IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, *et al.*, Plaintiffs, -against- EXECUTIVE OFFICE OF IMMIGRATION REVIEW, *et al.*, Defendants.	Civil Action No. 1:20-cv-00852 (CJN)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

This case is about Defendants' final decision, in the face of repeated and direct requests, not to take specific, necessary actions to protect the health and lives of detained persons, their counsel, all those who participate in the immigration system, and all those with whom they have direct contact, in an exponential cascade of risk due to the COVID-19 pandemic. Plaintiffs ask for relief that would address this risk without removing the ability of detained persons to communicate safely with counsel and without interfering with Defendants' enforcement of the immigration laws. Defendants' opposition attacks straw men, rather than Plaintiffs' motion for TRO or the evidence filed in support of it.

First, Defendants' surprising argument that there is no injury to Plaintiffs sufficient to confer standing – in the midst of a world-wide health crisis to which persons clustered closely together in detention are especially vulnerable – is contrary to law, including law on which Defendants themselves rely. This is not a case claiming relief for Eighth Amendment violations for deliberate indifference, as Defendants' citation (Opp. at 15) to *Helling v. McKinney*, 509 U.S. 25 (1993), might suggest. But if it were, the standard for injury articulated there is easily met in the case of COVID-19 – "a serious, communicable disease" – as the *Helling* Court made clear that a detained person has standing to bring such claims even if they "show no serious current symptoms" and "even if it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Id*. at 33.

> It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.

Id. The issue in *Helling* was exposure to second-hand smoke ("ETS"), and the Court rejected the claim of the United States there that, as a matter of law, "the harm to any particular individual

from exposure to ETS is speculative, that the risk is not sufficiently grave to implicate a 'serious medical nee[d],' and that exposure to ETS is not contrary to current standards of decency." *Id*.

The Court should likewise reject Defendants' position here. Consistent with the relevant circumstances, the uncontradicted evidence of Dr. Jha demonstrates that COVID-19 is a "serious disease," Ex. 27, Jha Decl. ¶ 7, is "highly contagious," *id*. ¶ 6, and there is no vaccine against it or "any known medication to prevent or cure infection from the virus at this time," *id.* ¶ 9. "The only known effective measures to reduce the spread of transmission of COVIS-19 includes containment and mitigation," *id*. ¶ 10, which is to say "[d]ramatically scaling back all human interaction is the primary strategy we have today." Such dramatic social distancing has been adopted as policy by the President's COVID-19 Task Force, and has been ordered in virtually every state in the Nation. Simply put, the risk of exposure to COVID-19 "is not one that today's society chooses to tolerate." *Helling*, 509 U.S. at 36. The injury prong for injunctive relief – as to the claims *actually* at issue – is therefore easily met.

Second, Defendants argue that various statutory provisions strip the Court of jurisdiction to hear Plaintiffs' claims, but base their arguments on a fundamental mischaracterization: Plaintiffs do not seek to "shut down" immigration court proceedings. This is also not a case about individual removal proceedings or their results. Nor could the threatened health injuries be remedied in appellate review of individual removal proceedings. The jurisdiction-stripping provisions on which Defendants rely are thus irrelevant.

Third, and relatedly, this case *is* about what Defendants acknowledge is a decision taken by Defendants, in the face of requests to the contrary, which is to say agency action, to allow each immigration court to make its own decisions about whether to hold in-person hearings for detained persons during the pandemic and to allow ad hoc remote proceedings for that population, without

establishing minimum requirements that ensure that such proceedings enable the respondents to exercise their right to counsel without exposing themselves or their lawyers to risk of irreparable injury to their health and safety (with ripple effects to the general public described at length and well-established by bitter international and domestic experience).

