

Lawrence S. Lustberg, Esq.
Michael R. Noveck, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500
llustberg@gibbonslaw.com
mnoveck@gibbonslaw.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

AMERICAN IMMIGRATION LAWYERS
ASSOCIATION, NEW JERSEY CHAPTER, on
behalf of its members; Michael DiRAIMONDO;
Brian O'NEILL; Elizabeth TRINIDAD; and John
PEREZ,

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.

Civ. No. 20-9748

**AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

Plaintiffs American Immigration Lawyers Association, New Jersey Chapter; Michael DiRaimondo; Brian O'Neill; Elizabeth Trinidad; and John Perez, by and through their attorneys, Gibbons P.C., allege as follows:

PRELIMINARY STATEMENT

1. This case is about the Government's efforts to compel immigration attorneys to risk their health, and the health of their families and communities, by forcing them to appear for in-person proceedings at the Newark, New Jersey immigration court in the midst of a severe global pandemic. The novel coronavirus, SARS-CoV-2, has devastated countries around the world, including the United States. It is highly transmissible from person to person, even from people who do not show symptoms, and causes COVID-19, a respiratory disease that can lead to severe illness, and even death, particularly among persons who are medically vulnerable, but also among people who are otherwise healthy. The long-term consequences of contracting the new virus are only now beginning to emerge.

2. Governments throughout the world, including in New Jersey, have reacted to the pandemic by ordering an unprecedented shutdown of normal group gatherings to abate the virus's spread. While the disease has currently receded to some extent in New Jersey, case numbers are still increasing and the virus transmission rate continues to fluctuate around dangerously high levels, such that public health officials and experts continue to warn against the hasty resumption of normal activities. Indeed, states that have resumed normal activities have been forced to reckon with additional severe outbreaks of COVID-19, which threaten to overwhelm hospitals. COVID-19 has caused a national death toll of over 150,000 people, a number that rises every day.

3. The Newark Immigration Court is no stranger to the devastating effects of COVID-19. The coronavirus spread through the court before it closed in March, and COVID-19 illnesses tragically caused the deaths of both a longtime private immigration attorney and a staffer at the immigration prosecutor's office, as well as causing the serious illness of both a senior immigration prosecutor and a court translator. More recently, the head of Federal Protective Services at 970

Broad Street in Newark—the building where the Newark Immigration Court is housed—died from COVID-19.

4. Yet, despite the risks posed by the spread of COVID-19, and the actual serious illness and death it has already caused to people involved with the Newark Immigration Court, that court was recently reopened for immigration hearings regarding cases for persons who are not held in detention (the so-called “non-detained docket”). Moreover, even though immigration law and regulations provide for immigration hearings to take place by videoconference—and the Executive Office of Immigration Review, which operates the nation’s immigration courts, has touted its use of such videoconference hearings—the Newark Immigration Court does not provide the option for attorneys or others to appear by videoconference for cases on the non-detained docket.

5. The Newark Immigration Court is thus ignoring the successful experiences that other courts, including federal and state courts in New Jersey and throughout the country, have had in conducting evidentiary hearings through videoconferencing technology during the pandemic. Indeed, some of these courts have conducted bench trials, even complex ones, entirely by video, while evidentiary hearings and oral arguments have also been conducted remotely. Immigration court hearings are also essentially bench trials, so the same process could be replicated in the Newark Immigration Court, thus permitting the court’s work to continue while also ensuring the health of its participants, including Plaintiffs and other attorneys. But instead, the Newark Immigration Court has insisted that attorneys appear in-person, and has specifically denied adjournment motions based on attorneys’ concerns about contracting or spreading COVID-19 at the courthouse. Further, immigration judges have even threatened attorneys with disciplinary action under the applicable rules of professional conduct should they decline to appear in person.

6. This action is brought by a professional organization of hundreds of New Jersey immigration attorneys, and four specific immigration attorneys, seeking to prohibit the Government from mandating their appearance at in-person proceedings when it can, by statute and regulation, permit those proceedings to take place by videoconference. By instead compelling attorneys to appear in person at significant risk to their personal health and to the detriment of the overall public health, Defendants have engaged in arbitrary and capricious action in violation of the Administrative Procedure Act. Defendants have provided no explanation for failing to utilize recognized, available videoconference hearing options. Defendants' actions also constitute a state-created danger to the health of immigration attorneys, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Plaintiffs therefore respectfully request that this Court enjoin Defendants from conducting compelled, in-person immigration proceedings.

THE PARTIES

7. Plaintiff American Immigration Lawyers Association, New Jersey Chapter ("NJ-AILA") is a part of the American Immigration Lawyers Association ("AILA"). Founded in 1946, AILA is a nonpartisan organization that provides continuing legal education, information, professional services, and expertise through its 39 chapters and over 50 national committees. The national organization consists of more than 15,000 attorneys and law professors who practice and teach immigration law. Plaintiff NJ-AILA, the New Jersey chapter, has well over 400 members, many of whom regularly practice in the Newark Immigration Court, representing respondents in removal and other immigration proceedings.

8. Plaintiff Michael DiRaimondo is a licensed attorney-at-law in the State of New York, with a business address of 120 Broadway, 28th Floor, New York, NY 10271. Mr.

DiRaimondo regularly practices in the Newark Immigration Court, representing respondents in removal and other immigration proceedings. He resides in New York.

9. Plaintiff Brian O’Neill is a licensed attorney-at-law in the State of New Jersey and the Commonwealth of Pennsylvania, with a business address of 55 Madison Ave, Suite 400, Morristown, NJ 07960. Mr. O’Neill regularly practices in the Newark Immigration Court, representing respondents in removal and other immigration proceedings. He resides in New Jersey.

10. Plaintiff Elizabeth Trinidad is a licensed attorney-at-law in the State of New Jersey with a business address of P.O. Box 294, Bridgeton, NJ 08302 and an office in Bridgeton. Ms. Trinidad regularly practices in the Newark Immigration Court, representing respondents in removal and other immigration proceedings. She resides in New Jersey.

11. Plaintiff John Perez is a licensed attorney-at-law in the State of New Jersey with a business address of Perez, Perez & Perez P.C., Wilson Towers, 41-51 Wilson Avenue, Suite 2A, Newark, NJ 07105. Mr. Perez regularly practices in the Newark Immigration Court, representing respondents in removal and other immigration proceedings. He resides in New Jersey.

