

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AMERICAN IMMIGRATION LAWYERS
ASSOCIATION, NEW JERSEY
CHAPTER, et al.,

CIVIL ACTION NUMBER:

Plaintiffs,

2:20-cv-9748-JMV

vs.

TRO

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW, et al.,

Defendants.

Frank R. Lautenberg Post Office and Courthouse
Two Federal Square
Newark, New Jersey 07102
September 3, 2020

B E F O R E:

THE HONORABLE JOHN MICHAEL VAZQUEZ,
UNITED STATES DISTRICT COURT JUDGE

**** ALL PARTIES PRESENT VIA TELEPHONE CONFERENCE ****

A P P E A R A N C E S:

GIBBONS P.C., BY:
LAWRENCE S. LUSTBERG, ESQ.
MICHAEL ROSS NOVECK, ESQ.
One Gateway Center
Newark, New Jersey 07102

appeared on behalf of the Plaintiffs;

OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, BY:
BEN KURUVILLA, ESQ.
970 Broad Street, Suite 700
Newark, New Jersey 07102

appeared on behalf of the Defendant.

/S/Lisa A. Larsen, RPR, RMR, CRR, FCRR
Lisalarsen25@gmail.com
(630) 338-5069

1 (PROCEEDINGS held via telephone conference before
2 The HONORABLE JOHN MICHAEL VAZQUEZ, United States
3 District Judge, on September 3, 2020.)

4 THE COURT: This is Judge Vazquez. We're on the
5 record in the matter of *American Immigration Lawyers*
6 *Association, New Jersey Chapter, et al. vs. the Executive*
7 *Office For Immigration Review, et al.* The civil number in
8 this case is 20-9748.

9 Can I please have the appearances of counsel, beginning
10 with petitioner.

11 MR. LUSTBERG: Good afternoon, Your Honor. This is
12 Lawrence S. Lustberg from Gibbons P.C. on behalf of the
13 plaintiffs. I am joined today by my colleague Michael R.
14 Noveck, also from Gibbons, who will be presenting argument to
15 the Court today.

16 MR. NOVECK: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 And for respondents.

19 MR. KURUVILLA: Good afternoon, Your Honor. This is
20 Ben Kuruvilla from the U.S. Attorney's Office for the
21 defendants. Thank you.

22 THE COURT: Good afternoon, Mr. Kuruvilla.

23 Pending before the Court is a request for injunctive
24 relief as well as declaratory relief. The primary concern in
25 this case focuses on the Newark immigration courts.

1 I have reviewed all of the submissions of counsel,
2 including all of the related materials. It's quite a robust
3 record.

4 The critical documents off of which I worked were
5 obviously the complaint at Docket Entry 1, the moving brief at
6 Docket Entry 6-1, the opposition brief at Docket Entry 13, and
7 the reply brief at Docket Entry 15.

8 Now, there were a number of supporting documents
9 supplied that I also reviewed, including numerous
10 declarations.

11 The critical issue in this case is whether, under the
12 two causes of action brought by plaintiffs -- and that is an
13 alleged violation of the APA or Administrative Procedures Act
14 or under a due process challenge under the Fifth Amendment,
15 specifically state-created danger, whether plaintiffs are
16 entitled to injunctive relief.

17 The parties do very well address those issues as well
18 as the requisite standard that I must apply. Reasonable
19 likelihood of success on the merits is the first
20 consideration, second is imminent irreparable harm, third is
21 the balancing of the harms among the parties but really
22 between plaintiffs and defendants, and then finally the public
23 interest.

24 I have to be frank that I do think after reviewing all
25 of this information I am going to need additional information

1 from both parties but primarily from the respondents.

2 That being said, I have a number of questions that I do
3 need answered now, and that will impact the information that
4 I do believe I need before making a final decision on this
5 motion.

6 Most of that information -- most of my questions,
7 actually, are really for the respondents because I need to
8 understand certain facts and legal arguments to make sure I
9 have them in proper context.

10 Mr. Kuruvilla, let me go through the questions that I
11 have. They are both factual and legal.

12 First, I have the following questions from the
13 declaration of David Cheng who is the assistant chief
14 immigration judge. That's at Docket Entry 13-1.

15 According to Judge Cheng -- and by "judge," I don't
16 mean any disrespect. I know he's the assistant chief
17 immigration judge, but as opposed to saying "ACIJ" each time,
18 I'm just going to refer to him as Judge Cheng for simplicity's
19 sake.

20 He talks about the proceedings that occur in the Newark
21 immigration court, the fact that it's a non-detained court,
22 there's 13 IJs, there's 8 courtrooms, and office and
23 administrative space.

24 As to the proceedings handled by the court, he
25 says they include removal proceedings, withholding-only

1 proceedings, credible fear and reasonable fear interviews,
2 and other types of proceedings under the Immigration and
3 Nationality Act.

4 Now, he does go on to say that the most common are
5 removal proceedings with approximately 67,500 cases, but I am
6 reading that correctly that that's the most common type of
7 case that's heard but it's not the exclusive type of case
8 that's heard in Newark.

9 Is that correct?

10 MR. KURUVILLA: That's my understand, Judge.

11 THE COURT: That becomes important because you base
12 a lot of your arguments on removal proceedings, and one of
13 my first questions when we get to your legal arguments is
14 going to be these are not just removal proceeding cases, but
15 you seem to rely very much on removal proceeding law when it
16 seems as though there's more types of cases than removal
17 proceedings.

18 Okay. Now, at paragraph 17 Judge Cheng says -- I'm
19 paraphrasing -- it's his understanding that the policies,
20 practices, and guidance that are at issue here were informed
21 by multiple sources, including DOJ, OMB, OPM, CDC, and GSA.

