

EXHIBIT 1

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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

LAS AMERICAS IMMIGRANT ADVOCACY)	CASE NO. 3:19-cv-02051-IM
CENTER; ASYLUM SEEKER ADVOCACY)	
PROJECT; CATHOLIC LEGAL)	
IMMIGRATION NETWORK, INC.;)	
INNOVATION LAW LAB; SANTA FE)	
DREAMERS PROJECT; and SOUTHERN)	
POVERTY LAW CENTER,)	
)	
Plaintiffs,)	
)	
v.)	
)	
DONALD TRUMP, in his official capacity as)	
President of the United States; WILLIAM BARR,)	
in his official capacity as Attorney General of the)	
United States; U.S. DEPARTMENT OF)	
JUSTICE; EXECUTIVE OFFICE FOR)	
IMMIGRATION REVIEW; and JAMES)	
McHENRY, in his official capacity as Director)	
of EOIR,)	
)	
Defendants.)	
)	

**DECLARATION OF JAMES MCHENRY, DIRECTOR, EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW**

I, James McHenry, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am the Director of the Executive Office for Immigration Review (EOIR), a component with the Department of Justice (DOJ).
2. I have held the position of Director since January 2018. I was previously the Acting Director from May 2017 to January 2018. At EOIR I previously served as an Administrative Law Judge (ALJ) from November 2016 to May 2017 and as a Judicial Law Clerk/Attorney Advisor from October 2003 to September 2005.
3. Outside of EOIR, I worked for the Office of the Principal Legal Advisor (OPLA), Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS) from October 2005 to August 2014 as an Assistant Chief Counsel and, later, as a Senior Attorney. In that capacity I frequently represented DHS in immigration court proceedings before multiple immigration judges, primarily in an immigration court in Atlanta, Georgia. I also served as a lead attorney for national security, denaturalization, and gang cases, anti-human trafficking operations, and worksite enforcement matters. Between 2010 and 2011, I also served a detail as a Special Assistant United States Attorney for the Criminal Division of the United States Attorney's Office for the Northern District of Georgia.
4. Between August 2014 and November 2016, I worked as an Administrative Law Judge in the Social Security Administration (SSA).

1 5. As the EOIR Director, I manage EOIR and its employees and am responsible for the
2 supervision of each EOIR component in the execution of its respective duties in accordance
3 with the law.

4 6. My testimony in this declaration is based upon my experience with and personal knowledge
5 of EOIR's operations, information obtained from records and systems maintained by
6 EOIR, and publicly available statements or announcements.

7 7. I am testifying in this declaration to the best of my knowledge and understand this
8 declaration is for use in the *Las Americas Immigrant Advocacy Center (Las Americas)* case.

9 **Background**

10 8. EOIR contains three components responsible for immigration-related administrative
11 adjudicatory proceedings conducted under the Immigration and Nationality Act (INA) and
12 associated regulations.

13 9. The Office of the Chief Immigration Judge (OCIJ) oversees the operations of EOIR's
14 immigration courts. OCIJ currently operates 69 immigration courts and immigration
15 adjudication centers (IAC) in 29 states, Puerto Rico, and the Northern Mariana Islands.¹

16 10. Immigration courts located within a detention center operated or leased by DHS hear
17 exclusively detained cases. A small number of courts located outside a DHS detention
18 facility also hear primarily or exclusively detained cases. A small number of courts hear
19 primarily or exclusively non-detained cases, but may conduct bond hearings as appropriate.
20 The remaining plurality of immigration courts hear primarily non-detained cases but also
21 maintain regularly-scheduled dockets for detained cases. The two IAC hear cases

¹ <https://www.justice.gov/eoir/eoir-immigration-court-listing>

1 exclusively by video conferencing (VTC). All immigration courtrooms are equipped
2 with VTC technology.

3 11. OCIJ currently employs approximately 460 immigration judges (IJs) authorized to conduct
4 proceedings under the INA and the associated regulations. Over 1200 support staff,
5 including contractors, further support immigration court operations.

6 12. IJs preside over multiple types of proceedings. Among the most common are removal
7 proceedings, custody redetermination proceedings (bond proceedings), and credible fear
8 review proceedings.

9 13. Removal proceedings are conducted pursuant to section 240 of the INA. As of March 19,
10 2020, there were 20,375 pending detained cases in removal proceedings and 1,071,035
11 pending non-detained cases in removal proceedings.

12 14. All cases in removal proceedings are initiated by DHS, and DHS generally retains
13 prosecutorial discretion in determining whether to place an alien into removal proceedings.
14 For aliens convicted of crimes which render them removable, Congress has directed that
15 DHS “shall begin any removal proceeding as expeditiously as possible after the date of the
16 conviction.”² DHS initiates removal proceedings by serving a charging document, called a
17 Notice to Appear (NTA), on an alleged alien and then filing the NTA with an immigration
18 court. The NTA contains various information, including factual allegations and charges of
19 removability based on alleged violations of either section 212 or 237 of the INA.³ In some
20 cases, the NTA provides notification of the time and date of the first hearing in removal
21 proceedings, but if it does not, the immigration court provides notice.

² 8 U.S.C. § 1229(d)(1).

³ 8 U.S.C. § 1229(a)(1).

1 15. In removal proceedings, DHS is represented by an attorney within OPLA. In removal
2 proceedings, an alleged alien has the privilege of being represented by an attorney at no
3 expense to the Government.⁴

4 16. Removal proceedings generally encompass two types of hearings, master calendar hearings
5 and individual, or merits, hearings. Master calendar hearings are typically brief procedural
6 hearings, which are roughly analogous to initial appearances or arraignments in criminal
7 proceedings. At a master calendar hearing, an immigration judge will provide multiple
8 advisals to an alien, apprise the alien of the alien's rights in removal proceedings, go over
9 the contents of the NTA, assess whether an unrepresented alien wishes to seek
10 representation, provide a list of pro bono legal service providers to the alien, assess whether
11 the alien may be eligible for any form of relief or protection from removal, including
12 asylum, and if eligible, provide the alien with an opportunity to apply for such relief.⁵ After
13 providing the required advisals and depending on the specific facts of each case and how
14 the alien wishes to proceed, an immigration judge may also take pleadings and determine
15 removability at a master calendar hearing. The immigration judge may also rule on any
16 motions that have been filed. Unless an alien decides to accept an order of removal or
17 voluntary departure at the initial master calendar hearing or unless an immigration judge
18 decides that the proceedings should be terminated, most removal cases encompass multiple
19 master calendar hearings followed by one individual hearing. Once an immigration judge
20 has found an alien removable as charged and determined that the alien is prima facie
21 eligible for a form of relief or protection from removal, the immigration judge will schedule

⁴ 8 U.S.C. § 1362.

⁵ 8 C.F.R. §§ 1240.10(a) and 1240.11(a)(2) and (c).