12. Defendant Executive Office for Immigration Review (“EOIR”) is a federal government agency within the United States Department of Justice that includes the immigration courts and the Board of Immigration Appeals (“BIA”). It is responsible for directing and managing the immigration court system. 6 U.S.C. § 521; 8 C.F.R. § 1003.0.

13. Defendant William Barr is the Attorney General of the United States and the head of the United States Department of Justice, within which EOIR is located. He is sued in his official capacity.

14. Defendant James McHenry is the Director of EOIR. He is sued in his official capacity.

15. Defendant David Cheng is the Assistant Chief Immigration Judge (“ACIJ”) for the Newark Immigration Court. As ACIJ, Judge Cheng assists the national Chief Immigration Judge in establishing operating policies and overseeing policy implementation for the immigration courts, and specifically for the Newark Immigration Court. Judge Cheng thus issues and implements standing orders and other policies for the Newark Immigration Court. He is sued in his official capacity.

JURISDICTION AND VENUE

16. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Fifth Amendment to the United States Constitution.

17. The jurisdiction of this Court is predicated upon 28 U.S.C. § 1331 (assigning federal courts original jurisdiction over questions of federal law) and 5 U.S.C. § 701-06 (providing for judicial review of federal administrative agency action). Additionally, the Court has jurisdiction to grant declaratory and corresponding injunctive relief in this case pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and ¶ 2202.

18. Defendants’ decision to reopen the Newark Immigration Court, announced on June 24, 2020, is a final agency action for which there is no further avenue of administrative review, and is thus subject to judicial review under 5 U.S.C. § 551(12) and § 704. The Standing Order issued by Defendant Cheng on June 19, 2020, is likewise a final agency action for which there is also no further avenue of administrative review; it is similarly subject to judicial review under 5 U.S.C. § 551(12) and § 704. Each Plaintiff is a “person” as defined by 5 U.S.C. § 551(2) and thus is entitled to bring this action under 5 U.S.C. § 702.

19. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and § 1391(e)(1)(B) because the events giving rise to this action have occurred, and continue to occur, in Essex County, New Jersey, within the judicial district of the District of New Jersey. Venue is also proper pursuant to 28 U.S.C. § 1391(e)(1)(C) because Plaintiffs reside in this judicial district.

FACTUAL ALLEGATIONS

A. COVID-19, a global pandemic, is a severe disease that can spread rapidly and cause serious illness or death.

20. COVID-19 is the name assigned by the World Health Organization (“WHO”) to the severe respiratory tract disease caused by a novel coronavirus, SARS-CoV-2, that was first discovered in China in late 2019.¹ The coronavirus has since spread to virtually every country in the world.² On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a global “pandemic.”³ The White House and the State of New Jersey have each declared a state of emergency related to the COVID-19 pandemic.⁴ Those states of emergency have not been rescinded.

21. As of the date of this filing, there were over 17 million confirmed COVID-19 infections worldwide, with almost 4.5 million of those in the United States.⁵ Over 673,000 people

¹ Naming the coronavirus disease (COVID-19) and the virus that causes it, World Health Org. (last visited July 31, 2020), [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

² See World Map, Ctrs. for Disease Control & Prevention (updated July 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/world-map.html>.

³ WHO Director-General’s opening remarks at the media briefing on COVID-19, World Health Org. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ See Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, The White House (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; N.J. Exec. Order No. 103 (Mar. 9, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf>.

⁵ Coronavirus Resource Ctr., Johns Hopkins Univ. & Med. (last visited July 31, 2020),

worldwide have died of COVID-19, with over 150,000 deaths in the United States.⁶ New Jersey has been particularly affected by the novel coronavirus, with over 180,000 confirmed cases, almost 14,000 confirmed deaths, and another almost 2,000 “probable deaths” attributed to COVID-19.⁷ Indeed, Essex County, New Jersey—where the Newark Immigration Court is located—has suffered the greatest number of deaths of any New Jersey county.⁸

22. According to the Centers for Disease Control and Prevention (CDC), the virus that causes COVID-19 “is thought to spread mainly from person-to-person,” between people who are in close contact with one another, within about six feet, or for an extended period of time, through respiratory droplets that form when someone talks, coughs, or sneezes.⁹ The virus can spread from people who are infected but do not appear ill, either because they are “pre-symptomatic” (infected with the virus, but not yet presenting symptoms) or “asymptomatic” (infected with the virus but never presenting symptoms).¹⁰ Indoor areas pose particular risks for the spread of COVID-19: as the United States Environmental Protection Agency has stated, “[t]here is growing evidence that the SARS-CoV-2 virus remains airborne in indoor environments for hours, potentially increasing

<https://coronavirus.jhu.edu/map.html>

⁶ *Id.*

⁷ New Jersey COVID-19 Information Hub, State of N.J. (last visited July 31, 2020), <https://covid19.nj.gov/>.

⁸ *Id.*

⁹ How COVID-19 Spreads, Ctrs. For Disease Control & Prevention (updated June 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

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

in concentration over time.”¹¹ Indeed, there is a growing body of scientific evidence showing that the virus is transmitted by airborne aerosols, which accumulate indoors and increase the risk of infection from crowded, indoor environments.¹²

23. COVID-19 can cause severe illness and death, particularly among those who are considered medically vulnerable due to age or preexisting medical conditions.¹³ Even “mild” cases of COVID-19 can have lingering long-term effects such as blood clots, strokes, and recurring symptoms.¹⁴ COVID-19 outbreaks have also led to astronomical spikes in hospitalizations, with corresponding concerns that hospitals lack the staff, equipment, and space to meet the demand for their services.¹⁵

¹¹ Science and Technical Resources related to Indoor Air and Coronavirus (COVID-19), U.S. Env'tl. Prot. Agency (last visited July 31, 2020), <https://www.epa.gov/coronavirus/science-and-technical-resources-related-indoor-air-and-coronavirus-covid-19>; see also Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors*, *W.H.O. Says*, N.Y. Times, Jul. 9, 2020 (reporting that “mounting evidence has suggested that in crowded indoor spaces, the virus can stay aloft for hours and infect others, and may even seed so-called superspreader events”).

¹² E.g., Linsey C. Marr, *Yes, the Coronavirus Is in the Air*, N.Y. Times, July 30, 2020, <https://www.nytimes.com/2020/07/30/opinion/coronavirus-aerosols.html>.

