purpose of preventing "the deconstruction, fragmentation, and hence prolongation of removal proceedings," *Reno*, 525 U.S. at 487, apply to this case, because Plaintiffs do not seek to litigate the substantive issues of removal proceedings or to delay them—but instead, just to require the provision of a remote videoconferencing option during those proceedings. *See also Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1907 (2020) (describing § 1252(g) as "narrow" and not "cover[ing] 'all claims arising from deportation proceedings' or impos[ing] 'a general jurisdictional limitation.'" (quoting *Reno*, 525 U.S. at 1907)).

is not to "bar[] judicial review," but simply to "channel" alien claims that "can be raised in removal proceedings and eventually brought to the court of appeals" through the administrative process. *Aguilar v. U.S. ICE*, 510 F.3d 1, 11 (1st Cir. 2007).

But Plaintiffs' claim of prohibiting compelled in-person appearances for attorneys, without a remote videoconferencing option, cannot be litigated through that administrative process. Indeed, Plaintiffs' claims are entirely "collateral to the removal process": because EOIR does not currently provide for remote videoconferencing in removal proceedings, an individual immigration judge cannot offer such a proceeding in the removal process. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) ("[C]laims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)."). Indeed, in the absence of remote videoconferencing, the judicial review process cannot take place until after an in-person proceeding has already been mandated—which, of course, is exactly what Plaintiffs are seeking to prevent. *See Aguilar*, 510 F.3d at 12 (explaining that a claim is "collateral" when it "cannot effectively be handled through the available administrative process"). Because, then, Plaintiffs' claims "cannot be raised efficaciously within the administrative proceedings delineated in the INA," preventing jurisdiction here "would foreclose them from any meaningful judicial review," directly contrary to congressional intent. *Aguilar*, 510 F.3d at 11.

The Government's overbroad interpretation of these statutes leads its brief to contain obvious errors. For example, the Government argues that "the plaintiffs here are plainly 'challenging [ ] part of the process by which *their* removability will be determined.'" Gov't Br. at 25 (alteration in original) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018)). But of course, Plaintiffs' removability is not at issue. The Government also states that Plaintiffs' claims are barred because these provisions channel jurisdiction over "any challenge arising from any aspect of the processes or practices that apply to aliens in immigration court," Gov't Br. at 24, but Plaintiffs' claims are about how the Newark Immigration Court's policies apply to attorneys, not "aliens" (*i.e.*, their clients).

In sum, this Court should reject the Government's jurisdictional challenges based on 8 U.S.C. §§ 1252(a)(5), (b)(9), and (g), because Plaintiffs' claims are not brought by or on behalf of immigration respondents and cannot be effectively channeled to the court of appeals.

B. Because Plaintiffs are not seeking to enjoin removal proceedings, 8 U.S.C. § 1252(f) does not bar this action.

The Government is correct, of course, that the INA restricts this Court's jurisdiction "to enjoin or restrain the operation of" removal proceedings, "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). Plaintiffs' Complaint, however, does not fall within this restriction.

Instead, despite the Government's protestations to the contrary, the injunction that Plaintiffs seek would not "alter the removal process set forth by Congress," let alone enjoin or restrain proceedings from taking place, as the statute provides. Gov't Br. at 29. To the contrary, Plaintiffs desire proceedings that fully comply with the immigration statutes. As Plaintiffs have stated before—and the Government does not dispute—both law and regulation authorize immigration proceedings to "take place . . . through video conference." 8 U.S.C. § 1229a(b)(2)(A)(iii); *accord* 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."). Plaintiffs' position, then, is that the failure to provide remote videoconference proceedings in light of the COVID-19 pandemic is both arbitrary and capricious in violation of the APA, and also results in an unconstitutional state-created danger. At the same time, nothing in Plaintiffs' proposed injunction enjoins removal proceedings from going forward, so long as the Government provides the remote videoconferencing option that the law provides, and common sense demands, under these circumstances.

This case is thus distinct from *Ali v. Barr*, --- F. Supp. 3d ---, 2020 WL 2986692, at *6 (S.D.N.Y. June 3, 2020), upon which the Government relies. Gov't Br. at 30. There, Plaintiffs specifically sought to prevent the immigration court from taking particular "adverse actions" against attorneys who did not comply with filing

deadlines. *Id.* Plaintiffs here do not seek such relief, or any other measures that would impede the orderly conduct of removal proceedings, which could continue unimpeded, albeit through a process that includes a remote videoconferencing option. Accordingly, Plaintiffs' proposed relief does not run afoul of § 1252(f)(1).[3]

C. Plaintiffs' Complaint does not interfere with the Attorney General's discretion under 8 U.S.C. § 1252(a)(2)(B)(ii).

As its final statutory jurisdictional argument, the Government cites 8 U.S.C. § 1252(a)(2)(B)(ii), which withdraws jurisdiction over actions of the Attorney General that the statute places "in the discretion of the Attorney General or the Secretary of Homeland Security." The Government posits that the authority to hold removal proceedings by videoconference is conferred to the Attorney General's discretion, and is thus completely unreviewable under this section. Gov't Br. at 31.