1 an individual, or merits, hearing on the application for relief or protection. An individual
 2 hearing is roughly similar to a bench trial, and the immigration judge will consider the
 3 evidence submitted by the parties related to the alien's application. At the conclusion of
 4 the individual hearing, the immigration judge will typically render an oral decision, though
 5 in more complex cases, the immigration judge may reserve a decision and issue a written
 6 decision at a later date.

7 17. During removal proceedings, an IJ will first determine removability. If the IJ determines
 8 that the alleged alien is not removable as charged, the IJ will terminate the proceedings. If
 9 the IJ determines that the alien is removable as charged, then the IJ will consider whether
 10 the alien is eligible for any relief or protection from removal. At the conclusion of removal
 11 proceedings, if they have not been terminated, an IJ will issue an order of removal, an order
 12 of voluntary departure, or an order granting relief or protection. Some orders may be issued
 13 in the alternative. Both DHS and the alien may appeal the IJ's decision to the Board of
 14 Immigration Appeals (the Board), another component within EOIR.

15 18. By statute, an alien who fails to attend a scheduled hearing shall be ordered removed *in*
 16 *absentia* if DHS establishes both the alien's removability and that the alien received proper
 17 notice of the hearing.⁶ An *in absentia* order of removal may be rescinded based on a motion
 18 to reopen filed at any time if the alien demonstrates that the alien did not receive notice or
 19 the alien demonstrates that the alien was in state or federal custody.⁷ An *in absentia* order
 20 of removal may also be rescinded based on a motion to reopen filed within 180 days if the

⁶ 8 U.S.C. § 1229a(b)(5).

⁷ 8 U.S.C. § 1229a(b)(5)(C)(ii).

alien demonstrates that the alien's failure to appear was because of exceptional circumstances.⁸ Exceptional circumstances "refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."⁹

19. Aliens in the physical custody of DHS do not generally fail to attend hearings of their own volition and, thus, there is rarely, if ever, a basis to support the issuance of an *in absentia* order of removal for an alien in the physical custody of DHS.

20. Immigration judges possess contempt authority by statute subject to the promulgation of implementing regulations.¹⁰ No implementing regulations have been promulgated; accordingly, immigration judges do not possess practical contempt authority at the present time.

21. In addition to statutes, regulations, and case law, removal proceedings are generally conducted in accordance with the Immigration Court Practice Manual (ICPM),¹¹ though an IJ may direct that the provisions of the ICPM not rooted in statute or regulation do not apply in particular cases.¹² For non-detained cases, the ICPM sets a general filing deadline of 15 days before a master calendar hearing if the party is requesting a ruling prior to the hearing; otherwise, filings may be made at any time prior to the hearing or in open court

⁸ 8 U.S.C. § 1229a(b)(5)(C)(i).

⁹ 8 U.S.C. § 1229a(e)

¹⁰ 8 U.S.C. § 1229a(b)(1).

¹¹ <https://www.justice.gov/eoir/page/file/1258536/download>

¹² ICPM, ch. 1.1(b) and (c).

1 during the hearing.¹³ For non-detained cases, the ICPM sets a general filing deadline of 15
 2 days before an individual hearing, excluding impeachment or rebuttal evidence, and
 3 objections to the evidence may be made at any time.¹⁴ For all detained hearings, the ICPM
 4 defers to individual immigration judges to specify deadlines.¹⁵ For all hearings, an IJ retains
 5 discretion to set his or her own deadline, and IJs vary in the extent to which they follow
 6 the ICPM in non-detained cases.¹⁶

7 22. IJs also have the authority to grant extensions of filing deadlines in advance of the deadline
 8 or to excuse untimely filings made after a deadline has passed. Untimely filings are not
 9 rejected by immigration court staff, and the IJ retains authority for how to deal with
 10 untimely filings.

11 23. Although EOIR does not have experience with delayed filings due to a disease such as
 12 COVID-19, it does have significant experience with filings delayed due to comparable
 13 situations such as hurricanes or other natural disasters. In those situations, parties should
 14 file a motion to accept the untimely filing.¹⁷ In my experience, properly filed and supported
 15 motions to accept untimely filings due to natural disasters are rarely denied. Similarly, in
 16 my experience, properly filed and supported motions to extend a filing deadline due to an
 17 impending natural disaster, such as a hurricane, are also rarely denied.

¹³ ICPM, ch. 3.1(b)(i)(A).

¹⁴ ICPM, ch. 3.1(b)(ii)(A).

¹⁵ ICPM, ch. 3.1(b)(i)(B) and (b)(ii)(B).

¹⁶ ICPM, ch. 1.1(b) and (c).

¹⁷ ICPM, ch. 3.1(d)(iii) and (iv).

1 24. In general, in my experience, for untimely filings related to an individual hearing, IJs
 2 frequently either excuse the untimeliness of the filing at the hearing or continue the case to
 3 another date to allow both the IJ and the opposing party additional time to review the filing.

4 25. How an IJ addresses an untimely filing will also depend on the specific facts of the case,
 5 the nature of the filing, and the extent of its untimeliness. For example, an IJ may not
 6 address the timeliness of a filing that is found to be cumulative or irrelevant because such
 7 a filing would be excluded from evidence even if it were timely. In my experience, the
 8 probative value of the filing, rather than its timeliness, is the most dispositive factor in how
 9 an IJ assesses the filing. Based on my experience, as a general—though not universal—
 10 proposition, the more probative the filing, the more likely an IJ will overlook its untimely
 11 filing.

12 26. Deadlines for filing motions to reopen, motions to reconsider, and appeals are generally set
 13 by statute or regulation. Although IJs and members of the Board cannot alter those
 14 deadlines *per se*, evolving case law has made many of them subject to equitable tolling.
 15 Thus, depending on fact-specific circumstances of individual cases and applicable case
 16 law, equitable tolling may excuse filings not meeting these deadlines.

17 27. Many aliens apply for asylum in removal proceedings. As of March 19, 2020, over 518,000
 18 asylum applications were pending in EOIR proceedings. In general, an asylum application
 19 for an adult alien must be filed within one year after the date of the alien's arrival in the
 20 United States, unless the alien demonstrates extraordinary circumstances excusing the
 21 failure to file and the alien files the application within a reasonable period given those
 22 circumstances.¹⁸ Applicable regulations contain a non-exhaustive list of circumstances

¹⁸ 8 U.S.C. §§ 1158(a)(2)(B) and (D).

1 which may be considered extraordinary. Excusing the one-year filing deadline due to
 2 extraordinary circumstances generally requires a showing that the circumstances “were not
 3 intentionally created by the alien through his or her own action or inaction, that those
 4 circumstances were directly related to the alien's failure to file the application within the
 5 1-year period, and that the delay was reasonable under the circumstances.”¹⁹

6 28. During a bond proceeding for an adult, an IJ determines whether a detained alien is eligible
 7 for release from DHS custody and, if so, under what conditions.²⁰ IJs also have authority
 8 to consider requests to ameliorate the conditions of release from custody if the request is
 9 filed within 7 days of release.²¹ An IJ may consider a request for bond even in cases where
 10 DHS has not filed an NTA. Based on evolving case law, an IJ may also have jurisdiction
 11 to consider bond requests for aliens whose removal proceedings have concluded but who
 12 have not yet been removed.