22 Now, those are agencies. It doesn't really tell me
23 specifically within those agencies what's considered.
24 Actually, it doesn't tell me at all what's considered within
25 those agencies and what the reasoning was of EOIR after

1 reviewing those materials.

2 So can I ask you how can I -- I know you have
3 jurisdictional questions which are issues I'll get to, but how
4 can I perform any type of review to see whether or not this
5 was arbitrary and capricious if I don't know what EOIR did in
6 coming to their conclusions?

7 MR. KURUVILLA: I understand, Judge. Look, I think
8 we have submitted the policy guidance that EOIR put out there
9 when it reopened, so we were, you know, directing the Court
10 to -- directing the Court's attention to those materials as a
11 basis.

12 But with respect to each of those agencies and the
13 guidance that was received from those agencies, you're right.
14 That's not flushed out in this declaration. And if the Court
15 is looking for more information on that, you know, I can
16 pursue it.

17 I think that, you know, as you noted, of course there's
18 the threshold issues regarding jurisdiction that we think the
19 Court should address first, you know, before getting to the
20 likelihood of success on the merits of the APA of the
21 state-created danger claims, but with respect to --

22 THE COURT: I will. I'm going to do that. I'm
23 going to do that, but I just want to get through this
24 declaration first and then I'll turn to your legal arguments.

25 I do have specific questions about the jurisdictional

1 arguments.

2 MR. KURUVILLA: Okay.

3 THE COURT: Now, what Judge Cheng also said is that
4 when it was announced on 6/24 of this year, 2020, by Twitter
5 and then followed up soon after with another pronouncement
6 that Newark would resume in-person hearings in non-detained
7 cases on July 13, 2020, I didn't see that it was limited to
8 removal cases. It just says they were going to resume
9 non-detained cases at that point.

10 Am I reading that accurately? That's paragraph 30.

11 MR. KURUVILLA: Right. Let me get to that.

12 (Brief pause.)

13 MR. KURUVILLA: Right. It's correct that it applied
14 to non-detained cases. As far as whether it extends beyond
15 just removal matters, actually, I don't know the answer to
16 that. I can find out.

17 THE COURT: Okay. Now, what I need you to next
18 look at, because I have two questions, is paragraph 50 of
19 Judge Cheng's declaration and then paragraph 62.

20 Paragraph 50 says that the court does not have Web
21 cameras, okay, but there's no explanation as to could they
22 have Web cameras.

23 Is there something prohibiting them from having Web
24 cameras?

25 As counsel points out, you know, it doesn't seem that

1 much of a cost but maybe it's prohibitive. I don't know. But
2 it could be anywhere from -- for all eight courtrooms, it
3 could be 240 to \$320 or maybe a little bit more to get Web
4 cameras.

5 I know that Judge Cheng says they do not have Web
6 cameras, but one of the questions I'm going to be asking is
7 are you prohibited from having Web cameras. This is going to
8 be follow-up information, but I just wanted to point that out
9 to you.

10 More concerning to me is that paragraph 50 Judge Cheng
11 says commercial videoconferencing is not a viable alternative,
12 and he makes that declaration. But at paragraph 62 he says
13 it's unclear if commercial videoconferencing can address these
14 concerns.

15 My concern is that those statements are not the same.
16 One, he's saying it's not viable. The other, he's saying it's
17 not clear.

18 How come in the same declaration I have the assistant
19 chief immigration judge telling me he's concluded it's not
20 viable but at the same time telling me it's not clear whether
21 it's viable, basically?

22 MR. KURUVILLA: Judge, there's a lot of
23 considerations that go into the webcam issue and things that
24 go beyond just cost. It goes into, you know, the licensing
25 issues. There are procurement, licensing, testing, all sorts

1 of issues that go into it.

2 THE COURT: Mr. Kuruvilla, first of all, you're not
3 going to testify, okay. Judge Cheng didn't say any of those
4 things, which is going to be a real concern of mine, that
5 there's no explanation given other than a statement that would
6 not even pass plausibility pleading statement in a conclusory
7 fashion that is not viable.

8 He didn't say that. I'm not asking for your
9 explanation because it's not testimony.

10 My first question is why did Judge Cheng say on one
11 hand it's not viable and then at the same time say it's
12 unclear? He's telling me two different things in that
13 declaration.

14 MR. KURUVILLA: Right, Judge. That's -- to the
15 extent you identified a discrepancy, Judge, is this -- are you
16 going to provide us with an opportunity to address these
17 questions?

18 THE COURT: Yes, yes. Yes, I am. I'm going to
19 absolutely provide you with an opportunity. That's some of
20 the information I need, but I am concerned, particularly
21 coming from a judicial officer, that a declaration says on the
22 one hand it's not viable and then on the other hand says it's
23 not clear.

24 Maybe a layperson would not see the distinction there,
25 but for attorneys and certainly for judges that's an important

1 distinction. One is making a statement to me that it's not
2 viable. The other one is that it's not clear whether it's
3 viable.

4 MR. KURUVILLA: Right.

5 THE COURT: Those are not the same things.

6 MR. KURUVILLA: Right. I appreciate what you're
7 saying, Judge. We will revisit this with Judge Cheng. It
8 could be a matter, you know, of getting the technical people
9 also involved as well to buttress what's in here and provide
10 an additional declaration to answer your specific questions
11 about, you know, the technical ability of the court.

12 THE COURT: Okay. But just to be clear, that is a
13 concern I have. My concern right now with this declaration is
14 that I do have the critical judge saying two different things
15 to me in a declaration.

16 Now, as to paragraph 60, Judge Cheng does say that EOIR
17 does not conduct temperature checks or health screenings.
18 That responsibility lies with the party having business before
19 the court.