Thus, contrary to Defendants' assertions, Plaintiffs have established a likelihood of success on the merits – and certainly a serious issue on the merits – concerning their claims under the APA and their statutory and constitutional rights to counsel. Plaintiffs have shown through competent means that the decisions Defendants have taken are putting individual Plaintiffs and the associational Plaintiffs' members at risk of exposure to and contracting COVID-19, and have resulted in an ongoing deprivation of their rights to receive and provide counsel. The chaotic system Defendants champion is actually preventing hearings from going forward at all. Indeed, both Plaintiffs and Defendants have introduced evidence that in-person hearings are being adjourned at the very last minute, rather than proceeding remotely both because the courts were blind to requests for remote proceedings and because many do not have acceptable means of conducting them. In this respect, the thrust of the TRO application and proposed order is to increase the options available for the operation of the court system by making remote proceedings a real option while preserving Plaintiffs' statutory and constitutional rights to counsel and health.

The balance of hardships and public interest thus tip decidedly in Plaintiffs' favor. The generalized interest Defendants assert in "enforcement of United States immigration laws" (Opp. at 39) is a red herring and does not weigh in their favor because Plaintiffs do not seek to stop such enforcement. Tellingly, nowhere in their opposition do Defendants specify what concrete harms would occur if Plaintiffs' relief were granted. Plaintiffs have not asked that the immigration courts be shut down or that detention centers be blindly vacated. Rather, Plaintiffs have asked for a short

pause for in-person hearings for detained persons, which EOIR has suspended for the non-detained population, and that Defendants promptly develop minimum policies, procedures, practices, and physical means for such hearings to be conducted remotely and to allow detained persons to have adequate access to counsel so that such hearings may proceed. There is therefore no conflict between the relief requested and the public interest. Defendants' insistence on proceeding with the supposed "business as usual" approach, in contrast, irreparably imperils the health and safety of Plaintiffs, all other participants in the court-hearing process and public health more generally, and Plaintiffs' statutory and constitutional rights.

Finally, there is nothing improper about the scope of relief Plaintiffs seek. Plaintiffs do not seek a "nationwide injunction" that mandates specific procedures be adopted uniformly in each of the 69 immigration courts and plethora of detention facilities around the country. The relief is "nationwide" only in the sense that it applies to persons and entities that have nationwide authority and administer nationwide programs. The proposed injunction simply requires Defendants to establish and enforce minimum standards for the conduct of remote hearings and associated detention practices so that detained persons may safely exercise their rights within the immigration system. How those standards will be implemented necessarily will vary from location to location, so long as they meet the specified minimum standards. This is an entirely conventional remedy in a challenge to agency action, and should be adopted here.

ARGUMENT

I. This Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims

Because none of the predicates for the application of 8 U.S.C. § 1252(a)(5), (b)(9), (f), (g), and (a)(2)(B)(ii) are present, no part of 8 U.S.C. § 1252 bars this Court from adjudicating Plaintiffs' claims.

Defendants must overcome the "strong presumption in favor of judicial review of administrative action." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991) (holding that the Immigration Reform and Control Act's prohibition on judicial review "of a determination respecting application" did not remove jurisdiction over "general collateral challenges to unconstitutional practices and policies used by the INS in processing applications"). "[O]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (internal quotations marks omitted). The language of 8 U.S.C. § 1252 does not meet this standard so as to strip this Court of jurisdiction over the claims in this case.

Section 1252(a)(5). By its terms, § 1252(a)(5) applies to "judicial review ***of an order of removal*** entered or issued" under Chapter 12 of Title 8. 8 U.S.C. § 1252 (a)(5) (emphasis added). *See O.A. v. Trump*, 404 F.Supp.3d 109, 129 (D.D.C. 2019) (holding "§ 1252 (a)(5) [had] no bearing on the Court's statutory jurisdiction" because plaintiffs pled under the APA, among other statutes, "a facial challenge to the validity of a regulation of general applicability [restricting asylum eligibility]"). Plaintiffs here are not challenging the validity of any particular removal order(s), but rather agency action of general applicability.