13 29. Any individual in DHS custody may request a bond hearing prior to the issuance of an
 14 administratively final order of removal. The initial request may be in writing or it may be
 15 made orally to the IJ during the individual's regularly-scheduled hearing. If requested in
 16 writing, the immigration court is supposed to schedule the hearing within three to five days
 17 after the request is received.²² If requested orally, an IJ will typically conduct the bond

¹⁹ 8 C.F.R. §§ 1208.4(a)(2) and (5).

²⁰ 8 C.F.R. §§ 1003.19 and 1236.1(d).

²¹ 8 C.F.R. § 1236.1(d); *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009).

²² EOIR Policy Memorandum 20-07, *Case Management and Docketing Practices* (Jan. 31, 2020) at 2, <https://www.justice.gov/eoir/page/file/1242501/download>

1 hearing after concluding the scheduled hearing in order to keep the proceedings separate.

2 Either party may appeal the IJ's bond decision to the Board.

3 30. Some adult aliens are not eligible for a bond from an IJ while their removal proceedings
 4 are pending due either to their criminal history or their manner of attempted entry into the
 5 United States.²³ Such aliens may nevertheless be released from DHS custody if an IJ
 6 terminates their removal proceedings or grants them relief or protection at the conclusion
 7 of an individual hearing in their removal proceeding case. For example, an immigration
 8 judge generally lacks jurisdiction to grant bond to a detained "arriving alien,"²⁴ but if the
 9 immigration judge grants that alien's asylum application following an individual merits
 10 hearing, then in my experience, there is a strong likelihood DHS will release that alien from
 11 custody. Similarly, an immigration judge generally lacks jurisdiction to grant bond to a
 12 detained lawful permanent resident (LPR) alien convicted of certain crimes,²⁵ but
 13 immigration judges do have authority to cancel the removal of an LPR whose conviction
 14 is not an aggravated felony, who meets other criteria, and who warrants a favorable exercise
 15 of discretion.²⁶ In my experience, IJs often grant cancellation of removal to LPR who are
 16 statutorily eligible following an individual hearing, and upon the granting of such relief,
 17 there is also a strong likelihood that DHS will release the LPR from custody. Thus, for
 18 detained aliens, both bond proceedings and removal proceedings provide a potential
 19 mechanism for release from custody, and the blanket postponement of all detained cases

²³ 8 U.S.C. §§ 1225(b), 1226(c); 8 C.F.R. § 1003.19(h)(2)(i).

²⁴ 8 C.F.R. § 1003.19(h)(2)(i)(B).

²⁵ 8 U.S.C. §, 1226(c); 8 C.F.R. § 1003.19(h)(2)(i)(D).

²⁶ 8 U.S.C. 1229b(a).

1 would deprive aliens of the opportunity to avail themselves of that mechanism. Between
 2 March 17 and March 27, 2020, for example, IJs either terminated proceedings or granted
 3 an application for relief or protection from removal for approximately 181 detained aliens,
 4 who may now be amenable to release from detention, but who would not necessarily have
 5 had that opportunity if their proceedings had been postponed.

6 31. Pursuant to paragraph 24A of what is known as the Flores Settlement Agreement (FSA),
 7 as interpreted by the Ninth Circuit, EOIR is required to hold bond hearings for any
 8 unaccompanied alien child (UAC) detained in the custody of the Department of Health and
 9 Human Services (HHS) in a secure or staff-secure facility or for any UAC who has
 10 affirmatively requested a hearing, including by requesting a hearing directly from the IJ.²⁷
 11 During a bond proceeding for a UAC, an IJ determines whether a UAC is a danger to the
 12 community or is a flight risk, though HHS may not release a UAC determined to be neither
 13 a flight risk nor a danger to the community until a suitable sponsor is located. Either party
 14 may appeal the IJ's bond decision to the Board. Because a UAC may request a bond
 15 hearing directly from an IJ during a regularly-scheduled hearing, the blanket postponement
 16 of all detained cases would deprive some UAC of the opportunity to request a bond hearing
 17 and potentially subject EOIR to liability for violating the FSA and disregarding a district
 18 court order.

19 32. Neither adult nor juvenile aliens are required to file a written motion or request in order to
 20 receive an initial bond hearing, and many aliens often request a bond hearing orally during
 21 their regularly-scheduled hearings. Thus, postponing all hearings for detained aliens would

²⁷ *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017)

1 necessarily require all such aliens to request a bond hearing in writing which is a
 2 requirement not currently imposed by the applicable regulation.²⁸

3 33. Both DHS and HHS have authority to release aliens in their custody separate and apart
 4 from the authority of an IJ, though HHS cannot simply release a UAC alone without the
 5 availability of a sponsor.²⁹ The blanket postponement of all detained cases in removal
 6 proceedings—and, thus, the elimination of any opportunity for an IJ to review the custody
 7 determination made by either DHS or HHS, to terminate proceedings, or to grant the alien’s
 8 application for relief or protection that would make the alien amenable to release—would
 9 place extraordinary pressure on both DHS and HHS to release all aliens in their custody to
 10 avoid possible constitutional violations or violations of existing federal court orders. The
 11 mass release from custody of all detained aliens, including criminal aliens or aliens with
 12 national security concerns, in DHS custody and UAC in HHS custody, would have
 13 significant, adverse consequences for public safety.

14 34. Further, the blanket postponement of all detained cases in removal proceedings, including
 15 initial master calendar hearings for aliens recently detained by DHS, would make it
 16 extremely difficult for DHS to arrest and detain aliens prospectively, even aliens with
 17 significant criminal histories or national security concerns, because of the uncertainty of
 18 how long an alien would have to remain in custody before being able to obtain a hearing
 19 in front of an IJ that may lead to the alien’s release.

²⁸ 8 C.F.R. 1003.19(b),

²⁹ 8 U.S.C. §§ 1182(d)(5), 1226(a), and 1232(c).

1 35. An alien otherwise subject to expedited removal may avoid removal initially if the alien
 2 demonstrates a credible fear of persecution or torture.³⁰ An alien's claim of a fear of
 3 persecution or torture is first reviewed by DHS.³¹ If DHS determines that the alien does
 4 not have a credible fear of persecution or torture, the alien may seek review of that
 5 determination by an IJ.³² By statute, that review "shall be concluded as expeditiously as
 6 possible, to the maximum extent practicable within 24 hours, but in no case later than 7
 7 days after the date of the [DHS] determination."³³ If either DHS or an IJ finds that an alien
 8 does possess a credible fear of persecution or torture, that alien is placed in removal
 9 proceedings for a full consideration of his or her application for asylum.³⁴

10 36. By statute, most aliens are detained during the credible fear review process, and an IJ does
 11 not have jurisdiction to grant an alien bond while that process is ongoing.³⁵ Whether an
 12 alien who has been found to have a credible fear and subsequently placed in removal
 13 proceedings is eligible for release from custody is the subject of ongoing litigation, and the
 14 most recent ruling from the Ninth Circuit on March 27, 2020, affirmed that such aliens who
 15 had entered the country illegally are eligible for a bond hearing.³⁶ Even if such aliens are
 16 ultimately determined not to be eligible for bond, the granting of such an alien's asylum
 17 application by an IJ in removal proceedings would typically cause DHS to release the alien

³⁰ 8 U.S.C. § 1225(b)(1)(A)(i) and (ii).