20 What's his basis for saying that it's not the court's
21 responsibility to ensure it's safe, that it's the parties'
22 responsibility? What's his legal basis for that?

23 MR. KURUVILLA: Well, Judge, I'm reading through it
24 right now. As far as folks coming into the building -- the
25 building is in part maintained by GSA. As far as temperature

1 checks coming into the building, I think it's in part a
2 factual statement that deals with both the reality of who
3 manages and controls the building that the parties are
4 entering into.

5 The Newark immigration court is in a building that's
6 maintained by GSA, so that's -- I think factually that's part
7 of what is being said here.

8 THE COURT: But, Mr. Kuruvilla, that's not what he
9 said. If he said it's GSA's responsibility, then I have
10 questions for GSA. He didn't say that.

11 He said EOIR does not, however, conduct temperature
12 checks or health screens. Rather, that responsibility lies
13 with the party having business before the court.

14 He doesn't say it's GSA's responsibility. He says it's
15 the parties' responsibility.

16 I did read that correctly; right?

17 MR. KURUVILLA: Correct.

18 THE COURT: So if the party is irresponsible, then
19 that means that basically he's conceding that you're going to
20 have a hotspot in the court because it's not the court's
21 responsibility?

22 MR. KURUVILLA: Judge, I think this also -- you know,
23 the guidance that was issued when the court reopened also
24 directed members of the public and EOIR employees to a public
25 health notice regarding, you know, anyone who has had

1 contact -- you know, COVID-like symptoms or contact with
2 people who have COVID-like symptoms or complaining on coming
3 to the courtroom have to be on notice or should be on notice
4 that, you know, that could be a potential spreader of COVID.

5 I think there is an element of this being tied to the
6 guidance that was issued by the court, you know, both on its
7 Web site and otherwise, directing members of the public to the
8 general guidance about COVID-19 and being aware of, for
9 example, having symptoms or being in contact with people who
10 had symptoms or exposure to COVID-19 and taking actions that
11 are appropriate with that which would include, for example,
12 staying home and not coming to the court if you fall into
13 those categories.

14 THE COURT: What if you're asymptomatic? What if you
15 have it but you're not showing any symptoms? How does the
16 guidance cover that situation?

17 MR. KURUVILLA: I mean, I don't know that it does,
18 other than the rest of the -- the factual information that's
19 in -- the guidance that's in there such as maintaining social
20 distancing, having face coverings, and any other precautions
21 that you generally understand folks are supposed to take in
22 relation to COVID-19.

23 I think if you have somebody that's asymptomatic,
24 then --

25 THE COURT: Because they're not doing temperature

1 checks and it's not their responsibility. So they could be
2 asymptomatic. Maybe a temperature check could reveal it, but
3 that's not EOIR's responsibility according to Judge Cheng;
4 correct?

5 MR. KURUVILLA: I mean, that's what's here in the
6 declaration, Judge.

7 As far as -- but I would say if somebody is
8 asymptomatic that, you know, I would imagine a temperature --
9 if someone is asymptomatic, that would imply that they don't
10 have a high temperature but . . .

11 THE COURT: Okay. Now we get to your jurisdictional
12 question. Before I get to your specific jurisdictional
13 argument, let me just ask you a basic question, hypothetical.

14 Let's take a different scenario. Let's say it's
15 determined that the immigration court in Newark has asbestos
16 and it's in a position where it can harm people. Let's say
17 the judge decides it's not that big of a harm and we're
18 going to still continue to have proceedings even though
19 there's asbestos exposure. Nobody is contesting there's
20 asbestos exposure.

21 What's your view as to where an attorney goes to get
22 relief so he or she does not have to appear in an asbestos
23 courtroom based on your arguments?

24 What avenues of relief would that attorney have so that
25 they didn't have to expose themselves to asbestos?

1 MR. KURUVILLA: I mean, I think they would make an
2 application for a continuance or an adjournment to the
3 immigration judge. That would be one -- that would be the
4 first thing they would do.

5 THE COURT: I've already told you that the judge is
6 saying come on in anyway.

7 MR. KURUVILLA: Okay. So make the motion. It's
8 denied --

9 THE COURT: And we know that the court is denying
10 just based on requests because of COVID; right? That's actual
11 fact in this case.

12 If somebody just says "I'm concerned about COVID,"
13 that's not sufficient for the Newark immigration courts.
14 Correct?

15 MR. KURUVILLA: Well, I think -- I don't know if
16 that's true as a general matter. I know that there's been --
17 I know that there was one -- at least one motion for
18 adjournment or continuance that were denied based on it
19 being -- based on there not being a more particularized
20 concern raised.

21 THE COURT: Okay.

22 MR. KURUVILLA: But I don't know that as a general
23 matter all immigration judges are denying requests for
24 continuances or adjournment, you know, just based on the fact
25 of, you know, the pandemic.

1 THE COURT: Okay. Now returning to the hypothetical
2 with asbestos, they ask the judge but the judge already told
3 them to come in, the judge denied it.

4 Where can the attorney go for relief at that point?

5 MR. KURUVILLA: I mean, you could file an appeal with
6 the BIA seeking review of that decision.

7 THE COURT: BIA denies it. Where does the attorney
8 go? And it's interlocutory. We haven't even gotten to the
9 merits. There's no final order of removal. If it's a removal
10 case, there's no final order in another case.

11 What avenue of relief does that attorney have at that
12 point?

13 MR. KURUVILLA: Once it's denied by the BIA, then,
14 you know, at that point -- I mean, a petition for review is
15 only for final orders of removal, so . . .