¹³ People with Certain Medical Conditions, Ctrs. for Disease Control & Prevention (updated July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>; COVID-19: vulnerable and high risk groups, World Health Organization (last accessed July 27, 2020), <https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups>.

¹⁴ Chia-Yi Hou, *‘Mild’ cases of coronavirus may have serious long-term and recurring effects*, *The Hill*, July 10, 2020, <https://thehill.com/changing-america/well-being/prevention-cures/506752-mild-cases-of-coronavirus-may-not-be-as-mild-as>; Ryan Prior, *I can’t shake Covid-19: Warnings from young survivors still suffering*, *CNN*, July 19, 2020, <https://www.cnn.com/2020/07/18/health/long-term-effects-young-people-covid-wellness/index.html>.

¹⁵ See Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. Times, Mar. 27, 2020, <https://www.nytimes.com/article/flatten-curve-coronavirus.html>; Edgar Walters, Shannon Najmabadi, & Emma Platoff, *Texas hospitals are running out of drugs, beds, ventilators and even staff*, *Texas Tribune*, July 14, 2020, <https://www.texastribune.org/2020/07/14/texas-hospitals-coronavirus/>

24. There is no vaccine for COVID-19; nor is there a known cure.¹⁶ The director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, has stated that even if a vaccine were to be developed by the end of this year, it would likely be several months into next year before the vaccine might become widely distributed within the United States.¹⁷

B. New Jersey has responded to COVID-19 by severely limiting groups of people from congregating, particularly indoors.

25. “Limiting close face-to-face contact with others”—also known as “social distancing”—“is the best way to reduce the spread of” COVID-19.¹⁸ Social distancing requires people who are not in the same household to remain at least six feet apart from each other whenever possible.¹⁹ New Jersey Governor Phil Murphy has noted that the new virus poses particularly lethal risk indoors.²⁰ New Jersey, along with many other state and local governments, has therefore taken unprecedented measures to ensure that its residents practice social distancing in order to mitigate the spread of COVID-19.

26. On March 21, 2020, Governor Murphy ordered all New Jersey residents to stay in their homes or their places of residence and ordered all but essential businesses to close, while also mandating that “individuals must practice social distancing and stay six feet apart whenever

¹⁶See Jonathan Corum, Katherine J. Wu, & Carl Zimmer, *Coronavirus Drug and Treatment Tracker*, N.Y. Times, updated July 22, 2020, <https://www.nytimes.com/interactive/2020/science/coronavirus-drugs-treatments.html> (“There is no cure yet for Covid-19. And even the most promising treatments to date only help certain groups of patients, and await validation from further trials.”).

¹⁷ Gisela Crespo et al., *US gets reality checks on Covid-19 vaccine, duration of symptoms*, CNN, July 24, 2020, <https://www.cnn.com/2020/07/24/health/us-coronavirus-friday/index.html>.

¹⁸ Social Distancing, Ctrs. for Disease Control & Prevention (updated July 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

¹⁹ *Id.*

²⁰ Summer Concepcion, *NJ Governor Urges National Mask Requirement: ‘Not Debatable,’* Talking Points Memo, July 5, 2020, <http://talkingpointsmemo.com/news/new-jersey-governor-murphy-national-mask-requirement-not-debatable> (quoting Governor Murphy as stating that “this virus is a lot more lethal inside than outside”).

practicable.”²¹ On May 18, Governor Murphy “unveiled a multi-stage approach” to gradually lift the restrictions imposed due to COVID-19, based on “data that demonstrates improvements in public health and the capacity to safeguard the public.”²² Importantly, the plan provides that at all stages of that plan, “[w]ork that can be done from home should continue to be done from home.”²³

27. Throughout the process, Governor Murphy has emphasized the dangers of lifting restrictions too soon, and has “stressed [that] ‘we’re trying to stay one step ahead of this virus.’”²⁴ Thus, for example, on June 29, Governor Murphy, in part due to “recognition by public health experts that indoor environments present significantly increased risks of transmission as compared to outdoor environments,” abruptly paused the planned resumption of indoor dining in New Jersey because public officials and public health experts “have attributed the rise in [COVID-19] cases to activities in indoor food and beverage establishments.”²⁵ In recent days, indoor gatherings in New Jersey have led to new clusters of coronavirus outbreaks, leading Governor Murphy to reemphasize “the dangers in indoor gatherings” and reiterate that the state “ha[s] had to hit pause on expanding the restart of more indoor activities.”²⁶

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

²² When and how is New Jersey lifting restrictions?, N.J. Dep’t of Health, (updated July 20, 2020), <https://covid19.nj.gov/faqs/nj-information/reopening-guidance/when-and-how-is-new-jersey-lifting-restrictions-what-does-a-responsible-and-strategic-restart-of-new-jerseys-economy-look-like>.

²³ *Id.*

²⁴ Brent Johnson, *Gov. Murphy defends canceling N.J. indoor dining reopening. ‘We’re trying to stay one step ahead of this virus.’*, N.J. Advance Media, June 30, 2020, <https://www.nj.com/coronavirus/2020/06/gov-murphy-defends-canceling-nj-indoor-dining-reopening-were-trying-to-stay-one-step-ahead-of-this-virus.html>

²⁵ N.J. Exec. Order No. 158 (June 29, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-158.pdf>.

²⁶ Matt Arco, *COVID-19 clusters from massive N.J. house parties belong in ‘Knucklehead Hall of Fame,’ Murphy says*, N.J. Advance Media, July 29, 2020, <https://www.nj.com/coronavirus/2020/07/covid-19-clusters-from-massive-nj-house-parties-belong-in-knucklehead-hall-of-fame-murphy-says.html>.

28. Public health officials have also warned that lifting restrictions related to COVID-19 too soon will exacerbate the outbreak of the disease. In March, Dr. Fauci warned that “easing lockdown restrictions could lead to a ‘big spike’ in new coronavirus cases.”²⁷ Dr. Fauci’s warning proved prescient: after some states, particularly in the south and west, lifted their own lockdown restrictions, they subsequently suffered significant COVID-19 outbreaks, which Dr. Fauci has attributed in part to those states’ failure to follow science-based federal guidelines regarding reopenings.²⁸

C. The Newark Immigration Court suspends in-person proceedings in March, but not before COVID-19 spreads to attorneys and staff working in the court building, causing serious illness and death.