However, the Government cites no case law to support this proposition, and for good reason: courts have consistently interpreted this jurisdictional restriction narrowly, contrary to the Government's argument. Thus, the Third Circuit has held that § 1252(a)(2)(B)(ii) applies only where the statute "explicitly assigns to the

[3] At the least, § 1252(f)(1) does not bar declaratory relief, so the Court could undoubtedly declare that EOIR's failure to provide a remote videoconference hearing is unlawful. *See Alli v. Decker*, 650 F.3d 1007, 1013 (3d Cir. 2011) ("[I]t is apparent that the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief."); *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (plurality opinion) (rejecting challenge to jurisdiction under § 1252(f)(1) because "the District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief"); *see also* Compl., ECF No. 1, at 30 (prayer for relief requesting declaratory relief).

Attorney General the discretion" to act. *Urena-Tavarez*, 367 F.3d at 159; *see also Aguilar*, 510 F.3d at 20 ("If a statute does not explicitly specify a particular authority as discretionary, section 1252(a)(2)(B)(ii) does not bar judicial review of an ensuing agency action."). *Urena-Tavarez* thus applied § 1252(a)(2)(B)(ii) to restrict jurisdiction over a hardship waiver because the statute states that "[t]he Attorney General, *in the Attorney General's discretion*, may" apply such a waiver. 367 F.3d at 159 (emphasis in original) (quoting 8 U.S.C. § 1186a(c)(4)). On the other hand, courts do not apply this jurisdictional limit where the statute does not expressly provide for such discretion. *See Aguilar*, 510 F.3d at 20-21 (not barring jurisdiction over claims regarding transfers of detainees, where statute states only that "[t]he Attorney General shall arrange for appropriate places of detention"); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) ("One might mistakenly read § 1252(a)(2)(B)(ii) as stripping us of the authority to review any discretionary immigration decision. That reading, however, is incorrect, because § 1252(a)(2)(B)(ii) strips us only of jurisdiction to review discretionary authority *specified in the statute*." (emphasis in original)).

Here, although the statute states that a removal proceeding "may take place" through videoconference, 8 U.S.C. § 1229a(b)(2)(A), it does not explicitly place discretion over that issue within the authority of the Attorney General. Thus, this Court has jurisdiction to reach the merits of the Government's actions and in the

process, to review the basis therefor, including whether the Government has appropriately exercised its discretion. *See Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005) (rejecting Government's claim that decision was unreviewable regardless of reasoning provided by immigration judge and BIA).

Finally, the heading of § 1252(a)(2)(B) itself demonstrates the inapplicability of that statutory provision to this case. *See generally Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting *Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). The section is entitled "[d]enials of discretionary relief," clearly referring to relief from deportation through "the adjustment of status application process." *Safadi v. Howard*, 466 F. Supp. 2d 696, 698 (E.D. Va. 2006); *see also Serrano v. Quarantillo*, 2007 WL 1101434, at *3 (D.N.J. Apr. 9, 2007) (same, citing *Safadi*). But Plaintiffs, as attorneys, are obviously not themselves seeking the kind of discretionary immigration relief from removal that this statute addresses. *See also* 8 U.S.C. § 1252(a)(2)(B)(i) (noting exceptions based on Attorney General's "granting of relief" under certain sections of the immigration laws). Quite simply, the provision—like others discussed herein—is targeted at jurisdiction over claims by aliens, and has nothing to do with the kind of claims brought by Plaintiffs.

D. Plaintiffs' claims are justiciable.

The Government argues that the Court should not reach the merits of Plaintiffs' claims based on the doctrines of standing and mootness. *See Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475 (3d Cir. 2016) ("Standing and mootness are two distinct justiciability doctrines[.]"). As is described in detail below, these claims all fail based on the relevant facts and applicable law.

1. Plaintiffs have standing due to upcoming immigration court hearings.

The Government argues that Plaintiffs lack standing. Gov't Br. at 32-35. As the Government concedes, however, Plaintiffs can meet the constitutional standing threshold if they can "show that [they] ha[ve] sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged official conduct," as long as "the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). Plaintiffs thus have standing to seek an injunction if they are "vulnerable to future [illegal conduct] by defendants" where "the threat that defendants will cause future harm . . . is both real and immediate." *Roe v. Operation Rescue*, 919 F.2d 857, 864-65 (3d Cir. 1990).