16 THE COURT: So you're saying there's no judicial
17 review in that situation? The IJ act in an unchecked manner
18 at that point.

19 MR. KURUVILLA: If they pursued their administrative
20 remedies by going to the BIA and that's been denied, then I
21 don't know at that juncture if there is another avenue for
22 judicial review.

23 THE COURT: Okay. So in this situation -- it's a
24 hypothetical but there was a sheriff down in Florida that I
25 read did it, ordered nobody can wear masks.

1 So if the immigration court in Newark ordered no one
2 can wear masks, it would be the same problem. The attorney
3 could ask for an adjournment. If it was denied, according to
4 your theory of jurisdiction, they could take an appeal to the
5 BIA. If the BIA denied it, they were basically without any
6 other recourse.

7 Is that essentially the position that respondents are
8 taking here?

9 MR. KURUVILLA: Judge, again, you're putting out a
10 hypothetical that's not, you know, what has happened here or
11 what's --

12 THE COURT: But I need to understand what your
13 parameters are for where there is judicial review so I do take
14 extreme cases. Either there's judicial review or there's not
15 based on your argument because you're saying it's not fact
16 sensitive.

17 If they decided now they were going to go with the
18 sheriff down in Florida and they were going to prohibit masks
19 because they read an article on the internet that said masks
20 actually help spread the disease -- I think that's what he
21 said -- and they said they're prohibiting masks, I just want
22 to know -- your position would be there is no judicial review
23 available to the attorneys.

24 Is that basically the position of respondents?

25 MR. KURUVILLA: In that instance, I think that

1 that would be our position. After they have exhausted the
2 administrative process by going through the BIA, then they
3 wouldn't have review at that juncture.

4 THE COURT: When are they supposed to get it? If
5 they have to wait for a final order, then they may be dead.

6 When do they get their -- let me ask you, at that point
7 you have a final order of removal, the case is over before
8 the -- unless they remand it. It's almost a moot issue at
9 that point. They have already gone through the process.

10 MR. KURUVILLA: Judge, all I can bring the Court's
11 attention back to is that, you know, you are giving me an
12 extreme example and the --

13 THE COURT: But we have to use extremes so I can
14 determine the parameters of your argument. You're saying
15 given that extreme example your argument doesn't change;
16 correct?

17 It's a question of review. Either I have the ability
18 to review or I don't, regardless of how extreme the example
19 is.

20 MR. KURUVILLA: Right. That's correct.

21 Like I said, our position is in that instance and at
22 that juncture there would not be an avenue for judicial review
23 after the BIA denied until, you know, there's a final order of
24 removal that can then be, you know, channelled to the appeals
25 court.

1 THE COURT: So now let's get to your specific
2 arguments under the facts of this case.

3 You argue first 8 U.S.C. 1252(a)(5) and (b)(9), channel
4 all challenges for removal proceedings to the Court of
5 Appeals.

6 Before I get to the particular facts of this case,
7 haven't we already agreed that these are not just removal
8 proceedings?

9 MR. KURUVILLA: That it's not just removal
10 proceedings that are occurring at the --

11 THE COURT: According to Judge Cheng's declaration,
12 that's what I'm working off of. He said it's the most common,
13 but he didn't say it's exclusive. Correct?

14 MR. KURUVILLA: That's what he said in the
15 declaration.

16 I think the one issue I was going to follow up with,
17 though, Judge, is whether what's been resumed are only removal
18 proceedings or something beyond removal proceedings.

19 THE COURT: Okay. But based on his declaration, he
20 said they resumed non-detention hearings. He didn't limit it
21 to removal proceedings in his declaration.

22 MR. KURUVILLA: Right.

23 THE COURT: Which is an important fact in light of
24 your argument; right?

25 MR. KURUVILLA: Right. But it is our understanding

1 that the claims brought by the plaintiffs here are all claims
2 that arise out of removal proceedings.

3 THE COURT: Okay. Well, you were wrong, though --
4 listen, we'll get to that. But even your information you
5 had about which cases they had pending was wrong that you
6 presented to me when you made your mootness argument.

7 And then they came back and said that's not right. We
8 do have other cases pending. And if you searched your
9 database, you would see if they had other cases pending;
10 right?

11 MR. KURUVILLA: Judge, I do have something to address
12 on that point, Judge.

13 THE COURT: Let me just keep going. So the removal,
14 though, talks about alien removal. We do agree that the
15 plaintiffs in this case are attorneys. They're not subject to
16 removal; correct?

17 MR. KURUVILLA: That's correct.

18 THE COURT: Have you seen anything that applies to
19 8 U.S.C. 1252(a)(5) or (b)(9) to concerns about the attorney
20 as opposed to concerns over the alien?

21 Do you have any cases that say this also applies to
22 attorneys if they have their own individual concerns?

23 MR. KURUVILLA: So we do think that the language of
24 the statute is broad enough to cover it, but I can direct you
25 to at least one case that --

1 THE COURT: Hold on, hold on, because you also say
2 something else in your brief that I'm trying to understand.

3 Around page 33 -- 36, I should say, you say nothing in
4 the INA suggests that it's meant to protect the interest of
5 immigration attorneys.

6 So when you make the admission to me that nothing in
7 the INA suggests that it's meant to protect the interest of
8 immigration attorneys, aren't you essentially admitting that
9 all your removal arguments are no longer valid because the INA
10 is not there to protect the interest of immigration attorneys?

11 MR. KURUVILLA: No. But the removal argument relates
12 to anything -- it's not about whether or not it protects the
13 rights of the immigration attorneys. It's about whether the
14 claim that the immigration attorney is making is one that
15 arises out of a removal proceeding or one that is part of the
16 process by which removal is determined, and that's the key
17 language in --

18 THE COURT: But it has nothing to do with the
19 interest of the attorney which is the issue before me; right?

20 You also admit the INA has nothing to do to protect the
21 interest of the attorney, and we can agree that right now I'm
22 dealing with the interest of the attorney; correct?