29. Since March, EOIR in Newark has responded to the COVID-19 pandemic haphazardly, with inconsistent notice to litigants, attorneys, and the public, regarding its continuing operations.

30. On March 6, the waiting room at the 12th Floor of 970 Broad Street, where the Newark Immigration Court is located, was evacuated when the court administrator informed people there that someone with COVID-19 had been present in the room. Litigants and attorneys were given the opportunity to adjourn their matters to a later date.

31. Meanwhile, Plaintiff Trinidad had conflicting experiences regarding her appearances with clients in the Newark Immigration Court on Tuesday, March 10 and Wednesday, March 11. On March 10, Ms. Trinidad’s client woke up ill with a high fever, so Ms. Trinidad

²⁷ Jason Lemon, *Dr. Fauci Says Easing Lockdown Measures Too Soon Will Lead to “Big Spike” in Coronavirus Cases: “It’s Gonna Backfire”*, Newsweek, Apr. 20, 2020, <https://www.newsweek.com/dr-fauci-says-easing-lockdown-measures-too-soon-will-lead-big-spike-coronavirus-cases-its-1498944>.

²⁸ Peter Sullivan, *Fauci says hard-hit states should be ‘pausing’ the reopening process*, The Hill, July 9, 2020, <https://thehill.com/policy/healthcare/public-global-health/506566-fauci-says-hard-hit-states-should-be-pausing-the>.

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

32. On March 13, EOIR issued a press release announcing the closure of the Seattle immigration court, and the suspension of master calendar hearings²⁹ for non-detained respondents at Newark and several other immigration courts (including the three immigration courts in New York City), through April 10.³⁰ Then, in the late evening of March 17 and early morning of March 18, EOIR announced via Twitter and in a press advisory that it was suspending all hearings for non-detained respondents at Newark and several other immigration courts through April 10.³¹

33. Tragically, two people who appeared at the Newark Immigration Court in March died of COVID-19. Raymond D'Uva, a long-time immigration attorney and NJ-AILA member who appeared at the Newark Immigration Court on March 11, became infected with COVID-19 and died on June 3. Another woman who served as a clerk for the Immigration and Customs Enforcement Office of Chief Counsel (who are the immigration court prosecutors) also died in

²⁹ A master calendar hearing generally serves as an initial appearance for the purposes of reviewing procedural issues and scheduling future proceedings. On the other hand, a merits hearing generally involves presentation of evidence, including a respondent's evidence in support of a claim for relief from removal.

³⁰ See EOIR Postpones Certain Non-Detained Master Calendar Hearings Due to COVID-19, Am. Immigration Lawyers Ass'n (Mar. 13, 2020), <https://www.aila.org/infonet/eoir-postpones-certain-non-detained-master-calenda>.

³¹ @DOJ_EOIR, Twitter (Mar 17, 2020, 11:55 PM), https://twitter.com/DOJ_EOIR/status/1240124718298038273; EOIR Statement (Mar. 18, 2020, 12:30am), <https://www.aila.org/File/Related/20030201u.pdf>.

April, apparently from a COVID-19 infection. In addition to these two deaths, a senior attorney in the Office of Chief Counsel was hospitalized and very nearly died of COVID-19. He has not yet returned to work. Finally, a court interpreter who appeared at the Newark Immigration Court in March also contracted COVID-19 and has reportedly been suffering from serious, systemic health issues as a result of the disease.

34. The death of Raymond D’Uva, and the serious illness of the senior immigration prosecutor, are believed to be traceable to their appearances in the same courtroom at the Newark Immigration Court on March 11. That day, another person appeared in that courtroom who was later diagnosed with COVID-19. Newark Immigration Court staff informed NJ-AILA of the possible exposure on March 24, and provided a list of other matters that took place in that courtroom so that NJ-AILA could advise its members that they might have been exposed to COVID-19. NJ-AILA also learned that an immigration judge had entered self-quarantine after learning of his possible exposure on March 13, from being in the same courtroom as the senior immigration prosecutor who was also infected with COVID-19.

35. While the court reopened for the limited purpose of court filings only on March 25, EOIR continued its suspension of in-person hearings, as follows:

- a. On March 30, EOIR’s Communications and Legislative Affairs Division notified stakeholders³² by email that “[h]earings in non-detained cases are postponed through May 1, 2020.”

³² These EOIR emails are sent to attorneys who are authorized to practice in the nation’s immigration courts, including NJ-AILA members, as well as others who sign up to receive them.

- b. On April 21, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that "[h]earings in non-detained cases are postponed through May 15, 2020."
 - c. On May 4, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that "[h]earings in non-detained cases are postponed through May 29, 2020."
 - d. On May 15, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that "[h]earings in non-detained cases are postponed through, and including, Friday June 12, 2020."
 - e. On May 29, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that, with the exception of the Honolulu Immigration Court, "[h]earings in non-detained cases at other immigration courts are postponed through, and including, Friday, June 26, 2020."
 - f. On June 15, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that hearings would resume in certain additional immigration courts (not including Newark), but "[h]earings in non-detained cases at all other immigration courts are postponed through, and including, Thursday July 2, 2020."
 - g. On June 22, EOIR's Communications and Legislative Affairs Division notified stakeholders by email that "[h]earings in non-detained cases at courts without an announced date are postponed through, and including, July 10, 2020."
36. As EOIR began to announce the reopening of immigration courts for the non-detained docket, on June 11 Defendant McHenry issued Policy Memorandum 20-13, EOIR Practices Related to the COVID-19 Outbreak, governing how immigration courts should handle

their reopening procedures during the pandemic.³³ AILA’s national office, along with other immigration advocacy organizations, responded on June 15 by sending a letter to Defendant McHenry criticizing the policy memorandum as “void of basic information about the procedures that EOIR is utilizing to determine court operations,” including because of its failure to provide for procedures that would permit social distancing and mitigate spread of COVID-19 in long security lines, building elevators (and lines to access those elevators), waiting rooms, and courtrooms.³⁴ The letter thus requested that non-detained hearings either be suspended or, alternatively, conducted by videoconference.³⁵ Although the letter requested a meeting with Defendant McHenry to discuss the groups’ concerns, EOIR did not respond to it.