The Government argues that the individual Plaintiffs lack standing because they "do not have imminent immigration court hearings." Gov't Br. at 33. But this

is simply untrue, as the supplemental declarations that Plaintiffs file herewith establish. Specifically, Plaintiff DiRaimondo has appearances at the Newark Immigration Court scheduled for November 13 and December 4, *see* Suppl. Decl. of Michael DiRaimondo ¶¶ 3-4, attached as Exhibit 2; Plaintiff O'Neill has appearances scheduled before the Newark Immigration Court for October 22 and October 27, *see* Suppl. Decl. of Brian O'Neill ¶¶ 3-5, attached as Exhibit 3; and, even more imminently, Plaintiff Trinidad has appearances scheduled for September 8 and November 12, *see* Suppl. Decl. of Elizabeth Trinidad ¶¶ 3-5, attached as Exhibit 4.[4] Moreover, as Plaintiffs have shown, EOIR has in fact been denying at least some motions for continuance that are based on the health risks of in-person appearances during the COVID-19 pandemic, instead requiring Plaintiffs and other attorneys to appear at the courthouse. *Cf. Ali*, 2020 WL 2986692, at *8 (noting "the absence of any outright denial of a continuance motion filed by the Attorney Plaintiffs"); *Nat'l Immigration Project of Nat'l Lawyers Guild v. Exec. Office for Immigration Review*, --- F. Supp. 3d ---, 2020 WL 2026971, at *7 (D.D.C. Apr. 28, 2020) ("[N]o declarant has described a situation in which an immigration judge held

[4]EOIR would have been aware of Plaintiffs' upcoming immigration court proceedings if it had taken the simple step of searching its own online case management portal, available at https://portal.eoir.justice.gov/, for this information.

an in-person hearing over a detainee's request for a continuance[.]").[5] Plaintiffs have thus shown the "real and immediate" threat of future harm necessary to sustain their standing. *Roe*, 919 F.2d at 865.

Plaintiff NJ-AILA has associational standing for similar reasons. The Government, while recognizing the general applicability of associational standing to NJ-AILA, *see* Gov't Br. at 36 (citing *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 886 F.3d 332, 345 (3d Cir. 2018)), nonetheless argues that the doctrine does not apply because "NJ-AILA does not identify an immigration attorney who has a hearing date approaching soon," *id.* Of course, NJ-AILA members "regularly practice in the Newark Immigration Court," Estela Decl. ¶ 2, and NJ-AILA members have numerous in-person appearances upcoming at the Newark Immigration Court. *See* Suppl. Estela Decl. ¶ 4. Thus, the Government's objection to NJ-AILA's standing should also be rejected.

[5] Defendant Cheng's unsupported claim that he is "not aware of any IJ at the Newark Immigration Court denying a properly supported motion for a continuance," Cheng Decl. ¶ 57, is belied by the record, which reveals that Defendant Cheng himself has denied multiple motions seeking continuances based on the risk of contracting COVID-19 at the courthouse. *See* DiRaimondo Decl. ¶ 4; Decl. of Jason Scott Camilo ("Camilo Decl.") ¶ 12, attached as Exhibit 5. Several other NJ-AILA members have also had continuance motions denied. *See* Suppl. Declaration of Cesar Estela ("Suppl. Estela Decl.") ¶ 5, attached as Exhibit 1. One NJ-AILA member has twice been forced to appear in-person at the Newark Immigration Court in order to seek granting of continuance motions, even though the motions were based on the health risks of going to the courthouse. Camilo Decl. ¶¶ 15, 39.

2. Plaintiffs' claims are not moot, both because of their upcoming Newark Immigration Court hearings and under the "capable of repetition yet evading review" exception.

The Government argues that Plaintiffs' claims are moot because "none of the individually name[d] plaintiffs currently has an in-person hearing scheduled at the Newark Immigration Court until next year." Gov't Br. at 35. Under the mootness doctrine, even if this assertion were factual, the Government cannot obtain dismissal unless it "show[s] that it is 'absolutely clear that the allegedly wrongful behavior [is] not reasonably [ ] expected to recur.'" *Freedom from Religion Found.*, 832 F.3d at 476 (alterations in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

As noted above, in light of Plaintiffs' upcoming Newark Immigration Court hearings, combined with the Government's failure to provide a remote videoconferencing option and given the denials of continuance motions based on COVID-19 health risks, the harm of a compelled appearance at the courthouse is, in fact, likely to recur. This is particularly true for Plaintiff NJ-AILA, given the frequency of its members' appearances, totaling at least 76 from now until the end of October. Suppl. Estela Decl. ¶ 4.

But perhaps most fundamentally, the Government cannot purposefully dodge Plaintiffs' Complaint and Motion by issuing piecemeal adjournments of Plaintiffs'

hearings and then seeking dismissal of their claims as moot.[6] To the contrary, because the individual plaintiffs, as well as the members of NJ-AILA, regularly practice in the Newark Immigration Court, the postponement of existing hearings would implicate the exception to the mootness doctrine for a claim that is "capable of repetition, yet evading review." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 (3d Cir. 2003). The exception applies because Plaintiffs can "establish that '(1) the challenged action was in its duration too short to be fully litigated to its cessation or expiration and (2) there is a reasonable likelihood that [they will] be subjected to the same action again.'" *Id.* (alteration in original) (quoting *Doe v. Delie*, 257 F.3d 309, 313 (3d Cir. 2001)); *see also Honig v. Doe*, 484 U.S. 305, 318 (1988) (holding that action was not moot where "there is a reasonable likelihood that [plaintiffs] will again suffer the deprivation of . . . rights that gave rise to this suit"). In sum, then, the Government's standing objections run contrary to blackletter law and do not provide a basis for the dismissal of Plaintiffs' claims.