23 MR. KURUVILLA: The claim is for the -- yes. The
24 claim that is being advanced is with respect to the attorney.
25 That's right.

1 THE COURT: In fact, the attorneys say we have an
2 ethical conundrum sometimes because our client wants us to do
3 something that we may not want to do, i.e. appear in person.

4 So not only is it in the attorney's interest but it
5 could be the alien may have a different interest in this case;
6 correct?

7 MR. KURUVILLA: I'm sorry, Judge. Can you say that
8 one more time? I'm sorry.

9 THE COURT: Tell me about your case where it says
10 that the attorney's safety is covered by the removal
11 proceedings, your argument under removal proceedings. You
12 said you have a case where attorney health and safety is
13 covered by removal proceedings.

14 What case is that?

15 MR. KURUVILLA: So the case was cited in the Southern
16 District, the *Ali* case. It's *P.L. vs. ICE*, which I should
17 have the cite for. Give me one second.

18 Basically in that one the plaintiffs consisted of
19 not only the immigrant aliens but also attorneys who were
20 challenging the policy of having VTC hearings for detained
21 here.

22 The court found -- and the plaintiffs who were
23 attorneys, you know, had claims in their own right which were
24 that these VTC hearings were costing them more time in terms
25 of working with their client -- time and costs of working with

1 their client.

2 So they were bringing -- at least they allege claims in
3 their own right and --

4 THE COURT: What was the health and safety issue of
5 the attorneys that was decided? I'm focusing on the health
6 and safety of the attorney.

7 Nobody is arguing about it's costing them more time or
8 they're losing money. That issue is not before me. This is a
9 health and safety issue.

10 In the case you cited, what was the health and safety
11 issue?

12 MR. KURUVILLA: There wasn't a health and safety
13 issue in that case. It's just a case where the court applied
14 (b) (9) to find that it did not have jurisdiction over a
15 challenge to the manner in which an immigration judge carried
16 out a hearing.

17 The claimant -- the plaintiff in the case was an
18 attorney. It's an example of a scenario where the court had
19 found that (b) (9) applies to claims by attorneys.

20 Look, admittedly there's not many -- there's not cases
21 out there where, you know, attorneys have advanced the claim.
22 The cases that deal with (b) (9) and (a) (5) and 1252(g) and the
23 other statutes that we cited to in the brief generally deal
24 with the alien themselves.

25 But, you know, the language both in the statute and in

1 the cases that interpreted the statute are broad enough to
2 where we feel it would cover the claims of the attorneys here.

3 Again, it's not a health and safety case, but we think
4 that *P.L.* case out of the Southern District of New York which
5 I can give you the cite for, it is cited in Judge Buchwald's
6 *Ali* decision.

7 In that case it was an instance where the plaintiff was
8 counsel, and the court found that (b)(9) applied to preclude
9 the claim -- to deny jurisdiction.

10 THE COURT: Okay. I guess the problem I have
11 with -- I'm being frank. First, I find your argument is a
12 disqualifier because what I have before me right now by way of
13 evidence from your witnesses and actually from petitioners
14 as well is that these are not all removal hearings.

15 Most of your arguments are based on the fact of what
16 can happen in a removal hearing, but I'll let you revisit that
17 issue if you want to make the argument as applied that these
18 are only removal hearings.

19 But, frankly, Mr. Kuruvilla, to say that attorneys'
20 health and safety is not subject to judicial review,
21 particularly in light of the pandemic -- I think as of today
22 we have over 6 million cases in the U.S., over 180,000 deaths.
23 Jersey is doing better, but we have been one of the hardest
24 hit.

25 It's somewhat of a shocking argument to hear the

1 Department of Justice say that there's nothing the attorneys
2 can do to protect themselves if the BIA decides not to take
3 action.

4 It's disheartening, to be quite honest, that the DOJ --
5 I underline the word "justice" in DOJ -- would be setting
6 forth that argument; that the attorneys then are subject to
7 whatever the EOIR wants to do or the particular IJ wants
8 to do.

9 If we can't protect our counsel -- and everybody at
10 that point but counsel who are dedicated to their jobs from
11 potential exposure to the COVID-19 virus which we know does
12 kill people and spreads easily and there's no way the judges
13 can be involved, I'll just be frank, either the Third Circuit
14 is going to have to tell me that or the Supreme Court.

15 That's not an argument that -- you are going to lose on
16 your jurisdictional arguments before me. I do also find even
17 if it were just removal proceedings that the health and safety
18 of the attorneys practicing is not what the removal statutes
19 were put in place for to limit judicial review.

20 If they had to wait until a final order of removal to
21 address this issue, they're never going to be able to get
22 judicial relief unless the circuit decides even though it's
23 moot they wanted to address it. Because at that point it
24 would be moot because the case would be over before the
25 immigration judge.

1 I was disappointed. But it's your right. You raise
2 your argument.

3 I'm not telling you how to litigate the case, but that
4 when I'm dealing with a health and safety issue and I've got
5 to go through 40 pages of your brief telling me why I can't
6 decide a health and safety issue in a real climate of a
7 pandemic, not in hypothetical -- but that's your decision.

8 Like I said, ultimately you may prevail, but you're not
9 going to prevail before me. It would have to be a higher
10 court that tells me I don't have jurisdiction to hear this.

11 By the way, we went through the same issues with the
12 immigration detainees, and the Third Circuit, without even
13 much of an analysis, said yes you can bring a habeas case to
14 address these issues.