³¹ 8 U.S.C. §§ 1225(b)(1)(A)(ii) and (b)(1)(B).

³² 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

³³ 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

³⁴ 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 1208.30(g)(2)(iv)(B).

³⁵ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

³⁶ *Padilla v. ICE*, ---F.3d--- (9th Cir. 2020).

1 from custody. Consequently, the postponement of credible fear review proceedings would
 2 effectively preclude aliens in those proceedings from any opportunity to seek release from
 3 custody except through federal habeas corpus litigation which itself is the subject of a case
 4 pending before the Supreme Court.

5 37. By regulation, “[i]n deciding the individual cases before them, and subject to the applicable
 6 governing standards, immigration judges shall exercise their independent judgment and
 7 discretion and may take any action consistent with their authorities under the Act and
 8 regulations that is appropriate and necessary for the disposition of such cases.”³⁷ No
 9 employee at EOIR, except members of the Board acting on an appeal from the decision of
 10 an immigration judge, possesses the authority to direct the result of an adjudication
 11 assigned to an immigration judge.³⁸

12 38. By regulation, as Director, I do not have the authority to adjudicate cases in immigration
 13 court or to direct the result of an adjudication assigned to an immigration judge, unless
 14 provided for by statute, regulation, or delegation of authority from the Attorney General.³⁹
 15 No existing statute, regulation, or delegation of authority from the Attorney General
 16 provides me authority to adjudicate cases or to direct the result of an adjudication assigned
 17 to an immigration judge. Consequently, I do not have authority to direct immigration
 18 judges to deny or grant any motion in individual cases or to direct any result in any case in
 19 immigration court. If I were to order immigration judges to deny or grant motions in

³⁷ 8 C.F.R. § 1003.10(b).

³⁸ 8 C.F.R. §§ 1003.0(c), (e)(2), (f), 1003.9(c), and 1003.10(b).

³⁹ 8 C.F.R. § 1003.0(c).

individual cases, I would be infringing on the independence and discretion accorded to immigration judges and potentially violating the regulations.

39. Immigration judges do have the authority to issue standing orders in certain circumstances.⁴⁰ Immigration courts may also adopt local operating procedures.⁴¹ Many courts and IJs hearing detained cases have done so over the past two weeks in response to the COVID-19 outbreak and have tailored them to the particular circumstances of their respective dockets.⁴²

40. The Board operates as the administrative appellate tribunal for appeals of immigration judge decisions. It also hears a limited number of appeals of certain types of adjudications initially conducted by DHS.

41. Like IJs, members of the Board exercise “independent judgment and discretion” in considering the cases that come before them.⁴³ No EOIR employee can direct a Board Member to decide a motion or an appeal to obtain a particular result.⁴⁴

42. The Office of the Chief Administrative Hearing Officer (OCAHO) administers proceedings conducted by ALJs pursuant to 8 U.S.C. §§ 1324a, 1324b, and 1324c. Within OCAHO, the Chief Administrative Hearing Officer (CAHO) hears appeals of ALJ decisions in cases heard under 8 U.S.C. §§ 1324a and 1324c. No EOIR employee can

⁴⁰ EOIR Policy Memorandum 20-09 (PM 20-09), *The Immigration Court Practice Manual and Orders* (Feb. 13, 2020), <https://www.justice.gov/eoir/page/file/1249276/download>.

⁴¹ 8 C.F.R. § 1003.40.

⁴² <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁴³ 8 C.F.R. § 1003.1(d)(1)(ii).

⁴⁴ 8 C.F.R. §§ 1003.0(c), (e)(2), (f) and 1003.1(a)(2)(ii) and (d)(1)(ii).

1 direct an ALJ to adjudicate a case in a particular manner, except the CAHO in adjudicating
 2 an appeal from an ALJ decision.

3 **Court Operations in Response to COVID-19.**

4 43. COVID-19 has presented challenges to EOIR, as it has to almost every court system
 5 in the United States, in ensuring that critical functions continue while the agency
 6 simultaneously aggressively monitors and works to mitigate risks presented by COVID-19
 7 to those within EOIR space. As with any type of emergency situation, EOIR is continually
 8 assessing how to best ensure the safety of employees, respondents, practitioners, and
 9 visitors. It continues to closely review and implement guidance from the Department of
 10 Justice, the Office of Management and Budget, the Office of Personnel Management, the
 11 Centers for Disease Control and Prevention (CDC), and the General Services
 12 Administration in responding to issues concerning specific locations or employee
 13 situations related to COVID-19. EOIR takes the safety, health, and well-being of its
 14 employees respondents, practitioners, and visitors very seriously and will continue to
 15 respond to the COVID-19 outbreak accordingly, while also attempting to ensure that its
 16 critical and essential judicial functions continue.

17 44. I have closely observed that many court systems have grappled with the operational
 18 challenges posed by the outbreak of COVID-19. I have observed that few courts have
 19 closed entirely, but I understand that most federal, state, and administrative courts have
 20 scaled back operations to what may be characterized as essential or critical services. I have
 21 observed that many courts continue to process filings, including those submitted by mail.
 22 I have observed that many courts continue to adjudicate motions or filings that may be
 23 resolved without a hearing. I am aware that many, though not all, courts have also

1 continued to conduct critical hearings of individuals in custody, including detention
2 hearings. I am aware that many, if not most, courts have issued multiple announcements in
3 March 2020 regarding their operational statuses and that these announcements are typically
4 posted on the website for each court. I am also aware that the federal courts with social
5 media accounts have also used social media channels to communicate announcements
6 regarding their operational statuses. I am unaware of any legal challenges to the continued
7 operation of other court systems or why the continued operation of those courts on a scaled-
8 down level do not pose the same issues alleged by Plaintiffs regarding EOIR.

9 45. Because COVID-19 has not affected all communities nationwide in the same manner and
10 because EOIR's dockets vary considerably from court to court, the challenges presented
11 by COVID-19 are not the same for every immigration court. In recognition of these
12 variances and of the fact that local immigration judges and court staff are often in the best
13 position to address challenges tailored to the specifics of their court's practices, EOIR has
14 not adopted a "one size fits all" policy for every immigration court, though it has issued
15 generally-applicable guidance regarding access to EOIR space, the promotion of practices
16 that reduce the need for hearings, and the maximization of the use of telephonic and VTC
17 means through which to hold hearings.