[6] The Government could, on the other hand, moot this action by providing an option for remote videoconference proceedings (*i.e.*, granting Plaintiffs the relief they request), or even by suspending the non-detained docket entirely. But the Government has obviously not undertaken, and does not here propose to undertake, either of those actions.

3. Plaintiffs can meet the minimal threshold required to demonstrate that they are in the relevant "zone of interests."

As a final justiciability argument, the Government posits that, as attorneys, Plaintiffs are not in the "zone of interests" of those who can bring an APA claim regarding the claims at issue in this case. Gov't Br. at 36-37. It is true that the Court must determine whether Plaintiffs' claims "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). But in the context of the "generous review provisions of the APA," that test is not "especially demanding," and forecloses suit only when "a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* at 130 (internal quotation marks omitted); *accord Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 164 (3d Cir. 2015).

Plaintiffs more than meet that minimal threshold here. That is because the provisions here at issue—the INA and its accompanying regulations—specifically govern immigration attorneys. For example, the INA makes clear that the Attorney General's authority extends to assuring that attorneys may represent respondents in removal proceedings only if they are "authorized to practice in such proceedings." 8 U.S.C. § 1229a(b)(4)(A). And EOIR's authority to sanction attorneys for misconduct encompasses several rules that would be violated if an attorney failed to

attend a court appearance. *See, e.g.*, 8 C.F.R. § 1003.102(*l*) ("fail[ing] to appear for . . . scheduled hearings"), (o) ("[f]ail[ing] to provide competent representation"), (q)(3) ("[f]ail[ing] to act with reasonable diligence and promptness in representing a client," including the obligation to "carry through to conclusion all matters undertaken for a client").

Moreover, the INA also includes the authority to conduct in-person proceedings in various formats, including by way of videoconferencing, *see* 8 U.S.C. § 1229a(b)(2)(A)(iii), a provision which certainly applies to attorneys, not only their clients. Taken together, the Government's regulation of immigration attorneys, including their conduct in removal proceedings, combined with the INA's authority regarding how removal proceedings are conducted, mean that Plaintiffs, as attorneys, are "regulated by the statute" and thus are well within the "zone of interests," more than sufficient to provide standing under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

E. The Government's resumption of in-person proceedings without providing for a remote videoconferencing option is reviewable as final agency action.

Finally, the Government argues that the Court should not reach the merits of Plaintiffs' APA claim in the absence of final agency action. Gov't Br. at 38-39. The parties agree that agency action is "final" under two conditions: "[f]irst, the 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 Government does not contest the first condition—nor could it, for there is no administrative procedure for challenging the reopening of the Newark Immigration Court without providing a remote videoconferencing option, or any other sense in which the decision to do so is tentative or interlocutory. Instead, the Government argues only that no legal consequences will flow from this determination. Gov't Br. at 39. But as Plaintiffs argued in their opening brief, because the policies regarding in-person proceedings affect "the way immigration judges run their dockets and their courtrooms," they have "practical consequence for . . . attorneys" who appear in immigration court. *Las Americas v. Trump*, Case No. 3:19-cv-02051-IM, 2020 WL 4431682, at *14 (D. Or. July 31, 2020); *see* Pls.' Br. at 26. In particular, because EOIR's regulation of attorneys requires them to attend court appearances and provide competent representation to clients or face potential disciplinary action, the disciplinary consequences of attorneys choosing not to appear at an in-person proceeding in order to safeguard their health and life are obvious. *See* 8 C.F.R. § 1003.102. On the other hand, of course, an attorney's decision to comply with EOIR's directive to appear at the court in-person, in light

of the ongoing pandemic, has the even more direct consequence of risks to his or her health and life. *See, e.g.*, Suppl. Estela Decl. ¶ 10; Camilo Decl. ¶ 57.

The Government counters with two arguments challenging the finality of the agency action at issue. First, according to the Government, only "a decision of an immigration judge in an individual case," and not EOIR's overarching policy against remote videoconferencing proceedings, is a final agency action. Gov't Br. at 39. But this does not accurately reflect the appropriate legal standard, because "courts consistently hold that" an agency's decision to "bind[] it and its staff to a legal position" is sufficient to "produce legal consequences or determine rights and obligations," and therefore constitutes final agency action. *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (citing cases). Here, EOIR has required the Newark Immigration Court, and its judges, to open without the option for remote videoconferencing court appearances, instead binding them to EOIR guidance and Judge Cheng's standing order, thus constituting final agency action.

Second, the Government argues that Plaintiffs' claims of legal consequence are "speculative" because it is within EOIR's discretion to pursue attorney disciplinary action, and they may choose not to do so. Gov't Br. at 39. However, the Third Circuit has squarely held that the Government's failure to take a discretionary action does not renders an agency decision non-final. *See Jie Fang v. Dir. U.S. ICE*, 935 F.3d 172, 184 (3d Cir. 2019). To the contrary, where an agency's

decision results in even the potential for further legal action, aggrieved parties should not "be forced to permanently endure . . . the threat of [such action] permanently hanging over their heads." *Id.* That, of course, is precisely the case here, and the potential for attorney disciplinary action flowing from EOIR's conduct and policies certainly renders its agency action final.