Section 1252(b)(9). This subsection limits subject matter jurisdiction only for claims "arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9). Justice Alito, writing for a plurality of the Supreme Court, "eschewed" any interpretation of the phrase "arising from" that would lead to results "no sensible person could have intended" and advised against construing the phrase in an "expansive" or "extreme" way. *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (internal quotations and citations omitted). In

Jennings, a plurality of the Court determined it had jurisdiction to hear a claim arising out of the prolonged detention of certain non-citizens during their immigration proceedings. *Id.* at 840-41.

Several U.S. Courts of Appeal and District Courts, including in this District, have held that § 1252(b)(9) is properly construed to refer only to claims "seeking judicial review of orders of removal," *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 504 n.19 (9th Cir. 2018). Claims "independent of or collateral to" removal proceedings are not barred by §1252(b)(9). *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1160 (D. Or. 2018) (citing *Reno v. AADC*, 525 U.S. 472, 482 (1999)). *See, e.g.*, *Nnadika v. Att'y Gen. of U.S.,* 484 F.3d 626, 632 (3d Cir. 2018) (holding that § 1252 did not apply to challenge to asylum rules); *OA v. Trump*, 404 F. Supp. 3d 109, 132 (D.D.C. 2019) (holding § 1252(b)(9) did not bar jurisdiction because plaintiffs brought "facial challenges to a regulation . . . seeking to set aside the regulation itself"); *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 309 (D.D.C. 2017) (holding court had jurisdiction to hear procedural challenge because § 1252(b)(9) only applies to bar review of adjudication of a particular removal order).[1] Accordingly, where, as here, the claims do not relate to a specific removal action or order of removal, § 1252(b)(9) does not apply.

Defendants cite *J.E.F.M. v. Lynch* for the proposition that the restriction in § 1252(b)(9) is "breathtaking" in scope and "vise-like" in grip. 837 F.3d 1026, 1031 (9th Cir. 2016) (quoting

[1] *See also Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1047-48 (C.D. Cal. 2019) (holding procedural Due Process and INA claims based on detention-center conditions that impaired in-person visits and phone calls with counsel did not arise from the removal proceedings); *Chhoeun v. Marin,* 306 F. Supp. 3d 1147, 1159 (C.D. Cal. 2018) (concluding court had jurisdiction and granting preliminary injunction delaying deportations so petitioners could challenge removal orders, in part due to restrictions of access to attorneys because petitioners "do not directly challenge the bases for their orders of removal. Instead, Petitioners seek an opportunity to challenge the removal orders."); *Martinez v. Nielsen*, 341 F. Supp. 3d 400, 406 (D.N.J. 2018) (concluding court had jurisdiction and granting TRO enjoining removal so that plaintiff could bring APA and Due Process claims in district court).

Aguilar v. ICE, 510 F.3d 1, 9 (1st Cir. 2007)). Importantly, however, *J.E.F.M.* (and *Aguilar* upon which it relies) pre-date *Jennings*, in which the Supreme Court counseled against reading "arising from" to include claims where the relief requested would become meaningless if delayed until review of a final deportation order, *see Jennings*, 138 S. Ct. at 840, as is the case here as to Plaintiffs' health-related injuries. *See O.A. v. Trump*, 404 F. Supp. 3d 109, 129 (D.D.C. 2019) (citing *Jennings,* 138 S. Ct. at 840-41 (2018)); *Torres*, 411 F. Supp. 3d at 1047 ("But *J.E.F.M.* is equally clear that the INA does not channel 'claims that are independent of or collateral to the removal process.'" (quoting *J.E.F.M.*, 837 F.3d at 1032)).[2] Because these injuries are not "enmeshed with the [detained person's] removal proceedings and [could] be adequately reviewed through a petition for review," *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 77 (D.D.C. 2018), Defendants' reliance on that case, is misplaced.