15 I'm firmly convinced that I have jurisdiction over the
16 immigration courts whether there's a health and safety issue
17 for the attorneys being there. I realize it's a high
18 standard, but that doesn't mean I can't review it in the first
19 instance. It's just troubling to me that members of the Bar
20 are making that argument.

21 Now, as to lack of standing, you know, you've already
22 told me that nothing in the INA suggests that it's meant to
23 protect the interest of the immigration attorneys -- which, by
24 the way, I am interpreting that to undercut your argument as
25 to removal proceedings, that admission -- that it's not there

1 to protect the interest of the immigration attorneys, then
2 I do have the ability to rule on this issue.

3 Tell me again why there's no final agency action in
4 this case.

5 MR. KURUVILLA: Judge, the two issues that were
6 identified or the two actions that were identified as final
7 agency actions were the decision to re-open and the standing
8 order that Judge Cheng issued with respect to how telephonic
9 hearings would be conducted.

10 It's our position that that's not -- those are not
11 actions from which, you know, legal consequences flow in that
12 there are still -- for example, if someone has a hearing, they
13 have an opportunity to make a motion to continue it or adjourn
14 it.

15 The IJ would then have to deny it. And, you know -- so
16 the standing order that sets forth how telephonic hearings are
17 conducted in and of itself doesn't give rise to any sort of
18 legal consequences.

19 There still would have to be actions taken after that
20 point in order for the agency action to be considered final in
21 the context of immigration court proceedings, you know, the
22 final action -- the immigration judge, you know, taking some
23 action.

24 That's essentially our argument for why the two pieces
25 that have been identified here don't constitute final agency

1 action.

2 THE COURT: Don't attorneys have to comply with
3 orders whether they be standing orders or otherwise? Isn't
4 that required?

5 MR. KURUVILLA: Right. But the standing order just
6 sets forth -- right. The standing order sets forth how
7 telephonic hearings -- the procedures for telephonic hearings
8 and how they should be conducted from a procedural standpoint.

9 THE COURT: But you don't disagree that if an
10 attorney feels uncomfortable -- for example, one part of the
11 aspect of the telephonic order beyond not being able to object
12 solely on the basis of not having seen a document, but another
13 part of that standing order indicates that immigration judge,
14 at his or her discretion, can halt the telephonic hearing and
15 order an in-person hearing.

16 So that's within the authority of the immigration judge
17 under the standing order; correct?

18 The judge is given discretion to halt a telephonic
19 hearing and order an in-person hearing; correct?

20 MR. KURUVILLA: Right. Assuming events occur that
21 necessitate that, yes.

22 THE COURT: It's not really written that way; right?
23 It's just saying the judge has discretion how to do that
24 without delineating how to exercise that discretion; correct?

25 MR. KURUVILLA: Right. That's how it's written.

1 THE COURT: Okay. And you're not disagreeing that
2 if the attorney doesn't feel comfortable at that point and
3 doesn't go and the judge doesn't grant the continuance the
4 attorney is subject to discipline.

5 The argument is we don't know what the discipline would
6 be or whether it be imposed or anything; correct?

7 MR. KURUVILLA: That's correct. It would be a
8 hypothetical that -- that's correct.

9 Whether the judge would or would not order somebody to
10 go in person and then if someone failed to do that or tried to
11 seek not to do that whether the judge would then overrule that
12 objection and still compel the individual to come to court,
13 and then if the person fails to do so, you know, subsequently
14 issue discipline as a result of that.

15 THE COURT: That's not hypothetical. That's the
16 process; right?

17 You ask not to go and the judge makes a decision. If
18 you disagree with the judge's decision, you could be subject
19 to discipline.

20 There's nothing hypothetical about that process, is
21 there?

22 MR. KURUVILLA: That you could be subject to
23 discipline? No, that's not hypothetical.

24 THE COURT: Okay. There's been no indication from
25 Judge Cheng that people will not be disciplined if they don't

1 show up because they're concerned about COVID; right? That's
2 not in the standing order; correct?

3 He could have put that in there; right? He could have
4 put that in there or he could have even said if you're
5 concerned about COVID we'll respect you and you'll be granted
6 a continuance.

7 That could have been done, as well; correct?

8 MR. KURUVILLA: That is not in the standing order.
9 Right.

10 THE COURT: I'm going to turn it over to plaintiffs,
11 but I will tell the folks what I'm going to need more
12 information on before I make a final decision.

13 I do want to know more about the screening. I am
14 extremely concerned about the statement by Judge Cheng that
15 it's not the EOIR's responsibility, it's the parties'
16 responsibility.

17 Because the whole purpose of taking preventative
18 measures is not only individual but once the individual has it
19 it's to stop the spread.

20 Basic technology, you know, whether -- in schools --
21 I know this because my wife teaches, but now they have
22 technology before you get on the bus you hold your hand up and
23 it says whether you have a temperature or not.

24 Again, they're concerned for the individual student,
25 but once a person has it they have it. The concern is the

1 spread. So I am a little concerned that, well, if the party
2 is irresponsible, they're going to spread it.

3 I want to know more about screening before they come to
4 court. Not guidance. Screening. I know the guidance is if
5 you're feeling sick, stay home. Even that says you should
6 stay home. It doesn't say you shall stay home.

7 But I want to know what they're doing to protect people
8 before they come to court, before they get into the court. I
9 want to know how they enforce this guidance because there's
10 indications that staff have been seen without masks and even
11 immigration judges have been seen without masks.

12 So what's the consequence besides putting your mask on?
13 Are you docked pay? Are you told to leave? How is it
14 enforced to ensure that the masks are worn?