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

A. Count One: Arbitrary and Capricious Agency Action.

The Government offers a hodgepodge of reasons why its actions in reopening the Newark Immigration Court without providing attorneys the option to appear by videoconference is not arbitrary and capricious. On careful review, however, the Government's rationales simply belie the arbitrariness and unreasonableness of its actions, particularly in light of the experience of numerous others courts, including this one, that have successfully utilized remote videoconferencing technology during the COVID-19 pandemic.

First, the Government does not rebut Plaintiffs' initial argument that it failed to "disclose the basis of its action" to reopen the Newark Immigration Court, or for the conditions it imposed. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (internal quotation marks omitted); *see* Pls.' Br. at 26-27. Rather, the Government states, in conclusory fashion, that "its policies, practices, and guidance were informed by multiple sources," including other government agencies "and the

operations of other court systems." Gov't Br. at 44.[7] But the Government does not provide even the slightest explanation of *how* those sources informed its decision-making process. This absence of an explanation undergirds two critical legal errors. First, the Government has acted arbitrarily and capriciously because it has made no effort to explain the "internally inconsistent" analysis in reopening the Newark Immigration Court while leaving its immigration courts in New York City—only a few miles away—closed. *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.").[8] Second, the Government's unexplained decision-making process does not permit this Court to in any way evaluate whether there is "a significant mismatch between the decision [EOIR] made and the rationale [it] provided." *Dep't*

[7] The Government's statement in its brief in fact overstates its supporting evidence. Rather than providing firsthand knowledge of how EOIR made the decision to reopen the Newark Immigration Court, the Government provides only a vague and uncertain statement from Defendant Cheng that "[i]t is [his] understanding" that EOIR relied upon certain sources in making its decisions. Cheng Decl. ¶ 17. The Government's submission conspicuously omits any rebuttal of Plaintiffs' claim that, as stated by Defendant McHenry, EOIR relied on the United States Attorney's Office to make the court reopening decision, and that he would not reveal the "specific information or what information is being considered" in that decision. Estela Decl. ¶ 17 (quoting statements by Defendant McHenry).

[8] Indeed, while the Government notes, in purported support of its argument, that the Newark Immigration Court has a non-detained docket of approximately 67,500 cases, Gov't Br. at 28 n.14, that number pales in comparison to the non-detained docket in the New York City immigration courts, which totals over 124,000 cases. *See* https://trac.syr.edu/phptools/immigration/court_backlog/ (cumulative cases at "New York City" and "New York Broadway" courts).

of Commerce, 139 S. Ct. at 2575.

Indeed, perhaps the Government does not provide an explanation precisely because there would be such an obvious mismatch between EOIR's actions and those "of other court systems" that it purportedly factored into its decision-making process. Gov't Br. at 44. To the contrary, as Plaintiffs have explained in their submissions, and as the Government does not (and cannot) dispute, numerous other courts in New Jersey and across the nation have quickly, and successfully, established remote videoconferencing proceedings since the COVID-19 pandemic began. *See* Pls. Br. at 16-19. In fact, courts in this district have used Zoom to conduct remote proceedings.[9] Because the Government's decision therefore cannot survive "[t]he reasoned explanation requirement of administrative law," *Dep't of Commerce*, 139 S. Ct. at 2575, it cannot be upheld.

The Government's substantive explanations for not providing remote videoconferencing options, *see* Gov't Br. at 41-42, also fail to hold up to scrutiny when compared to the experiences of other courts, including this one. *See* Noveck Decl. Ex. G (Standing Order 20-02). Thus, the Government first claims that third-party services do not have "audio transcription" features used by the immigration

[9] *See, e.g.*, Jeannie O'Sullivan, *NJ Gym Told To Work Out Virus Shutdown Fight In State Court*, Law360, June 19, 2020, https://www.law360.com/articles/1284799 (describing Zoom hearing before Judge Kugler).

court. *Id.* at 41. But in fact, several third-party providers contain their own recording and transcription options.[10] Moreover, if EOIR can allow parties to appear by telephone without disrupting the recording process, it is unclear why it cannot do the same with a videoconference proceeding, presumably by placing the recording device near the computer speaker.[11] Indeed, the New Jersey state courts—which, as noted in Plaintiffs' earlier submissions, are now conducting almost all proceedings through remote videoconferencing—also uses its own digital audio recording technology, including during remote video proceedings.[12]

The Government further argues that third-party software does not have required "security features." Gov't Br. at 41. But the Government never describes the security features that might distinguish EOIR's VTC system from any other

[10] *See, e.g.*, Shelby Brown, *Zoom vs. Microsoft Teams: Which video chat app to use during quarantine*, CNET, May 7, 2020, https://www.cnet.com/news/zoom-vs-microsoft-teams-which-video-chat-app-to-use-during-quarantine/.