37. Similarly, after EOIR began announcing openings of certain immigration courts, on June 23 a group of twelve senators, including both of New Jersey’s senators, Robert Menendez and Cory Booker, wrote to Defendant McHenry with numerous questions regarding the reopening of immigration courts.³⁶ Among other questions, the senators inquired about what factors were involved in EOIR’s decisions about which immigration courts to open, and how the reopening plans would ensure social distancing and protect vulnerable participants in the immigration court process.³⁷ EOIR never responded to that letter, nor did it provide a response to press inquiries regarding the reopening of immigration courts.³⁸

³³ Memorandum from James R. McHenry III, Director, to All of EOIR (June 11, 2020), <https://www.justice.gov/eoir/page/file/1284706/download>.

³⁴ Letter from Am. Immigration Council, et al., to James McHenry (June 15, 2020), <https://www.aila.org/File/DownloadEmbeddedFile/85133>.

³⁵ *Id.* at 2.

³⁶ Letter from Senator Elizabeth Warren, et al., to James McHenry (June 23, 2020), <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20EOIR%20re.%20reopening%20-%20final%20-%2006.23.2020.pdf>

³⁷ *Id.*

³⁸ Shannon Dooling, *After Increasing Its Caseload, Attorneys Say Boston's Immigration Court Is In 'Disarray,'* WBUR, July 24, 2020, <https://amp.wbur.org/news/2020/07/24/boston->

38. Indeed, Defendant McHenry has explicitly declined to explain the process that EOIR is using to decide whether to reopen immigration courts. While participating in a July 23 open forum hosted by AILA, Defendant McHenry stated that the Department of Justice, through its U.S. Attorney’s Offices, are assisting in the decision regarding whether immigration courts should reopen—notwithstanding the fact that such decisions are not within a United States Attorney’s statutorily delegated authority. *See* 28 U.S.C. § 547 (listing statutory powers of a United States Attorney, which do not mention decisions regarding operation of immigration courts). Defendant McHenry explicitly stated that he “cannot speak to the specific process” and “can’t get into the specific deliberations or what information is being considered” in determining whether an immigration court will reopen. The president of the National Association of Immigration Judges union has also stated that “EOIR has not told immigration judges how the decision to resume non-detained hearings is being made.”³⁹

D. EOIR abruptly announces resumption of in-person proceedings at the Newark Immigration Court and threatens disciplinary action against attorneys who do not appear.

39. In the afternoon of June 24, without any advance notice to immigration lawyers, EOIR announced via Twitter that it would reopen the Newark Immigration Court on Monday, July 13, 2020.⁴⁰ The Twitter post vaguely stated that the court would “resume hearings in non-detained cases” and that “additional important information” would be provided “in the coming days.”⁴¹ ACIJ Cheng also issued a Standing Order, which was dated June 19, 2020, governing appearances

immigration-court-disarray.

³⁹ Biana Bruno, *Legal Community Says Immigration Court Reopening Lacks Transparency, Safety Measures*, Courthouse News Service, June 18, 2020, <https://www.courthousenews.com/legal-community-says-immigration-court-reopening-lacks-transparency-safety-measures/>.

⁴⁰ @DOJ_EOIR, Twitter (June 24, 2020, 12:06PM), https://twitter.com/DOJ_EOIR/status/1275822667275341829.

⁴¹ *Id.*

at the Newark Immigration Court, which provides, among other things, that: (1) for telephonic merits hearings, the respondent must file “a sworn affidavit or declaration . . . indicating that he or she has been advised of the right to proceed in person and waives that right”; (2) “[a]ny party appearing telephonically waives the right to object to the admissibility of any documents offered in Court on the sole basis that they are unable to examine the document”; (3) if counsel is unavailable by telephone at the time of the hearing, he or she “will thereafter be required to appear in person at any rescheduled hearing”; and (4) “[a]n Immigration Judge may, in his or her discretion, halt any telephonic hearing, and the parties may be required to attend a future in-person hearing on a date to be determined.”⁴²

40. Due to the absence of meaningful guidance regarding the court’s reopening, as well as numerous concerns about immigration lawyers’ health and their ability to properly litigate cases during the pandemic, NJ-AILA wrote to Chief Immigration Judge Tracy Short on July 6, 2020 to request reconsideration of the decision to resume in-person proceedings at the Newark Immigration Court.⁴³ NJ-AILA’s letter noted the safety concerns about congregating judges, prosecutors, court staff, attorneys, litigants, family members, and interpreters in an indoor space, particularly in light of the risk of COVID-19 spreading indoors, as recognized by Governor Murphy’s decision to suspend the resumption of indoor dining. Furthermore, NJ-AILA identified logistical concerns about maintaining social distancing in the court’s security line; in the small elevators used to access the courtrooms on the 12th floor of the building; outside the courtrooms

⁴² Standing Order Regarding Telephonic Appearances for Master and Merits Hearing, U.S. Immigration Court, Newark, N.J. (June 19, 2020), <https://www.justice.gov/eoir/page/file/1287336/download>.

⁴³ Letter from Cesar Estela on behalf of the New Jersey Chapter of AILA to Hon. Tracy Short (July 6, 2020), <https://www.aila.org/File/Related/20051400d.pdf>.

while waiting for cases to be called; and in the courtrooms with the numerous people (judges, attorneys, litigants, translators, and witnesses) who need to be in the courtroom at the same time.

41. EOIR did not respond to that letter. Instead, on July 8, EOIR issued a “Notice” reaffirming that the Newark Immigration Court (along with courts in Baltimore and Detroit) would reopen on July 13 for both master calendar hearings and merits hearings in non-detained cases.⁴⁴ Nonetheless, the risk of COVID-19 spreading within the immigration court remains both real and incalculable. Indeed, just last week, the head of Federal Protective Services at 970 Broad Street in Newark, New Jersey—the building where the Newark Immigration Court is housed—died from a COVID-19 infection.

42. Despite the risks to attorneys, litigants, court staff, and others from conducting in-person proceedings, EOIR has insisted on holding such in-person proceedings, and has arbitrarily refused to postpone the proceedings when requested. For example, Plaintiffs Trinidad and O’Neill are jointly representing a respondent in an immigration proceeding that was scheduled for an individual hearing on July 27. They filed a detailed, timely motion with EOIR on July 10 seeking adjournment of the proceeding based, among other reasons, on the attorneys’ personal and public health concerns about appearing in-person. Ms. Trinidad followed up with the immigration court administrator on July 20 and July 23 seeking a status update as to the pending motion via email, and Mr. O’Neill called the court several times, to no avail. No response was received until July 25, 2020, when Mr. O’Neill received a mailed copy of a court order dated July 20, 2020 denying the motion and instructing the attorneys and their client to appear either in-person or by telephone.