Section 1252(g). This subsection concerns "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [Chapter 12 of Title 8]." As with § 1252(b)(9), the limitation of jurisdiction in § 1252(g) applies only to those claims specifically "arising from" the three exclusions listed in that subsection. Under controlling Supreme Court construction of this language, it does "not . . . sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." *See Jennings*, 138 S.Ct. at 841 (citing *Reno v. AADC*, 525 U.S. 471, 482-83 (1999)). Section 1252(g) is directed "against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno*, 525 U.S. at 485 n.9.

[2] At the very least, § 1259(b)(9) cannot apply to the four Detained Plaintiffs in asylum proceedings. *See, e.g.*, *Jennings*, 138 S. Ct. at 840 & n.2; *Innovation Law Lab*, 310 F. Supp. 3d at 1160; *Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1269 (9th Cir. 2020).

Plaintiffs' claims here do not fall within those three categories and are not barred by § 1252(g). The fact that Plaintiffs' requested relief would, among other things, affect the timing and availability of remote access to removal proceedings, does not change that conclusion. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority."). *See also Martinez v. Nielsen*, 341 F. Supp. 3d 400, 406 (D.N.J. 2018) (permitting a challenge to legal authority to exercise discretion, not discretion itself).

Section 1252(f)(1). Plaintiffs' request for injunctive relief to address public health concerns and preserve the right of access to counsel do not fall within the limitation of § 1252(f)(1) on enjoining "the operation of the provisions of part IV of this subchapter [subchapter II of Chapter 12 of Title 8] regarding removal proceedings." None of the specific injunctive relief requested by Plaintiffs asks this Court to obstruct operation of statutory provisions relating to removal proceedings.

First, Plaintiffs' request to suspend in-person hearings does not infringe on statutory provisions relating to removal proceedings because 8 U.S.C. § 1229a(b)(2) expressly permits that a "proceeding may take place . . . through video conference . . . or [under certain circumstances] through telephone conference." The Plaintiffs have not requested that the Court suspend all proceedings, only that precautions be implemented in line with public health needs and statutory provisions.

Second, the request to protect the safety and confidentiality of communications between detained persons and attorneys does not prohibit any provision under the relevant statutes. To the

contrary, it furthers the rights guaranteed under § 1229a(b)(4) that "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."

Third, the injunctive relief sought regarding detention and visitation does not impede the operation of removal proceedings. Therefore, injunctive relief requiring the Defendants to provide PPE at cost if Defendants require PPE does not abrogate any statutory requirement. Injunctive relief ensuring the adequate representation of clients in immigration proceedings only helps to ensure those proceedings can continue.

Moreover, even if the requested relief were held to affect the operation of statutory provisions relating to removal proceedings, § 1252(f)(1) does not apply where a plaintiff seeks to enjoin "conduct that violates" the governing statute, rather than to "obstruct the operation" of the statute. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 143 (D.D.C. 2018) (finding court had jurisdiction to enjoin certain unlawful credible fear policies); *cf. Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, at *4 (D.D.C. Sept. 5, 2019) (holding § 1252(f)(1) does not apply when a plaintiff seeks to enjoin "'conduct' that the INA allegedly does not authorize" and issuing classwide injunction against internal ICE policy). Plaintiffs' requested relief does not seek to "obstruct the operation" of removal proceedings, but rather to permit them to continue in a manner that is protective of health and safety and constitutional and statutory rights to counsel.

Section 1252(a)(2)(B)(ii). This subsection limits review of decisions "specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Defendants argue that because the statutory language providing for remote hearings uses the word "may," the decision whether to use remote technology is discretionary and unreviewable by this Court. This Circuit has not had occasion to determine