18 46. Overall, EOIR has followed a path similar to that of other courts. For example, on March
19 18, 2020, I issued EOIR Policy Memorandum (PM) 20-10 restricting access to EOIR space
20 for individuals at risk of having COVID-19; reminding practitioners and IJs of well-
21 established law that could help minimize the risk of exposure to COVID-19 such as

1 waiving appearances,⁴⁵ granting continuances,⁴⁶ limiting physical presence in the
 2 courtroom,⁴⁷ issuing standing orders,⁴⁸ deviating from the ICPM,⁴⁹ and conducting
 3 hearings by VTC or by telephone; and, encouraging IJs and the parties to resolve cases
 4 through written filings⁵⁰ and establishing a policy of conducting hearings through VTC or
 5 by telephone⁵¹ to the maximum extent practicable consistent with the law.⁵² PM 20-10 was
 6 modeled on similar orders issued by federal district courts.

7 47. PM 20-10 also commits EOIR to using alternative hearing mediums—such as hearings by
 8 telephone or by VTC—“to the maximum extent practicable in accordance with the law” to
 9 further minimize in-person interaction and reduce the risk of the spread of COVID-19.
 10 VTC is commonly used for detained hearings already, and EOIR conducted almost 35,000
 11 hearings by VTC in the first quarter of FY 2020.⁵³ Aliens may also consent to have their
 12 individual hearings occur by telephone, though VTC is more logistically feasible for aliens
 13 who are detained.

14 48. Between March 18 and March 26, 2020, EOIR conducted approximately 81.5% of credible
 15 fear reviews by telephone or by VTC. Excluding removal cases heard by an immigration

⁴⁵ 8 C.F.R. § 1003.25(a).

⁴⁶ 8 C.F.R. §§ 1003.29 and 1240.6.

⁴⁷ 8 C.F.R. § 1003.27(a) and (b).

⁴⁸ PM 20-09.

⁴⁹ ICPM, ch. 1.1(b) and (c).

⁵⁰ 8 C.F.R. § 1003.25(b).

⁵¹ 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c).

⁵² EOIR Policy Memorandum 20-10, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak (Mar. 18, 2020), <https://www.justice.gov/eoir/file/1259226/download>

⁵³ <https://www.justice.gov/eoir/page/file/1117301/download>

1 court physically located inside a DHS detention facility, EOIR conducted approximately
 2 76.4% of removal hearings during that same time period by telephone or by VTC. For cases
 3 heard by a court physically located inside a DHS detention facility, no policy or law
 4 prevents either party from requesting to follow social distancing guidelines within the
 5 courtroom or prevents the IJ from following those guidelines *sua sponte*.

6 49. On March 18, 2020, EOIR postponed all removal hearings of non-detained aliens through
 7 at least April 10, 2020.

8 50. On March 23, 2020, EOIR postponed all removal hearings involving aliens placed in
 9 removal proceedings under the auspices of DHS's Migrant Protection Protocols (MPP)
 10 program through at least April 22, 2020.

11 51. Although EOIR has completely closed particular immigration courts for a limited period
 12 of time and on a court-specific basis for issues related to COVID-19, courts that are open
 13 are limited to the performance of essential functions, such as those associated with hearing
 14 cases of detained individuals or with the processing of mail and filings. At courts without
 15 a regular detained docket, EOIR's staff presence is minimal, as is their interaction with the
 16 public. Overall, EOIR's current operating posture is similar to the one in which it operates
 17 during a lapse in appropriations in which only critical functions, such as hearing cases of
 18 detained aliens, continue.⁵⁴

19 52. The impact of postponements and court closures on any filing deadlines varies
 20 considerably from case to case and depends on the nature of the filing, the procedural
 21 posture of the specific case, and the IJ's specific order on filings, if any. Because filing

⁵⁴ <https://www.justice.gov/jmd/page/file/1015676/download>

1 deadlines are committed by the ICPM to IJs for all detained cases, the impact of any court
2 closures will depend on any specific order issued by an IJ in a particular case.

3 53. Unless there is a specific IJ order to the contrary, postponements and court closures would
4 not be expected to raise issues regarding filing deadlines for non-detained cases at the
5 master calendar stage because any deadline imposed by the ICPM only applies to a motion
6 and only applies if the party wishes to receive a ruling on the motion prior to the hearing.
7 “Otherwise filings may be made either in advance of the hearing or in open court during
8 the hearing.”⁵⁵

9 54. Similarly, unless there is a specific IJ order to the contrary, postponements and court
10 closures would also not be expected to raise issues regarding filing deadlines for non-
11 detained cases at the individual calendar stage. If the IJ has ordered that the deadlines in
12 the ICPM are applicable, the postponement of the hearing would necessarily postpone the
13 deadline because the ICPM deadline applies in advance of date of the “hearing” which may
14 change if the hearing is postponed.⁵⁶ If a court is closed when a deadline occurs, the
15 deadline then becomes the next business day the court is open.⁵⁷ These rules are
16 longstanding, and in my experience, most, if not all, practitioners are well aware of them.

17 55. I understand that on March 24, 2020, EOIR announced via social media the reopening of
18 several immigration courts handling primarily, if not exclusively, non-detained cases and
19 noting that filings due to those courts during the time they were closed would be due the
20 next business day. Although this announcement was consistent with the longstanding rule

⁵⁵ ICPM, ch. 3.1(b)(i)(A).

⁵⁶ ICPM, ch. 3.1(b)(ii)(A).

⁵⁷ 8 C.F.R. § 1001.(h); ICPM, ch. 3.1(c)(i) and (ii).

1 that filings due when a court is closed become due on the next business day the court is
 2 open, it nevertheless caused confusion because it did not account for the fact that all non-
 3 detained hearings had been postponed through April 10, 2020. Consequently, the earliest
 4 possible due date for a filing in a non-detained case following the ICPM would have been
 5 15 days prior to the earliest possible scheduled non-detained hearing, which would not
 6 occur until April 13, 2020. Thus, filings for hearings scheduled on April 13, 2020, were
 7 not actually due until March 30, 2020.⁵⁸

8 56. I did not see or approve the initial announcement on March 24, 2020, before it was posted
 9 on social media, and once I became aware of it, I immediately directed that it be changed
 10 to reflect that filings would be due by March 30, 2020. Going forward, EOIR has
 11 implemented additional internal protocols regarding its messaging on social media, and I
 12 have directed that EOIR be more careful in reviewing announcements it makes via social
 13 media.

14 57. EOIR has not completely closed—meaning closed even to process mail or receive filings—
 15 all immigration courts. The complete closure of all immigration courts, for even a month,
 16 would render aliens subject to removal by DHS without an opportunity to file a motion to
 17 reopen or to seek a stay of removal.⁵⁹ Such an action would be contrary to statutory
 18 provisions allowing the filing of a motion to reopen⁶⁰ and would likely be viewed as a
 19 violation of due process for aliens whose removal is imminent. Accordingly, EOIR is
 20 continuing to receive and process filings at all courts, including motions to reopen.