⁴⁴ Notice, EOIR to Resume Hearings in Non-Detained Cases at the Baltimore, Detroit, and Newark Immigration Courts, U.S. Dep’t of Justice Exc. Office of Immigration Review (July 8, 2020), <https://www.aila.org/infonet/eoir-resumes-hearings-baltimore-detroit-newark>.

43. Ms. Trinidad and Mr. O’Neill appeared by telephone for the July 27, 2020 hearing; Mr. O’Neill participated from his office, and Ms. Trinidad and their client participated together from a public park outside her office, with face masks on, to minimize the risk of any potential transmission of the coronavirus. However, because the respondent did not consent to a telephonic hearing on the merits (as is his right), the immigration judge in the matter ordered the attorneys and their client to appear in-person on Monday, August 3.

44. The immigration judge made clear that Trinidad and O’Neill would face EOIR disciplinary sanctions if they failed to appear for this in-person proceeding. At the same time, however, the immigration judge granted the ICE prosecutor’s request to appear telephonically, rather than in person, based on ICE’s concerns about COVID-19 risks. Indeed, since the Newark Immigration Court reopened, the ICE prosecutors’ office remains physically closed, even for service of filings. Prosecutors have repeatedly filed motions to appear telephonically at removal proceedings because of their concerns for their own health due to the ongoing pandemic. Reportedly, all of those motions have been granted without exception. Yet immigration attorneys representing respondents who are subject to removal proceedings cannot unilaterally avail themselves of the same option; instead, it is their clients’ choice alone to consent to a telephonic hearing, and the client’s choice involves a waiver of important rights. *See infra* ¶¶ 55-56.

45. The risk of appearing in-person in the Newark Immigration Court is exacerbated by EOIR’s failure to ensure safe practices at the courthouse. Thus, immigration attorneys who have appeared in-person report observing immigration judges and others without face masks, contrary to EOIR guidance and public health advice.⁴⁵ Immigration attorneys also report that

⁴⁵ *See* Ctrs. for Disease Control & Prevention, About Cloth Face Coverings (updated June 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (“To reduce the spread of COVID-19, CDC recommends that people wear cloth

multiple people are crowding onto the building's small elevators, such that social distancing within the elevator is impossible. Additionally, the Newark Immigration Court has announced that in-person master calendar hearings will resume on Monday, August 3; those hearings will result in more people appearing in the courtroom facilities, thus making social distancing even more challenging.

46. Plaintiff DiRaimondo also currently faces the risk of a compelled appearance in the Newark Immigration Court, as he represents an immigration respondent with an in-person individual hearing scheduled for August 24. On July 30, Mr. DiRaimondo filed a motion to adjourn the matter based, in part, on his concerns about appearing in-person during the COVID-19 pandemic. But given the experience of Plaintiffs O'Neill and Trinidad, Mr. DiRaimondo cannot be assured that his motion will be granted, and he therefore also faces the risk of a compelled in-person appearance (under threat of disciplinary sanction), at significant risk to his health.

47. Plaintiff Perez also currently faces the risk of a compelled appearance in the Newark Immigration Court, as he represents an immigration respondent with an in-person individual hearing scheduled for September 16. On September 10, Mr. Perez filed a motion to adjourn the matter based, in part, on his concerns about appearing in-person during the COVID-19 pandemic. On the afternoon of September 14, Mr. Perez was notified by phone that the immigration judge had denied his adjournment request, instead directing him to participate by phone while his client (who is ten years old) appears in person.

48. Most significantly, EOIR has not provided any opportunity for judges, attorneys, litigants, witnesses, and others to appear at Newark Immigration Court hearings for non-detained

face coverings in public settings when around people outside of their household, especially when other social distancing measures are difficult to maintain.”).

respondents via videoconferencing, which is very clearly not provided for by the Standing Order dated June 19, 2020. This is so notwithstanding that videoconferencing is, by both statute and regulation, a permissible mechanism to hold an immigration court proceeding. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii) (noting that removal proceedings “may take place . . . through video conference”); 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

49. Indeed, the Newark Immigration Court, as well as the nearby immigration court in Elizabeth, New Jersey, both use videoconferencing technology to conduct immigration hearings for people who are detained pending their removal proceedings. And EOIR’s own guidance regarding proceedings during the pandemic, memorialized in a Memorandum from Director McHenry on EOIR Practices Related to the COVID-19 Pandemic dated June 11, 2020, states that “[i]mmigration judges may conduct any hearing by video teleconferencing (VTC) where operationally feasible,” and notes that “EOIR has used VTC for hearings for three decades[.]”⁴⁶ However, EOIR has not made that same option available to attorneys who are representing non-detained immigration respondents, even under these extraordinary and dangerous circumstances and notwithstanding that, as is described in detail below, numerous other courts in New Jersey and around the country have successfully utilized videoconferencing technology to conduct bench trials and other proceedings in an effective, safe manner during the COVID-19 pandemic.

E. Courts in New Jersey and around the country have all but eliminated in-person proceedings and replaced them with virtual platforms, including videoconferencing.

50. Other courts, including New Jersey state and federal courts, have grappled with the difficulties of continuing proceedings during the pandemic. However, unlike the Newark

⁴⁶ Memorandum from James R. McHenry III, Director, to All of EOIR (June 11, 2020), <https://www.justice.gov/eoir/page/file/1284706/download>.

Immigration Court, those courts have not compelled attorneys to attend in-person proceedings that risk their life, health and/or the health of their communities. Instead, courts have implemented videoconferencing technology (usually for the first time ever) to conduct the work of the courts while ensuring the safety of attorneys, litigants, judges, and court staff.