whether a grant of discretionary authority requires more express language, such as the language used in 8 U.S.C. § 1229(b)(2)(D), "shall be within the sole discretion of the Attorney General." *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005). However, other circuits have required such express language because there are "no less than thirty-two" express grants of discretionary authority used throughout the relevant portion of the statute. *See Alaka v. Att'y Gen.*, 456 F.3d 88, 97 (holding that the terms "decide" or "determine"in 8 U.S.C. § 1231(b)(3)(B) were not grant of discretionary authority) (overruled on other grounds); *Royal Siam Corp. v. Chetoff*, 484 F.3d 139, 143 (1st Cir. 2007) ("8 U.S.C. § 1184(a)(1) [was] considerably less definitive in its commitment of authority to agency discretion than other statutes."); *Sanusi v. Gonzales*, 445 F.3d 193, 198-99 (2d Cir. 2006) (holding that 8 U.S.C. § 1252(a)(2)(B)(ii) did not strip jurisdiction to review 8 U.S.C. § 1229a(a)(1)). To the extent any ambiguity in the statute's language remains, EOIR's purported "discretion" as to the form of hearing cannot override its other constitutional and statutory obligations, nor the presumption favoring review of administrative action. *See EOHC v. Secretary U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 190-91 (3d Cir. 2020) (finding that any remaining doubt whether "may return" afforded discretionary authority was dispelled by the presumption favoring review of agency action (internal quotation marks omitted)); *Ms. L v. ICE*, 302 F. Supp. 3d 1149, 1161 n.5 (S.D. Cal. 2018) ("[T]he Ninth Circuit has held decisions that violate the Constitution cannot be discretionary, so claims of constitutional violations are not barred by § 1252(a)(2)(B)" (internal quotation marks omitted)).

II. Plaintiffs Satisfy Standing Requirements

Plaintiffs meet the requirements of Article III standing, and Organizational Plaintiffs additionally meet the requirements of associational standing.

A. Plaintiffs Have Article III Standing

All Plaintiffs meet the injury-in-fact requirements for Article III standing[3] because they are at imminent risk of death or serious bodily injury from contracting COVID-19, and Detained Plaintiffs have additionally suffered a violation of their constitutional and statutory due process rights due to continued severe limitations on access to counsel; those injuries are a direct result of Defendants' arbitrary and capricious policies; and those injuries would be redressed by granting the TRO. Defendants do not contest the traceability and redressability of Plaintiffs' injuries. Their arguments that the injuries are too speculative or otherwise insufficient lack merit. Opp. at 14.

Plaintiffs are suffering two injuries as a result of Defendants' policies: (1) the imminent risk of contracting and spreading COVID-19; and (2) continued violation of the due process and statutory right to counsel. As to the first injury, the substantially-heightened risk of contracting and spreading COVID-19 is concrete and particular because it impacts each Plaintiff in a personal and individual way when he or she is forced to appear for in-person hearings and meet in person to prepare for such hearings or when other detained persons at the same facilities are exposed due to in-person hearings and meetings. As discussed above, *Helling v. McKinney*, 509 U.S. 25, 33-36 (1993), on which Defendants rely, Opp. at 15, demonstrates that this is a cognizable injury.

While it is not necessary in the current pandemic conditions that each Plaintiff demonstrate that a person has been diagnosed with COVID-19 in the facility in which they or their clients are detained or brought for immigration court proceedings, contrary to Defendants' assertion that there

[3] Injury-in-fact requires "(1) a plaintiff has suffered a concrete and particularized injury (2) that is fairly traceable to the challenged action of the defendant and (3) that is likely to be redressed by a favorable decision, i.e., a decision granting the plaintiff the relief it seeks." *Elec. Privacy Info. Ctr. (EPIC) v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 376–77 (D.C. Cir. 2017).

is no facility-specific threat to the Detained Plaintiffs, La Palma Correctional Center and Pine Prairie ICE Processing Center each have confirmed cases of COVID-19.[4] The risk Plaintiffs face arises because Defendants are not adhering to CDC guidelines that called for an end to in-person hearings and policies to limit in-person interaction in detention facilities.[5] Those guidelines are based on the substantial probability of imminent harm from being COVID-19 exposure, and the substantial risks of contracting COVID-19 in courthouses and detention facilities specifically.[6] Federal, state, and local governments have likewise mandated limits on physical interaction due to the probability of harm and substantial risk of contraction. By instituting policies that do not follow this guidance or achieve the same goals, Defendants have injured Plaintiffs. *See Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292-96 (D.C. Cir. 2007) ("If the agency action causes an individual or individual members of an organization to face an increase in the risk of harm that is 'substantial,' and the ultimate risk of harm also is 'substantial,' then the individual or organization has demonstrated an injury in fact.").