15 There's a lot of other information that I don't know.
16 Are the courtrooms cleaned in between uses? The way it reads
17 is you call one case, okay, you leave, another person comes
18 in.

19 Is there any cleaning done or is there even at least
20 cleaning materials made available to the parties who are
21 going to sit at those tables?

22 How many cases are called at one time? There's
23 8 courtrooms, there's 13 IJs, but I have no indication from
24 the record how Newark is handling their docket calls at this
25 time. It could be very different if they're only calling a

1 few cases every couple hours. Or are they telling everybody
2 show up and we'll get to you when we get to you?

3 I don't know the answer to that. It wasn't in this
4 information.

5 How is social distancing enforced on the elevators and
6 the line to get into the building? Frankly, if you don't have
7 a processes in place before you get into the court, whatever
8 you have in court could be for naught because you could have
9 caught it on the way in.

10 Finally, do they have other safety measures in courts
11 like clear partitions? Are they being used?

12 Then, finally, I need a better explanation -- the
13 one thing that stood out to me from the videoconferencing
14 technology that the judge talks about was the need for the
15 DAR, the digital audio recording so they could get
16 transcribed.

17 Of course I then read the reply. The reply said what
18 they're overlooking is that you could still use a commercial
19 product and at the same time use your video recording in court
20 so you can get a transcription.

21 I don't know. It's an argument. Judge Cheng may say
22 you can't do that for the following reasons.

23 But the fact of the matter is, Mr. Kuruvilla, that in
24 many courts, this one included, have gotten the technology to
25 do videoconferencing, and I don't think anybody is going to

1 disagree that remote videoconferencing is the safest way.

2 It may not be feasible. That's why I want more
3 information. And it may not even be unreasonable.

4 I know it's a very high standard that plaintiffs have
5 to meet to win their case here, but it's just more information
6 that I would like to have so that I could make an intelligent
7 decision based on these facts.

8 That I'm not critical of the respondents for. They
9 gave me a lot of information. It just led to more questions
10 for me. I'm going to do an order asking for that information.

11 I will note for the parties, it's not directly on
12 point, but recently the Third Circuit on August 27 came out
13 with the case *Sierra Club vs. The United States EPA*. It's not
14 an EPA case, but it was the same standard; arbitrary,
15 capricious, or abuse of discretion or otherwise not in
16 accordance with the law.

17 In that case they found that it had been arbitrary or
18 capricious. It's only by analogy. It's not a binding case,
19 it's not the same statute, but it is the same standard.

20 I did review it just to see how the circuit was working
21 through those decisions. It's out there. If you want to
22 address it, that's fine. You don't have to. It's not
23 directly on point, but it provides some analogous comments.

24 Let me hear from plaintiffs on these issues that they
25 have raised.

1 MR. NOVECK: Thank you, Your Honor. Michael Noveck
2 from Gibbons for the plaintiffs.

3 Your Honor, we're happy to review and respond to
4 whatever additional information the Government provides, but
5 as Your Honor noted and as we argued in our brief, really it's
6 the Government's failure to provide these explanations that is
7 itself arbitrary and capricious.

8 I think the Court noted that the Government's
9 opposition brief says that they relied on these government
10 agencies, and actually, Your Honor, it also says they relied
11 on the experience of other courts which, as you noted, other
12 courts have repeatedly used this remote videoconferencing
13 technology.

14 So in that respect it's the Government's failure to
15 actually explain what it did and why that is arbitrary and
16 capricious in the first place.

17 Obviously, we're happy to consider the Government's
18 response. I'm sure we would want to reply to that, as well.

19 But what we would ask the Court is in light of the
20 Government's -- the opportunity the Government has had to
21 explain its reasoning and its failure to do so thus far that
22 the Court would issue a temporary stay of compelled attorney
23 appearances at the Newark immigration court because, as we've
24 stated in our declarations, these hearings are ongoing every
25 single day under the procedures that Your Honor has noted have

1 not been explained.

2 The lack of using videoconferencing technology has not
3 been explained, and attorneys are risking their lives to go
4 in person every day or alternatively are not showing up and
5 facing potential discipline because of the Government's
6 failure.

7 If Your Honor wants to accept more information from the
8 Government, we're fine with that, but we would just ask the
9 Court to consider some sort of temporary stay while the
10 proceedings are ongoing.

11 THE COURT: All right. I'm not going to grant a TRO
12 at this point. But if there's a particular case while we're
13 getting this sorted out or a continuance is not granted and
14 the attorney -- I'll hear the parties on short notice. I
15 will. Meaning like the same day.

16 If that does come to fruition -- because I did look
17 at most of the hearing dates for the named plaintiffs, the
18 individual plaintiffs. There is one coming up on the 8th,
19 from what I read, for Mrs. Trinidad. The other seems to be --
20 I believe October is the first one. That seems to give some
21 leeway.

22 But I will say that if it gets to an issue where an
23 attorney has concerns and they are denied, I will hear the
24 parties on short notice as to the appropriate relief in that
25 regard.

1 The other thing, Mr. Kuruvilla, is I know you know
2 this, but I just want to make it clear. I'm looking for the
3 decision-making process before these instructions went into
4 place. "Before" being the operative term.

5 I'm not looking for an after-the-fact attempt to -- I
6 want to understand what EOIR considered and what the Newark
7 immigration judges considered before -- what they actually
8 concerned before they made these decisions.

9 I know now we can go back and look through things, but
10 I'm not looking for -- I can go read through and say this
11 could have justified it or not, but I'm looking for what they
12 actually took into account and what they base their reasoning
13 on before they made the decisions.