[11] As stated in guidance from the Michigan state courts regarding its recording system, "[w]here a direct feed into the recording system is not possible due to equipment limitations, a microphone should be placed near the speaker." Virtual Courtroom Standards and Guidelines A.2, Nat'l Ctr. State Courts (Apr. 2020), https://www.ncsc.org/__data/assets/pdf_file/0016/40363/RRT-Technology-Guidance-on-Remote-Hearings.pdf (attached as Exhibit A to the Supplemental Declaration of Michael R. Noveck ("Suppl. Noveck Decl."), attached hereto as Exhibit 8).

[12] *See* Supreme Court of New Jersey, Order (Apr. 20, 2020) ¶ 6, https://www.njcourts.gov/notices/2020/n200420a.pdf ("Records of all events that are not livestreamed will be preserved on CourtSmart or other Judiciary approved recording systems.") (Suppl. Noveck Decl. Ex. B).

software. Indeed, Zoom, Teams, Skype, and other standard videoconferencing systems all have significant security features that allow moderators to regulate the proceedings.[13] Moreover, the federal government itself has authorized use of "Zoom for Government, Zoom's platform developed for U.S. government use," through FedRAMP, "a U.S. government-wide program that provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services."[14] Also, the New Jersey state courts, again, have made effective use of videoconferencing software even though certain proceedings are confidential. *See* N.J. Ct. R. 1:38-3 (describing exceptions to public access to court records). Additionally, while Plaintiffs do not dispute that certain proceedings may require taking steps to protect participants' confidentiality, it is also true that there is a "presumption of openness in most deportation proceedings." *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002); *see also* 8 C.F.R. § 1003.27.

Next, the Government claims that "the Newark Immigration Court's

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[13] Virtual Courtroom Standards and Guidelines, *supra* n. 11, at D.2 (describing security features to be used in court proceedings); Cathy Krebs, *Privacy and Confidentiality Tips for Virtual Hearings* (Am. Bar Ass'n, July 1, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/privacy-and-confidentiality-tips-for-virtual-hearings/ (describing privacy settings for common videoconferencing software systems).

[14] Press Release, Zoom Video Comm'ns, Inc., *Zoom Phone Added to FedRAMP Moderate Authorized Zoom for Government*, June 15, 2020, https://www.globenewswire.com/news-release/2020/06/15/2048406/0/en/Zoom-Phone-Added-to-FedRAMP-Moderate-Authorized-Zoom-for-Government.html.

computers are not equipped with web cameras to support videoconferencing through these third-party software applications." Gov't Br. at 41. But that position makes little sense, given the Government's position that the Newark Immigration Court has at least some cameras available for use in its VTC hearings; nor does the Government provide any reason why those cameras could not be used for other standard videoconferencing platforms. And, of course, the Government does not even try to explain why it cannot purchase external web cameras, which are readily available through commercial sellers at extremely affordable rates.[15]

The Government also seeks to avoid the arbitrary nature of its actions by reference to the "various measures" it has implemented in its courthouse. Gov't Br. at 42. But attorneys who have appeared at the Newark Immigration Court since it reopened report regular noncompliance with EOIR's policies, including the non-use of face masks and the failure to effect social distancing between and among EOIR personnel and others. *See* Kazemi Decl. ¶¶ 4-7; Suppl. Decl. of Monica Kazemi ¶¶ 4-6, attached as Exhibit 6; Camilo Decl. ¶¶ 16-22; Decl. of Joyce Phipps ¶ 3, attached as Exhibit 7. And even though EOIR's policies require that "individuals

[15] *See, e.g.*, Amazon, *Webcam with Microphone, Unzano*, https://www.amazon.com/dp/B0834MB2ZS/ (web camera available for purchase for $29.99). Because there are eight courtrooms at the Newark Immigration Court, Cheng Decl. ¶ 7, it would cost a mere $240 for EOIR to equip all of its courtrooms with one of these cameras.

with symptoms . . . of COVID-19 should not enter EOIR space," Gov't Br. at 42, Defendant Cheng's declaration forthrightly admits that it was required to close the Newark Immigration Court on August 20 because an EOIR employee was symptomatic. Cheng Decl. ¶ 38. Obviously, if EOIR cannot even ensure that its own employees comply with the policies and procedures it has designed to make the courthouse safe, then it is at least dubious that it could effectively assure the health and safety of the premises when it is populated not only by EOIR employees, but also immigration attorneys, litigants, witnesses, and interpreters, among others.

More fundamentally, though, even if the Court does conclude that EOIR's policies and procedures are reasonably designed, the Court nonetheless must "view[] the evidence as a whole" in evaluating the arbitrariness and capriciousness of the agency's actions. *Dep't of Commerce*, 139 S. Ct. at 2575. And for the reasons described above, the failure to provide any remote videoconferencing option for attorney appearances, as so many other courts have done since the pandemic, is arbitrary and capricious irrespective of the policies purportedly in place for those who appear, as currently required, in-person at the courthouse.