The second injury is violation of Detained Plaintiffs' constitutional and statutory right to counsel, which is an ongoing harm that is particular and concrete. *See Dearth v. Holder*, 641 F.3d 499, 501-03 (D.C. Cir. 2011) (finding "present and continuing" injury is sufficient to show ongoing injury for standing "where plaintiffs seek declaratory and injunctive relief"). Defendants'

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[4] https://www.ice.gov/coronavirus; https://www.abc15.com/news/local-news/investigations/arizonas-first-confirmed-covid-19-case-in-an-ice-detention-center; https://www.kold.com/2020/04/10/protesters-demand-release-detained-migrants-during-covid-outbreak/. Defendants' allegedly "extensive measures to limit exposure," are exposed as meaningless in light of their apparent lack of awareness of these confirmed cases. *See* Opp. at 15-16.

[5] *See* Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 201 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.;

[6] *Id.*

own opposition brief confirms that Detained Plaintiffs have been unable to effectively communicate with counsel since mid-March, when the national emergency was declared. *Compare* Opp. at 10-11 (Plaintiff Rodriguez Cedeno: most recent attorney visit March 12, 2020; Plaintiff Napoles Vaillant: most recent attorney visit was during the "first two weeks of March"; Plaintiff Velasquez Quiala: "had a VTC conference with his attorney on March 6, 2020"; Plaintiff Guerrero-Cornejo: "was given a message to call his attorney" on April 6 (with no mention of whether he was able to make the call)) *with* Ex. 5, Rodriguez Cedeno Decl. ¶ 9 ("there is only one phone for all of the detainees in La Palma" for "over one thousand" detained persons and he "had to stand in line with about ten people for almost three hours" to make a phone call); Ex. 21, Napoles Vaillant Decl ¶ 9 ("there are not enough phones . . for all the detainees . . . [i]f a call with an attorney drops, one is usually not allowed to call the attorney back."). Plaintiffs therefore satisfy Article III standing.[7]

B. Organizational Plaintiffs Have Associational Standing

Organizational Plaintiffs additionally have associational standing because for each, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006). In order to sufficiently show that members would otherwise have standing to sue, Organizational Plaintiffs must "show that they have 'at least

[7] As the D.C. Circuit has emphasized, "even a slight injury is sufficient to confer standing." *New York State Republican Committee v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019). And if one Plaintiff has standing to raise a claim, "then this court has jurisdiction over that claim without regard to whether any other [plaintiff] also has standing." *Id*. at 503.

one member' who has suffered, or imminently will suffer, an injury-in-fact." *See Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 32–35 (D.D.C. 2019).

Defendants' do not contest that Organizational Plaintiffs meet the second and third prongs of the analysis, and limit their arguments to the incorrect assertion that no members of either of the Organizational Plaintiffs have standing to sue.[8] The three Organizational Plaintiffs, the National Immigration Project of the National Lawyers Guild ("NIPNLG"), the American Immigration Lawyers Association ("AILA"), and the Immigration Justice Campaign ("IJC"), are all non-profit organizations whose members include lawyers who provide direct legal services to detained persons in immigration proceedings.[9] Individual members of each of the Organizational Plaintiffs have suffered concrete and particularized injuries as a result of Plaintiffs' policies, which put their health and safety at risk and prevent them from accessing clients and potential clients, and therefore would have standing to sue in their own right.[10] They have explained how Defendants' practices have prevented them from invoking or utilizing remote proceedings or that remote communications are not safely available.[11] Like with Detained Plaintiffs, the substantial

[8] NIPNLG, AILA, and IJC have all identified the various ways the policies frustrate their mission of providing direct legal services to detained noncitizens. *See* Ex. 24, Voigt Decl. at 3-4 (on behalf of AILA); Ex. 29, Tolchin Decl. ¶¶ 11-16 (on behalf of NIPNLG); Ex. 15, Greenstein Decl. ¶¶ 9-15 (on behalf of OJC). The injunctive relief sought does not require participation of individual members. *See United Food & Commercial Workers Union Local 751*, 517 U.S. 544, 553-54 (1996).