14 That should go without saying, but I just want to make
15 that clear.

16 The second point is a practical point. Judge Cheng may
17 be 100 percent right that for either legal reasons or other
18 reasons the commercial videoconferencing is not a viable
19 option. To me that's obviously what this case rises and
20 falls -- not rises and falls but it's a critical consideration
21 in this case. That's really the only relief that plaintiffs
22 are seeking. But without better understanding, based on the
23 information, I can't make that decision.

24 All that being said, if they have already done the
25 analysis and they can't do it, then I'll hear the parties'

1 arguments. But if they haven't really looked at the issue in
2 depth and if they do look at it and it looks like it's a
3 viable option, putting aside the merits of the case, I think
4 we can all agree that remote videoconferencing is the safest
5 alternative under the current circumstances.

6 I would just strongly encourage if it's feasible -- I'm
7 not ordering. I'm totally suggesting it. But if it is
8 economically feasible and technologically feasible, I know
9 that you have to get your recordings, it would make the most
10 common sense at the current time.

11 It may not mean the plaintiffs win. I'm not making
12 that determination. But I always try to inject some common
13 sense into these decision points.

14 I don't want litigation necessarily to overcome
15 people's better judgment. That's just an observation.

16 What I will do is I'll deny the request for a TRO. I
17 will hear the parties on short notice. I am going to do a
18 list of areas that I need information on and I will --
19 Mr. Kuruvilla, I'm going to give you -- we're coming into the
20 Labor Day weekend. I'm familiar with that.

21 I'll give you two weeks to get the information. I'm
22 going to give the other side seven days to respond. That puts
23 us into the end of September.

24 As long as we can get at least by Ms. Trinidad's
25 September 8th conference, I think as to the individual

1 defendants I should be able to rule on this before they have
2 their upcoming court appearances. I'm going to issue that
3 order. I'm going to work on that right now and get it out and
4 I will let both parties address it.

5 In-person can be workable, but there's a lot more
6 information that I need besides what I have. That's where
7 I'll leave it at this point.

8 MR. NOVECK: Your Honor, may I be heard briefly?

9 THE COURT: Yes.

10 MR. NOVECK: So it's my understanding, I learned
11 just this morning, that Ms. Trinidad's hearing was adjourned I
12 think until December 21. That's the September hearing, not
13 the later one.

14 THE COURT: Okay.

15 MR. NOVECK: But I do just want to be clear, Judge,
16 that one of the plaintiffs is the organizational group the
17 New Jersey Chapter of AILA, and many members -- we've asserted
18 a standing on behalf of those members, and many of those
19 members are going to have hearings coming up.

20 So I just want to make sure I understand from the
21 Court's perspective that if we come to the Court on short
22 notice with a member of the organization that has an upcoming
23 hearing where a continuance was denied that the Court is
24 planning to hear us on those specific hearings.

25 THE COURT: Let me ask Mr. Kuruvilla. I would prefer

1 it that way because it will streamline the process.

2 Mr. Kuruvilla, I don't want to run into a procedural
3 hurdle. If a person comes forward and shows that they are a
4 member of the organization -- the association, I should say,
5 would that be sufficient or would you want to amend the
6 complaint and name a new individual plaintiff?

7 MR. KURUVILLA: Judge, you're asking whether -- if
8 someone comes forward whether they can be added to the case as
9 a litigant? I understand Mr. Noveck's question to be whether
10 or not the Court is going to grant relief with regard to a
11 request of somebody who has an upcoming hearing.

12 I'm not sure I understand what's being asked.

13 THE COURT: Let me say the way I understand it, and
14 then I'll let Mr. Noveck explain clearly.

15 My understanding is that if it's not one of the named
16 plaintiffs but it is a member of the association who gets
17 denied a request for a continuance and they have health
18 concerns, they would like to bring that to my attention.

19 Now, there's a few ways we can do it. We can say,
20 okay, we'll consider it under the currently filed case, we can
21 say file an amended complaint adding that person, or we can
22 simply say file a related case and I'll hear them together.
23 There's different ways to handle it.

24 I think the question is they don't want to have to know
25 what that decision is if that should arise, and if they just

1 file it in this case and it's not an individual plaintiff but
2 it's a member of the association, will your office's position
3 be that that's insufficient for me to hear it?

4 Am I phrasing that question correctly?

5 MR. NOVECK: Yes, that is my concern, Your Honor, is
6 that if we were to have a procedural bump in getting an
7 individual AILA member's case heard, given the concerns that
8 Your Honor has expressed and the denial of the request for a
9 TRO right now.

10 MR. KURUVILLA: I think for now, Judge, procedurally,
11 if it's a matter of just filing an amendment to add the person
12 to this action -- I mean, I think it depends in part on how
13 many maybe we're talking about.

14 But I think to avoid having too many related cases it
15 might make the most procedural sense for -- if someone falls
16 into that category to seek to enter this action either by
17 amendment or whatever other means, but I think that would
18 be --

19 THE COURT: So I think that makes the most sense, so
20 the record is clear.

21 Mr. Noveck, what you can do then is file an amended
22 complaint, add the person, add the material allegations as to
23 that person with whatever papers, and I'll hear you. Okay?

24 MR. NOVECK: Understood. Thank you, Your Honor.

25 THE COURT: Okay. All right. Thank you, Counsel.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. NOVECK: Thank you, Judge.

MR. KURUVILLA: Thank you very much, Your Honor.

(Which were all the proceedings had in
the foregoing matter on said day.)

* * *

FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

I, **Lisa A. Larsen, RPR, RMR, CRR, FCRR**, Official Court Reporter of the United States District Court for the District of New Jersey, do hereby certify that the foregoing proceedings are a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

/S/Lisa A. Larsen, RPR, RMR, CRR, FCRR

Official U.S. District Court Reporter

DATED this September 9, 2020