⁵⁸ Fifteen days prior to April 13, 2020, fell on Sunday March 29. Thus, any filings would have actually been due on Monday March 30.

⁵⁹ 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23.

⁶⁰ 8 U.S.C. § 1229a(c)(7).

1 58. EOIR has also not issued a blanket postponement of hearings of detained individuals. To
2 do so would raise serious constitutional and due process concerns, would be contrary to at
3 least one section of the INA, and would subject EOIR to potential litigation risk for
4 violating court orders or failing to follow binding circuit court decisions.

5 59. A blanket postponement of all hearings of detained individuals would raise constitutional
6 concerns regarding the intentional prolonging of an alien's detention and the functional
7 elimination of an alien's ability to challenge the alien's detention through a proceeding
8 before an IJ.

9 60. Preventing a detained alien from receiving a review of a negative credible fear
10 determination for at least a month would be contrary to 8 U.S.C. § 1225(b)(1)(B)(iii)(III).
11 It would also prevent that alien from potentially obtaining release from custody.

12 61. Preventing hearings from occurring without consent would prevent DHS from filing an
13 NTA to initiate proceedings with the time and date of the next hearing. Such an action
14 would not only infringe upon DHS's prosecutorial discretion to bring removal proceedings
15 but would also appear to be contrary to 8 U.S.C. § 1229(d)(1), which directs DHS to initiate
16 removal proceedings against aliens removable due to criminal convictions "as
17 expeditiously as possible after the date of the conviction."

18 62. I am aware that Plaintiffs have requested to carve out an exception to postponing hearings
19 for detained aliens if the alien or the alien's counsel consents to the holding of the hearing.
20 Such a carve-out would be unworkable in practice and would raise ethical questions beyond
21 EOIR's adjudicatory authority in cases where the alien and the alien's counsel disagreed
22 regarding consent. Further, based on my experience, many, if not most, aliens who are
23 detained do not want any additional delay in their proceedings precisely because they are

1 detained, making Plaintiffs' proposed carve out largely indistinguishable from the status
2 quo.

3 63. Verifying consent of both a respondent and the respondent's attorney prior to the
4 scheduling of a hearing is not possible in many cases. EOIR only knows if a respondent
5 has counsel if that counsel files a Form EOIR-28, Notice of Entry of Appearance as
6 Attorney or Representative Before the Immigration Court. Although counsel may file an
7 EOIR-28 at any time, it is common for counsel to wait and file it when appearing at a
8 hearing. As a result many respondents have counsel of which EOIR is unaware until a
9 hearing actually takes place. In such cases, EOIR would be unable to ever verify that
10 counsel has consented to the hearing without scheduling a hearing in the first instance.

11 64. Plaintiffs' proposed carve out does not specify that it would apply only to counsel for an
12 alien who is acting as the alien's representative in immigration proceedings. Many
13 respondents have counsel who provide assistance but do not represent them in removal
14 proceedings. As such, these attorneys do not file a Form EOIR-28, and EOIR would not
15 know their identities or contact information. Consequently, EOIR would not ever be able
16 to obtain their consent.

17 65. Aside from the practical difficulty of determining whether an alien has counsel and, thus,
18 whether that counsel has consented to a hearing, requiring consent from both the alien and
19 the alien's attorney would inject EOIR inappropriately into the attorney-client relationship
20 and raise significant ethical issues for both the IJ and the alien's attorney, particularly in
21 cases of detained aliens. Based on my experience, detained aliens are generally opposed to
22 lengthy continuances while they are detained, and many of them wish to resolve their cases
23 as quickly as possible. Thus, if Plaintiffs' remedy were enacted, I would expect multiple

1 cases in which the detained alien would want to consent to have the alien's case heard but
 2 the alien's attorney may not consent to a hearing, leaving the immigration judge in the
 3 untenable position of sorting out whether to follow the wishes of the attorney or the alien
 4 and likely leading to additional delay in order to sort out how to proceed.

5 66. EOIR must comply with rulings from multiple federal courts across the country requiring
 6 the provision of bond hearings in certain circumstances. For example, based on federal
 7 court rulings in some districts or circuits, EOIR is required to hold bond hearings, *inter*
 8 *alia*, for UAC,⁶¹ for aliens detained more than six months,⁶² for aliens in withholding-only
 9 proceedings,⁶³ for aliens otherwise subject to the mandatory custody provisions of 8 U.S.C.
 10 § 1226(c),⁶⁴ for juvenile aliens re-arrested after being released by HHS,⁶⁵ and for aliens
 11 who have been found to have a credible fear of persecution or torture.⁶⁶ The blanket
 12 postponement of all detained hearings would place EOIR at serious risk of violating federal
 13 court orders or rulings in each of these circumstances because it would prevent EOIR from
 14 scheduling and holding the hearings required by the various decisions, would effectively
 15 require each alien to file a written motion for bond in excess of the requirements of either
 16 the applicable regulation or the holdings of many of the cases, and would prevent EOIR

⁶¹ *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

⁶² *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2010); *Gonzales v. Sessions*, 325 F.R.D. 616 (N.D. Cal. 2018); *Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018).

⁶³ *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016); *Martinez Baños v. Asher*, 2018 WL 3244988 (W.D. Wash. 2018); *Diaz v. Hott*, 297 F.Supp. 3d 618 (E.D. Va. 2018).

⁶⁴ *Gayle v. Warden, Monmouth Cty. Correctional Inst.*, 2017 WL 5479701 (D.N.J. 2017).

⁶⁵ *Saravia v. Sessions*, 905 F.3d 1137 (9th Cir. 2018).

⁶⁶ *Padilla v. ICE*, ---F.3d--- (9th Cir. 2020).

1 from holding hearings in which an alien could potentially request a bond hearing directly
 2 from an IJ or obtain some form of relief or protection from removal that would render the
 3 alien amenable to release.

4 67. Rather than leading to increased demands to postpone hearings for detained aliens, as the
 5 Plaintiffs seek, the outbreak of COVID-19 appears to have actually accelerated demands
 6 for more immediate hearings for detained aliens. For example, on March 11, 2020, EOIR
 7 was served with a complaint seeking, *inter alia*, a custody hearing within a reasonable time
 8 for a class of aliens detained in Western New York.⁶⁷ On March 24, 2020, EOIR was
 9 notified that the plaintiffs in another suit intended to file a motion to force compliance with
 10 a court order due to EOIR's alleged failure to hold timely bond hearings.⁶⁸ Again, the
 11 blanket postponement of all detained hearings would preclude EOIR from effectively
 12 addressing these continuing suits.

13 68. On March 30, 2020, EOIR announced that all non-detained hearings were further
 14 postponed through May 1, 2020. For non-detained cases in which the IJ is following the
 15 ICPM for filing deadlines, that means that the earliest date filings could be due prior to an
 16 individual hearing is April 20, 2020.