[9] Ex. 29, Tolchin Decl. ¶ 2; Ex. 24, Voigt Decl. at 1; Ex. 15, Greenstein Decl. ¶ 2.

[10] Ex. 29, Tolchin Decl ¶¶ 12-14; Ex. 24, Voigt Decl. at 2-3; Ex. 15, Greenstein Decl. ¶¶ 4-15.

[11] *See* Ex. 3, Church Decl. ¶ 15; Ex. 6, Rivera Decl. ¶ 21; Ex. 8, Saenz Decl. ¶ 15; Ex. 9, Terezakis Decl. ¶ 30; Ex. 13, Bittner Decl. ¶ 29; Ex. 29, Tolchin Decl. ¶ 13; Ex. 34, Sud-Devaraj Decl. ¶ 8; Ex. 35, Boyle Decl. ¶ 6; Ex. 41, Lingat Decl. ¶¶ 4-8, 10, 20; Ex. 42, Weiner Decl. ¶¶ 8-9; Ex. 43. Muller Decl. ¶¶ 1-5.

probability of imminent harm from being exposed to COVID-19 and the substantial risks of contracting COVID-19 in courthouses and detention facilities due to Defendants' policies is a sufficiently concrete and particularized injury. *See supra* II.A. Defendants' arguments to the contrary are unavailing. Organizational Plaintiffs have therefore satisfied associational standing.[12] Defendants improperly include the zone of interest analysis under the Art. III standing umbrella, but it pertains to APA statutory standing, s*ee Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), where it will be addressed.

III. The All Writs Act Authorizes Interim Relief

This Court need not reach definitive answers on all the questions of law regarding Plaintiffs' statutory and constitutional claims to issue the desperately needed interim relief that Plaintiffs request. The All Writs Act is an independent basis for this Court to grant Plaintiffs' requested temporary relief before the Court reaches a definitive conclusion as to whether the injunctive relief Plaintiffs request is ultimately held to be available. The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In this case, where the threatened injury is to health and safety and to access to counsel for detained persons who may ultimately be *deported* before the health crisis resolves, the All Writs Act permits this Court to issue injunctive relief to "preserve the status quo." *Trump v. Committee on Ways and Means*, 415 F. Supp. 3d 38, 40 (D.D.C. 2019). In addition, to the extent Defendants argue that Plaintiffs' claims are not yet ripe because Plaintiffs have not demonstrated that the virus has been "shown to be spreading in the facilities at issue," Def. Opp. at 15, the argument is misplaced, considering that

[12] Defendants improperly include the zone of interest analysis under the Art. III standing umbrella, but it pertains to APA statutory standing, s*ee Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), where it will be addressed.

the facilities housing Detained Plaintiffs and a number of the immigration courts in which members of the Organizational Plaintiffs have appeared already have confirmed COVID-19 cases; asymptomatic people may spread the virus; and the rapidity with which the virus spreads and progresses in severity. They are effectively arguing that Plaintiffs' claims are not yet ripe, but by the time the claims become ripe – according to Defendants – the injured parties may already be dead. This type of manifestly unjust Catch-22 is precisely the type of situation in which courts exercise their power under the All Writs Act.