51. For example, on March 15, the New Jersey state judiciary announced a “rapid shift” to “video and phone conferencing options for attorneys, litigants, and the public” in all but a select few matters.⁴⁷ The state judiciary quickly “switch[ed] all court functions . . . to remote operations” through virtual courtrooms that allowed “[j]ustices, judges and staff [to] handle all types of motions, conferences, and hearings by telephone and with Zoom, Scopia, and Teams virtual platforms.”⁴⁸ Among other proceedings, New Jersey judges successfully conducted several bench trials using virtual platforms.⁴⁹ New Jersey is now in “Phase 2” of its reopening process, under which “[m]ost court hearings are still being held by phone and video conference,” and in-person appearances are limited to a select few types of cases, and even then only when the parties do not consent to remote proceedings.⁵⁰

52. This Court has also moved its operations to be almost entirely virtual. On March 16, Chief Judge Freda L. Wolfson issued Standing Order 20-02, which, among other things, “encouraged [judicial officers] to conduct proceedings by telephone or videoconferencing where practicable and as permitted by law.”⁵¹ The court is currently in “Phase II” of its COVID-19

⁴⁷ Notice, New Jersey Court Operations – COVID-19 Coronavirus, N.J. Courts (Mar. 15, 2020), <https://www.njcourts.gov/notices/2020/n200315a.pdf>.

⁴⁸ Press release, N.J. Courts, ‘A Monumental Task’: How New Jersey Courts Balanced Public Safety and Access to Justice During a Worldwide Pandemic (Apr. 14, 2020), <https://njcourts.gov/pressrel/2020/pr041420a.pdf?c=ncM>.

⁴⁹ *Id.*

⁵⁰ COVID-19 One Stop, Scheduled Court Hearings, N.J. Courts (last visited July 31, 2020), https://njcourts.gov/public/covid19_one-stop.html#court_hearings.

⁵¹ *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Standing

Recovery Guidelines, which provides that “[t]o the extent the parties consent, all proceedings should continue to be held by video and teleconference.”⁵²

53. Other courts throughout the country have also conducted remote proceedings, including bench trials. In Florida, a federal district court used Zoom to hold a two-day trial involving claims of international child abduction under the Hague Convention, with litigants and witnesses participating not only from Florida, but from Guatemala as well, with documentary provided to the court and witnesses in electronic form.⁵³ Another Florida federal district court held a week-long bench trial in a major voting rights case entirely by videoconference.⁵⁴ Other federal district courts have also authorized bench trials to be conducted by videoconference, and several circuit courts of appeal have conducted videoconference oral arguments as well.⁵⁵

Order 20-02, ¶ 8 (D.N.J. Mar. 16, 2020), <https://www.njd.uscourts.gov/sites/njd/files/StandingOrder2.pdf>.

⁵² District of New Jersey COVID-19 Recovery Guidelines Phase II, U.S. Dist. Ct. Dist. of N.J. at 7 (last visited July 31, 2020), <https://www.njd.uscourts.gov/sites/njd/files/DNJ%20COVID%20RECOVERY%20PHASE%20I%20FINAL.pdf>.

⁵³ Catherine Wilson, *It Can be Done! Far-Flung Zoom Trial Accomplished With Strong Wi-Fi, Willingness*, Daily Business Review, Apr. 20, 2020, <https://www.law.com/dailybusinessreview/2020/04/20/it-can-be-done-far-flung-zoom-trial-accomplished-with-strong-wi-fi-willingness/>.

⁵⁴ *Fla. Ex-Cons Who Can't Pay Fines Set For Voting Rights Win*, Law360, May 6, 2020, <https://www.law360.com/articles/1270061/fla-ex-cons-who-can-t-pay-fines-set-for-voting-rights-win>; Patricia Mazzei, *A Major Trial for Voting Rights in Florida Is Happening on Video Chat*, N.Y. Times, Apr. 27, 2020, <https://www.nytimes.com/2020/04/27/us/florida-felons-voting-trial.html>.

⁵⁵ *See* U.S. Court Closings, Cancellations and Restrictions Due to COVID-19, Paul Hastings (last visited July 31, 2020), <https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19>.

F. Because Newark EOIR does not provide a videoconferencing option, immigration attorneys are forced to either risk their health, and the health of others, by appearing in-person, or sacrifice their ethical obligations to their clients and thereby risk disciplinary action.

54. Like all attorneys, immigration lawyers are bound by the ethical responsibility to represent their clients as zealous, effective advocates. Indeed, EOIR itself regulates the immigration attorneys who practice before the nation's immigration courts with a special set of rules, and it can restrict or prohibit attorneys from appearing in any immigration court in much the same way that a court can reprimand, suspend, or disbar an attorney from appearing in judicial courts. As is set forth below, in the absence of the ability to appear remotely by videoconference, immigration attorneys who practice before the Newark Immigration Court now face an untenable dilemma: either appear in court and risk their health and the health of others, or fail to appear and risk sanctions for failure to comply with applicable rules of professional conduct.

55. Specifically, the Code of Federal Regulations authorizes EOIR to sanction immigration attorneys for misconduct, including public or private censure, suspension, or disbarment from practice before immigration courts. *See* 8 C.F.R. § 1003.101(a). Grounds for discipline are listed in the regulations, and they include: “[e]ngag[ing] in conduct that constitutes ineffective assistance of counsel,” *id.* § 1003.102(k); “[r]epeatedly fail[ing] to appear for pre-hearing conferences, scheduled hearings, or case-related meetings in a timely manner without good cause,” *id.* § 1003.102(l); “[f]ail[ing] to provide competent representation to a client,” *id.* § 1003.102(o); “[f]ail[ing] to abide by a client’s decisions concerning the objectives of representation and fail[ing] to consult with the client as to the means by which they are to be pursued,” *id.* § 1003.102(p); and “[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,” *id.* § 1003.102(q)(3).

56. Against this backdrop, any NJ-AILA member whose client's case is scheduled for an in-person hearing, but who wishes not to appear due to the risk of contracting or spreading COVID-19, simply cannot reconcile his or her own health concerns with counsel's ethical obligations to the client. The attorney can of course request a good cause adjournment, but if that request is denied—precisely the situation faced by Plaintiffs Trinidad and O'Neill, *see supra* ¶¶ 41-42—then the attorney cannot simply decline to appear. Instead, like Ms. Trinidad and Mr. O'Neill, the attorney can be threatened with sanctions if he or she does not appear in-person at the next hearing. Indeed, other NJ-AILA members have, under such duress, appeared in-person at hearings rather than risk such disciplinary action. Nor can the attorney simply drop the client's case, given the ethical obligation to see the matter through to conclusion. *See* 8 C.F.R. § 1003.102(q)(3).