Finally, the Government attempts to skirt the simplicity of providing a remote videoconferencing option by relying on its current system, which provides attorneys the option to appear by videoconference only if they go into the courthouse and appear in a courtroom separate from the judge. Gov't Br. at 41. Of course, the

Government effectively concedes the entire point with its admission that "this option requires that participants appear at the Newark Immigration Court to access the secure VTC system." *Id.* As explained in declarations submitted in support of Plaintiffs' Motion, this option does not mitigate the substantial, significant health and safety concerns of appearing at the courthouse in the middle of the pandemic, because attorneys still must enter the building through crowded security lines, enter crowded and unregulated elevators, and congregate with others in shared spaces like waiting rooms, hallways, and restrooms. O'Neill Decl. ¶ 18; Trinidad Decl. ¶¶ 45-46; Suppl. Estela Decl. ¶ 9. Thus, the risks described above regarding appearances in front of an immigration judge at the Newark Immigration Court are substantially equivalent to the risks posed by attending a VTC hearing at the same courthouse. In other words, the alternative that the Government proposes is not "remote" at all. Rather, the requirement to go to the courthouse still constitutes a compelled in person proceeding within the meaning of Plaintiffs' Complaint and Motion, with all of the risks inherent in attending proceedings at the courthouse.

Indeed, on multiple occasions when EOIR has suspected COVID-19 exposure at the courthouse, it has not cleared out only some courtrooms or shared spaces, but instead has shut down the Newark Immigration Court entirely. Thus, as described in Plaintiffs' prior submission, EOIR cleared the courthouse on March 6 after a suspected COVID-19 exposure. Estela Decl. ¶ 4; Leschak Decl. ¶¶ 2-3. And then

again, very recently, on August 20, EOIR again abruptly closed the entire Newark Immigration Court again due to suspected COVID-19 exposure. Cheng Decl. ¶ 38; Phipps Decl. ¶¶ 13-15.[16] In taking these actions, the Newark Immigration Court effectively acknowledges that any potential exposure at the premises of that Court risk the safety and health of anyone present at the courthouse—including, of course, those who might be present for a VTC hearing.

In sum, then, the failure to provide a *remote* videoconferencing option, as well as limiting video appearances to the VTC software available only through an in-person appearance at the courthouse itself, is arbitrary and capricious. This Court should therefore find that Plaintiffs have established a likelihood of success on the merits of their APA claim.

B. Count Two: State-Created Danger

The Government also fails to persuasively rebut Plaintiffs' claims of a likelihood of success on the merits of Count Two of their Complaint, based upon the Government's action in effecting a state-created danger in violation of the Fifth Amendment. The parties agree on the elements of the claim: (1) the harm was foreseeable; (2) the Government acted with deliberate indifference; (3) Plaintiffs are

[16] The abrupt nature of the court's closure is reflected in its announcement on EOIR's Twitter account, which posted about the 11:30 a.m. closure only three minutes *after* the court had actually closed. *See* @DOJ_EOIR, Twitter (Aug. 20, 2020, 11:33AM), https://twitter.com/DOJ_EOIR/status/1296470537397571584.

in a class of foreseeable victims separate from the public at large; and (4) the state action "created a danger to [Plaintiffs] or . . . rendered [Plaintiffs] 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); *accord Kedra v. Schroeter*, 876 F.3d 424, 437 (3d Cir. 2017) (describing deliberate indifference standard under the second element).

The Government does not seem to contest the foreseeability of the harm to Plaintiffs—nor could it, given the repeated closures of the Newark Immigration Court designed to prevent the spread of COVID-19, *see* Pls. Br. at 31-32—and it also does not appear to take on the third element, requiring that there be a class of foreseeable victims. Instead, the Government argues, essentially, that it has not acted with deliberate indifference because of its "guidance . . . regarding proper protocols" and because of the option to appear by VTC at the Newark Immigration Court, in a separate courtroom from the judge. Gov't Br. at 46-47. As noted above, however, EOIR's policies—whatever their merit on paper—are not adequately followed, while the VTC option requires attorneys to go to the courthouse, and thus creates the same danger of a COVID-19 infection in security lines, elevators, waiting rooms, hallways, restrooms, and other shared spaces as does a regular "in-person" appearance. *See supra* at 28-30. And given that Plaintiffs have shown that conducting hearings through remote videoconferencing platforms is an appropriate and reasonable alternative option, Plaintiffs have also demonstrated the

Government's "disregard of a substantial risk of serious harm" through "actions that evince a willingness to ignore a foreseeable danger or risk." *Kedra*, 876 F.3d at 437.

The Government further claims that it has not created a danger because Plaintiffs can request to appear by telephone, even if their clients do not consent to a telephonic hearing. First, the Government fails in any way to rebut Plaintiffs' straightforward and common-sense position that telephonic appearances do not permit attorneys to adequately fulfill their professional obligations in these kinds of hearings in the same way that videoconference appearances do. *See* Pls. Br. at 39 n.47. But second, the Government also does not explain how, under the existing statute and regulations, an immigration judge could permit an attorney to appear by phone even when his or her client declines to consent to a telephonic form of hearing. *See* 8 U.S.C. § 1229a(b)(2)(B) (stating that "[a]n evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved," without permitting others not to appear in-person); 8 U.S.C. § 1003.25(c) (same). Indeed, Plaintiffs' experience bears that out: Plaintiffs O'Neill and Trinidad were told that they had to attend an in-person appearance once their client did not consent to a telephonic hearing. *See* O'Neill Decl. ¶ 19; Trinidad Decl. ¶ 39.[17]

[17] The Government also contends that Plaintiffs can avoid the state-created danger of appearing at the Newark Immigration Court by filing an interlocutory appeal of the denial of a motion for a continuance. Gov't Br. at 46. But this argument ignores that the BIA "does not ordinarily entertain interlocutory appeals," except as is "necessary to address important jurisdictional questions regarding the administration

For all of these reasons, and those previously provided, Plaintiffs have established a likelihood of success on Count Two of their Complaint.

III. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

Although the Government argues that Plaintiffs will not suffer irreparable harm without an injunction, its arguments to that effect entirely overlap with its position on the merits, and are thus unpersuasive for the reasons described above. Thus, the Government's argument that there is no irreparable harm because it offers a VTC option at the Newark Immigration Court, *see* Gov't Br. at 47-48, fails based upon the harm, in the form of risk to Plaintiffs' health, of attending *any* hearings at the courthouse. *See supra* at 28-30; *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). Nor is irreparable harm avoided because of the possibility of continuance motions, which have repeatedly been denied, *see supra* at 14-15 & n.5,

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of the immigration laws, or to correct recurring problems in the handling of cases by immigration judges." *Matter of K-*, 24 I. & N. Dec. 418, 420 (BIA 1991). It is clear that the BIA does not view the issues in this case as falling within this definition, because the BIA has rejected interlocutory appeals of the denial of motions for continuances, *see, e.g.*, *In re: Maria Elena Parsons*, 2013 WL 6529172 (BIA Nov. 14, 2013), and, in at least one case, of the denial of a motion to appear by videoconference, *see In re: Guat Ngoh Lim*, 2013 WL 1933497 (BIA Apr. 22, 2013). *See also* Suppl. Estela Decl. ¶ 7 ("In NJ-AILA's experience, and the experience of other AILA chapters, an interlocutory appeal is not a practical, effective mechanism to seek review of the denial of a continuance prior to a hearing.").

or of interlocutory appeals to the BIA, which are generally disallowed, *see supra* n.17. Certainly, the risk of harm to Plaintiffs' health from compelled attendance at the Newark Immigration Court, a risk that the Government does not seriously dispute, constitutes irreparable harm favoring an injunction. *Sullivan*, 811 F.2d at 183; *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55 (2d Cir. 2004). And, as shown, this is so irrespective of whether hearings at the courthouse are conducted by VTC, on the one hand, or in person, on the other.

IV. The Public Interest Weighs in Plaintiffs' Favor.

Finally, this Court should reject the Government's arguments that an injunction is not in the public interest. Indeed, the Government's response on this point is based on two fallacies. First, the Government claims that "granting the relief sought here would effectively stay all proceedings in the Newark Immigration Court unless the alien respondent consented to a telephone hearing." Gov't Br. at 49. But that is obviously not what Plaintiffs seek; instead, Plaintiffs' proposed injunction would permit proceedings at the Newark Immigration Court to go forward, as long as EOIR allows remote videoconference as a permissible form of hearing. *See* Pls. Br. at 39 (citing *Nken v. Holder*, 556 U.S. 418, 436 (2009)).[18] Thus, the

[18] The Government is also wrong to allege that Plaintiffs' proposed relief "would long survive the COVID-19 pandemic," Gov't Br. at 49, given that the Government could always move to modify or dissolve the injunction based on changed factual circumstances. *See* Fed. R. Civ. P. 60(b)(5); *Horne v. Flores*, 557 U.S. 433, 448

Government's second fallacy is to claim that it would be a "major overhaul" for the Newark Immigration Court to permit remote videoconference hearings, Gov't Br. at 50, which claim is fully contradicted by not only common sense but also by the experience of numerous other courts that have successfully implemented remote video proceedings for the pandemic, *see* Pls. Br. at 16-19; *supra* at 23-24.

More fundamentally, the Government's brief does nothing to counter Plaintiffs' assertions that an injunction is in the public interest because of the "substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations," *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), as well as the "public . . . interest in preventing the further spread of COVID-19," *Rafael L.O. v. Tsoukaris*, Civil Action No. 20-3481 (JMV), 2020 WL 1808843, at *9 (D.N.J. Apr. 9, 2020). *See* Pls. Br. at 37-39. Thus, the Court should conclude that the public interest is served by granting the injunction.

CONCLUSION

For these reasons, the Court should enjoin the requirement that attorneys must physically appear at the Newark Immigration Court for hearings, regardless of whether those hearings are held in the same room as an immigration judge or in

(2009) ("[T]he passage of time frequently brings about changed circumstances . . . that warrant reexamination of the original judgment.").

another room through a VTC system. Either option arbitrarily disregards the simple, already widespread alternative of providing remote videoconferencing as a form of hearing, just as numerous other courts have done. Because the Newark Immigration Court's current practice of compelling in-person proceedings risks the health and lives of attorneys, and indeed of the public at large, it should be prohibited, effective immediately.

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Respectfully submitted,

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