17 69. EOIR has not announced any changes to operations of the Board due to COVID-19. The
 18 Board rarely hears oral arguments in a case and does not presently have any oral arguments
 19 scheduled. Because the Board adjudicates appeals of detained aliens, including appeals of
 20 bond decisions by IJs, the same concerns with closing detained courts or postponing
 21 detained cases also apply to the Board.

⁶⁷ *Onosamba-Ohindo v. Barr*, 1:20-cv-290 (W.D.N.Y.).

⁶⁸ *Gonzales v. Sessions*, 3:18-cv-01869, (N.D. Cal.).

1 70. EOIR has not announced any changes to operations at OCAHO due to COVID-19.

2 OCAHO continues to receive filings and adjudicate cases, and I am unaware of any
3 complaints or concerns directed at OCAHO's continued operations.

4 **Notifications**

5 71. EOIR has maintained a social media Twitter account since 2011 and a social media
6 Facebook account since 2013. The current version of EOIR's website launched in October
7 2010.

8 72. EOIR communicates information regarding immigration court operations by placing
9 information on its website and through postings on social media. For each case that is
10 rescheduled, it also provides a new notice of hearing in that case which is mailed to the last
11 address provided by an alien and the alien's representative, if any.

12 73. EOIR routinely posts announcements of immigration court closures on social media, in
13 addition to posting that information on its website. For example, between January 28, 2019,
14 and March 1, 2020, EOIR made approximately 150 separate announcements via social
15 media and its website regarding the operational status of immigration courts, including
16 many announcements regarding the closure of courts.

17 74. Prior to March 2020, I am unaware of any complaints EOIR received or concerns raised to
18 EOIR regarding the manner in which operational announcements were communicated,
19 even for announcements that involved the transfer of hearings and filings to a different
20 immigration court. For example, on August 16, 2019, EOIR announced, through social
21 media and its website, the indefinite suspension of operations at the immigration court in
22 Louisville, Kentucky, due to building safety conditions and the transfer of cases and filings
23 to the immigration court in Memphis, Tennessee. I am unaware of any complaints that

1 EOIR received regarding the adequacy of that announcement or of any confusion or
 2 difficulty in having the cases heard at the Memphis Immigration Court.

3 75. On March 15, 2020, EOIR established a specific web page, EOIR Operational Status
 4 During Coronavirus Pandemic (Operational Status website), which it has updated on
 5 almost a daily basis with information regarding hearing status, filings, court operations,
 6 and standing orders.⁶⁹

7 76. In addition to making operational announcements through its website and social media and
 8 providing written notice of postponement of hearings, EOIR created a listserv on March
 9 26, 2020, for announcements to practitioners, including announcements of the adoption of
 10 standing orders.⁷⁰

11 77. Multiple stakeholders also frequently retweet, forward, or collect and present information
 12 that EOIR announces publicly which further amplifies the dissemination of that
 13 information.⁷¹

14 78. All six named Plaintiff organizations are stakeholders, each maintains a social media
 15 presence, including on Twitter, and combined they have over 400,000 followers.

16 79. EOIR has publicly announced through social media and on its website when immigration
 17 courts have closed due to an incident related to COVID-19 or as a precautionary measure
 18 in situations without a confirmed or verified incident. Federal health and medical privacy
 19 laws prevent EOIR from disseminating medical information about particular individuals,
 20 including the results of medical tests. Accordingly, EOIR cannot publicly announce the

⁶⁹ <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁷⁰ <https://www.aila.org/infonet/eoir-sends-message-to-stakeholders-announcing-new>

⁷¹ <https://www.aila.org/recent-postings>

1 results of an individual's COVID-19 test, an individual's diagnosis from a doctor, or the
 2 identity of an individual involved in an incident.

3 **Filings and Appearances**

4 80. EOIR has no policy requiring the filing of unclassified documents in person. EOIR's
 5 current policy is to encourage filings by mail and through electronic means where
 6 available.

7 81. EOIR has allowed filing by mail since its inception, and I am unaware of any systemic
 8 problem at EOIR regarding filing by the United States Postal Service (USPS) or by a
 9 corporate delivery service. The INA's multiple references to service by mail⁷² further
 10 indicate that mail is deemed to be a generally reliable vehicle for communications to and
 11 from an immigration court. Every court system of which I am aware relies on the mail for
 12 filings, and most courts of which I am aware are continuing to receive filings by mail.
 13 Although there may be individual instances in which mail is not properly delivered to an
 14 immigration court, those are redressable through motion practice or legal argument.

15 82. EOIR has no policy requiring any attorney to appear in any case in person. The method of
 16 an attorney's appearance is subject to the discretion of the IJ.

17 83. Beginning March 17, 2020, many immigration courts began adopting local operating
 18 procedures (LOPs) pursuant to regulation, and many immigration judges began issuing
 19 standing orders pursuant to policy. As of March 31, 2020, all immigration judges at 29
 20 immigration courts had adopted LOPs in the form of standing orders.⁷³ As of the same date,

⁷² 8 U.S.C. §§ 1229(a)(2)(A) and (c).

⁷³ Immigration judges at courts hearing predominantly non-detained cases have generally not issued LOPs or standing orders because all non-detained hearings are postponed through May 1, 2020.

1 8 immigration judges had adopted standing orders at courts which have not yet adopted
2 LOPs.

3 84. Most, if not all, of these LOPs and standing orders allow for the appearance of practitioners
4 by telephone without the need to file a motion, including the Standing Order issued by the
5 Atlanta-Ted Turner Drive Immigration Court on March 20, 2020, and the Standing Order
6 issued by the Stewart Detention Center on March 24, 2020.

7 85. All LOPs and standing orders have been posted by EOIR on the website for the relevant
8 court, in the ICPM, and on its Operational Status website.⁷⁴ Additionally, all LOPs and
9 standing orders have been noted on EOIR's social media accounts and distributed through
10 its listserv. All of them are designed to protect EOIR employees, aliens, practitioners, and
11 attorneys for DHS while simultaneously maintaining the due process rights for detained
12 aliens.⁷⁵

13 86. EOIR does not have the authority to direct IJs on how to rule in their cases. Because IJs
14 exercise independence and discretion in deciding individual cases, neither I nor any
15 employee at EOIR—except a member of the Board adjudicating a case appeal—is
16 authorized to require IJs to deny or grant any particular motion. IJs are expected to adhere
17 to the law, and instances in which a party believes an IJ has failed to follow the law may
18 be redressed through an appeal to the Board, including an emergency interlocutory appeal.
19 I am not aware of any motions to continue being filed by Plaintiffs based on circumstances
20 related to COVID-19 that have been denied by an IJ. I am also not aware of IJs or the Board

⁷⁴ <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁷⁵ <https://www.justice.gov/eoir/page/file/1259916/download>

1 systematically failing to use sound judgment in consideration of motions filed during the
2 current situation related to COVID-19, especially after March 20, 2020.