57. Moreover, in the absence of a videoconferencing option, the only alternative to an in-person appearance is to appear telephonically, as permitted by statute and regulation. *See* 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c). However, telephonic appearances create their own ethical problems. For one, the choice to proceed telephonically rests entirely with the client, not with the attorney. *See* 8 U.S.C. § 1229a(b)(2)(B) (“An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.”); 8 C.F.R. § 1003.25(c) (“[A]n evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference[.]”). And because the attorney is required to “abide by a client's decisions,” 8 C.F.R. § 1003.102(p), an attorney whose client

declines to appear telephonically cannot unilaterally avail himself or herself of that option, no matter how serious the public and private health concerns arising from the COVID-19 pandemic.

58. More fundamentally, a telephonic appearance is a plainly inferior mechanism to fully and zealously litigate the client's case. For example, under Defendant Cheng's Standing Order, a telephonic appearance results in a waiver of the right to challenge evidence based on the inability to examine it. Moreover, an attorney who appears by telephone cannot gauge the reaction of a witness whom the attorney is examining or cross-examining, while the respondent is denied the fundamental right to face a witness who may be providing crucial evidence for or against him or her. Nor can a telephonic appearance permit the attorney to see the facial expressions or read the body language of the judge, who serves as the sole factfinder and whose discretionary decisions are therefore often beyond judicial review. That immigration judge holds the client's very future in his or her hands. It is at best questionable, then, whether an attorney can fulfill his or her responsibility to provide complete, diligent representation to a client through a telephonic merits hearing. At the very least, an attorney would have to advise a client of the serious disadvantages of appearing telephonically, and the client would then himself or herself face the untenable choice between proceeding telephonically or being exposed to the risk of virus infection.

59. Nor, for that matter, are telephonic hearings themselves safe from a health perspective. To the contrary, EOIR has undermined whatever safety telephonic hearings might achieve because it does not allow respondents to participate in a separate location from their attorneys. Thus, when one AILA member, whose client agreed to proceed telephonically for his merits hearing, asked an immigration judge to conference his client into the call, the judge indicated that the client could only participate from the attorney's office—thus placing the attorney himself at risk from exposure to his client, and vice versa. In that case, rather than calling the

client’s phone, the immigration judge refused and proceeded with the matter telephonically in the client’s absence.

60. By contrast, a videoconference appearance, while never a substitute for an in-person appearance, allows an attorney to benefit from the visual aspects of an in-person appearance, which are critical in this type of litigation, given the Plaintiffs’ professional and ethical obligations. Videoconferencing also allows the sharing of documents between the court and the parties, another vital aspect to the viability of courtroom proceedings; obviously, that is impossible in a telephone conference.

61. Indeed, other courts have used videoconferencing for bench trials with success. *See supra* ¶¶ 48-51. Several federal administrative tribunals, as well, have transitioned in whole or in part to videoconference hearings.⁵⁶ Similarly, the immigration courts can—and, by statute and regulation, are expressly authorized to—utilize videoconferencing for their matters, *see* 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c).

FIRST CAUSE OF ACTION
Administrative Procedure Act
Arbitrary and Capricious Agency Action
(All Plaintiffs Against All Defendants)

62. Plaintiffs repeat and reallege the above paragraphs as if the same were fully set forth at length herein.

63. The Administrative Procedure Act creates a right of judicial review of “final agency action for which there is no other adequate remedy in court,” 5 U.S.C. § 704, and of agency action “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1).

⁵⁶ *See generally* Coronavirus (COVID-19) and Adjudication, Admin. Conf. of the U.S. (updated July 23, 2020), <https://www.acus.gov/coronavirus-and-adjudication> (collecting agency orders and announcements about virtual hearings during the COVID-19 pandemic).

64. Defendant EOIR is subject to the APA as an “agency,” as defined in 5 U.S.C. § 701(1). Defendants Barr, McHenry, and Cheng are “officer[s] or employee[s] thereof” against whom judicial review can be sought under 5 U.S.C. § 702.

65. Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases, without providing an option to appear by videoconference, constitutes final agency action and/or agency action unlawfully withheld or unreasonably delayed.

66. Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases, without providing an option to appear by videoconference and without an explanation for its omission in that regard, is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), because of the risk it poses to Plaintiffs’ health and lives, and because the Immigration and Nationality Act (“INA”) and its associated regulations specifically provide for the possibility of appearances by videoconference.

67. Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases during the COVID-19 pandemic, without providing an option to appear by videoconference, is “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B), because it compels Plaintiffs to unreasonably risk their health and lives under threat of government sanction.

SECOND CAUSE OF ACTION

Fifth Amendment

Substantive Due Process, State-Created Danger

(All Plaintiffs Against All Defendants)

68. Plaintiffs repeat and reallege the above paragraphs as if the same were fully set forth at length herein.

69. The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.

70. In some circumstances, “the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199 (1989); *see also Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 431 (3d Cir. 2006) (“[T]he state may assume responsibility for the safety of an individual for whom it affirmatively creates or enhances a risk of danger.”); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) (applying *DeShaney* to federal actions under Fifth Amendment Due Process Clause), *rev’d on other grounds*, 947 F.3d 1159 (9th Cir. 2020).

71. Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases during the COVID-19 pandemic, without providing an option to appear by videoconference, creates a foreseeable, direct risk to Plaintiffs’ health and lives.

72. Defendants have thus acted with deliberate indifference to and with reckless disregard for Plaintiffs’ health and lives.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue judgment against Defendants:

- a. Declaring that Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases during the COVID-19 pandemic, without providing an option to appear by videoconference, violates the Administrative Procedure Act.
- b. Declaring that Defendants’ decisions to compel attorneys to appear at the Newark Immigration Court for in-person proceedings in non-detained cases during the

COVID-19 pandemic, without providing an option to appear by videoconference, violates the Due Process Clause of the Fifth Amendment.

- c. Enjoining Defendants from compelling attorneys to appear at the Newark Immigration Court for in-person proceedings;
- d. Compelling Defendants to provide attorneys with the option to appear for hearings at the Newark Immigration Court by videoconference;
- e. Awarding Plaintiffs their costs and reasonable attorney fees in this action as provided for by the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
- f. Granting such further relief as this Court deems just and proper.

Dated: September 15, 2020

Respectfully submitted,

GIBBONS P.C.

By: *s/ Lawrence S. Lustberg*

By: *s/ Michael R. Noveck*

Lawrence S. Lustberg, Esq.

Michael R. Noveck, Esq.

One Gateway Center

Newark, NJ 07102

(973) 596-4500

llustberg@gibbonslaw.com

mnoveck@gibbonslaw.com