3 87. Because IJs exercise independence and discretion in deciding individual cases, neither I
4 nor any employee at EOIR—except a member of the Board adjudicating a case appeal—is
5 authorized to require IJs to extend or restrict a filing deadline, to excuse or apply the
6 statutory one-year deadline for filing an asylum application, to determine whether an alien
7 has or has not demonstrated extraordinary circumstances warranting the excusal of that
8 deadline, or to require an IJ to excuse or follow any established filing deadline. IJs are
9 expected to adhere to all applicable law and to utilize their discretion appropriately.
10 Instances in which a party believes an IJ has failed to follow the law, including where a
11 party believes an IJ has abused his or her discretion, may be redressed through an appeal
12 to the Board. I am not aware of any motions or arguments on these issues raised by
13 Plaintiffs based on circumstances related to COVID-19 that have been rejected or denied
14 by an IJ. I am also not aware of IJs or the Board systematically failing to use sound
15 judgment in consideration of any of these legal issues during the current situation related
16 to COVID-19, especially after March 20, 2020.

17 88. EOIR does not control detention facilities maintained or leased by DHS and, accordingly,
18 has no authority to direct DHS operations regarding who may access, and under what
19 conditions, those facilities. I understand that DHS may have recently imposed additional
20 safeguards on visitors to its facilities and that it may have limited avenues of
21 communications between practitioners and detainees. I am not aware of any motions to
22 continue being filed by Plaintiffs based on these circumstances, nor am I aware of any such
23 motions being denied by IJs due to these circumstances. I am also not aware of any lawsuits

1 filed by Plaintiffs against DHS regarding the safeguards it has imposed. In general,
2 although neither I nor any EOIR employee possess the authority to direct an IJ how to rule
3 in a particular case, I am not aware of IJs systematically failing to use sound judgment in
4 consideration of motions filed during the current situation related to COVID-19, especially
5 for motions alleging that a practitioner was unable to access a facility where an alien is
6 detained.

7 89. In response to an inquiry from a stakeholder received on March 19, 2020, EOIR clarified
8 its policy on signatures for filings on March 31, 2020.⁷⁶ EOIR will allow the submission
9 of filings with electronic signatures, though the signature may be subject to authentication
10 as warranted by the facts in a particular case.

11 90. The outbreak of COVID-19 has suspended EOIR's rollout of its new electronic
12 adjudication system, the EOIR Courts & Appeals System (ECAS), which includes an
13 electronic filing capability. ECAS has already been deployed to 14 courts, and in courts
14 where ECAS has been deployed, filing may be made electronically through that system. In
15 the other courts, filing by mail remains available and encouraged.

16 91. Immigration courts and judges may authorize the filing of documents by facsimile or e-
17 mail,⁷⁷ and some LOPs and standing orders are allowing the filing of documents through
18 those means.⁷⁸ Further, beginning March 31, 2020, EOIR has established court-specific e-
19 mail addresses to be used as temporary electronic failing mailboxes, and it expects those
20 electronic mailboxes to be operational nationwide no later than April 1, 2020.

⁷⁶ ICPM, ch. 3.3(b)(i).

⁷⁷ ICPM, ch. 3.1(a)(vii).

⁷⁸ <https://www.justice.gov/eoir/page/file/1263056/download>

1 92. I am aware that several state and local jurisdictions have issued executive orders in
 2 response to the COVID-19 situation, though not every state or locality in which an
 3 immigration court is present has done so. Although these orders carry different labels and
 4 vary considerably in their specifics, they generally order individuals to limit public
 5 interactions to essential tasks. Although the precise definition of “essential” varies greatly
 6 among the orders, I am not aware of any state or local order that purports to limit or close
 7 the functioning of federal government entities such as EOIR. I am also not aware of any
 8 such order that deems court operations or the provision of legal services as non-essential,
 9 and I am aware of many orders that expressly state that such services are essential.⁷⁹ I am
 10 also not aware of any such order that considers the mail to be non-essential or that purports
 11 to close the operations of the USPS. I am aware that many such orders rely on an advisory
 12 list of critical infrastructure workers prepared by DHS’s Cybersecurity and Infrastructure
 13 Security Agency (CISA) in their assessments of essential work. I am also aware that CISA
 14 includes postal, parcel, and courier services, communications and information technology
 15 services, and operations of judicial systems among its list of critical infrastructure
 16 services.⁸⁰ In short, I am not aware of any state or local order that requires EOIR to cease
 17 its operations, especially hearings for detained individuals, or that prohibits legal
 18 practitioners from working with clients in conjunction with those operations.

19 93. The law and any EOIR policies on filing and appearances generally apply equally to both
 20 parties in an immigration proceeding. Thus, standards for filing deadlines, filings by mail,

⁷⁹ <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf>

⁸⁰ <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

1 and continuances apply equally to both aliens and DHS. I am unaware of any IJ treating
 2 these issues differently for DHS than for the aliens in immigration proceedings.

3 **Assessment of Plaintiffs' Assertions**

4 94. I understand Plaintiffs' claims related to EOIR to be speculative based primarily on
 5 isolated anecdotes about the mail and the denial of one motion to appear telephonically that
 6 appears to have been superseded by a subsequent standing order.⁸¹ Although I understand
 7 Plaintiffs to have raised various hypothetical scenarios stemming from the COVID-19, I
 8 am not aware of any scenario that cannot be addressed by extant law or policy, nor am I
 9 aware of any specific cases involving Plaintiffs in which an IJ or Board member has denied
 10 a motion or rejected an argument related to a continuance or a deadline involving the
 11 ongoing situation with COVID-19. I am not aware of any IJs or Board members
 12 systematically failing to account for the operational challenges posed by the outbreak of
 13 COVID-19 in Plaintiffs' cases or in any other cases.

14 95. I understand that Plaintiffs' claims, if accepted, would require the complete shutdown of
 15 all of EOIR's immigration court operations, including the hearing of cases of detained
 16 aliens, for at least 28 days if not longer. I am not aware of any other court system in the
 17 United States shutting down completely for such a period of time, nor am I aware of any
 18 other lawsuit seeking to shut down any court system in the United States at the current
 19 time. Such a shutdown would place EOIR at serious risk of failing to comply with district
 20 court orders and circuit court decisions related to hearings for detained aliens, would
 21 effectively invalidate various statutory provisions, and would eviscerate the independence
 22 and discretion of immigration judges and Board members in their consideration of the

⁸¹ <https://www.justice.gov/eoir/page/file/1259926/download>

1 individual circumstances of each case. Such a shutdown would further place significant
2 pressure on DHS and HHS to release all aliens in their custody in order to avoid
3 constitutional issues associated with potentially indefinite detention without recourse to a
4 hearing, which would raise additional issues of public safety. Such a shutdown would also
5 cause significant harm to aliens in detention who may utilize their hearings to become
6 amenable to release from detention and to aliens seeking to file motions to reopen or to
7 stay removal.

8 Executed on March 31, 2020.

9
10 

11 James McHenry
12