IV. Plaintiffs Are Likely To Succeed On The Merits

A. Plaintiffs Are Likely To Succeed On The Merits Of Their APA Claim

1. Plaintiffs Have Adequately Pled A Cause Of Action Under The APA

Defendants do not meaningfully contest Plaintiffs' statutory cause of action under the APA. Defendants' only argument is that "[n]othing in the INA suggests that it is meant to protect the interests of immigration attorneys," Opp. at 19-20, but the INA includes an express provision regarding right to counsel and numerous provisions to ensure proper legal representation of individuals navigating the immigration system. 8 U.S.C. § 1362 ("[i]n any removal proceeding before an immigration judge," the individual "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."); *see also* 8 U.S.C. § 1158(d)(4)(A)–(B) (asylum representation); *id.* § 1101(i)(1) (T visa representation); *id.* § 1184(p)(3)(A) (U visa representation); *id.* § 1228(a)(2), (b)(4)(B) (expedited removal proceeding representation); *id.* § 1229(a)(1), (b)(2) (deportation proceedings representation); *id.* § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process). Furthermore, under the APA, the zone of interests "test is not 'especially demanding.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) ("the benefit of any doubt goes to the plaintiff, and

[the Supreme Court has] said that the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." (internal quotation marks and citations omitted)).

The interest of Plaintiffs, both as detained individuals and members of Organizational Plaintiffs representing detained individuals, clearly fall within the zone of interests sought to be protected by the INA. *See O.A. v. Trump*, 404 F. Supp. 3d 109, 144–45 (D.D.C. 2019) (finding interests that legal services "organizational plaintiffs seek to protect are at least 'arguably' within the zone of interests protected by the INA and that, as a result, the organizational plaintiffs' claims satisfy the zone of interests test"); *see also Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, No. 19-1778, --F.3d --, 2020 WL 1320886, at *5–9 (2d. Cir. Mar. 20, 2020) (holding Federal Defenders could challenge limitations on access to counsel under the APA).[13] Plaintiffs have established a statutory cause of action under the APA.[14]

[13] *Fed'n for Am. Immigration Reform, Inc. v. Reno*, Opp. at 20, is not instructive as it related to members of a private anti-immigration club who were found not to be "beneficiaries or as suitable challengers of violations" of the INA. *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 904 (D.C. Cir. 1996). Organizational Plaintiffs could not be better suited to represent the interests of detained plaintiffs as that's what they regularly do in individual cases.

[14] Plaintiffs are also entitled to judicial review based on the nonstatutory or common law review. The zone of interest analysis need only be performed where plaintiffs claim they were "adversely affected or aggrieved by agency action within the meaning of the relevant statute" and not for a non-statutory basis of review. *See Seeger v. United States Dep't of Def.*, 306 F. Supp. 3d 265, 276 (D.D.C. 2018) (finding that a party can seek judicial review with a prima facie showing of arbitrary and capricious abuse of discretion even where the relevant statute does not provide express jurisdiction to adjudicate the merits of the claim) (internal quotation marks and citation omitted)).

2. EOIR's And ICE's Denial Of The Requested Relief Is Final Agency Action

Defendants incorrectly assert that "Plaintiffs do not identify any specific final agency action from which they allege 'legal consequences' flow." Opp. at 29.

First, EOIR's and ICE's denial of Plaintiffs' repeated requests for action are not tentative or interlocutory and constitute the consummation of the agency decisionmaking process, thus meeting the first condition of final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also* 5 U.S.C. §§ 702, 706. Following the five requests for agency action in March 2020 that included specific policy recommendations, neither ICE nor EOIR engaged with the recommendations or implemented policies that addressed the concerns raised. *See* TRO Br. at 26-28. ICE declined to act and, instead, on March 17, 2020 sent an email that pointed to ICE's generic COVID-19 website. Its subsequent lack of action or follow up after additional requests were made demonstrates that ICE's agency action was final. EOIR failed to respond directly at all, instead issuing a policy memorandum on March 18, 2020 entitled "Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak" that did not directly address the concerns raised in the requests for agency action and instead resulted in further inconsistencies in how immigration courts were addressing the COVID-19 outbreak.[15] The memorandum was issued by the Office of the Director pursuant to authority at 8 C.F.R. § 1003.0(b) and the stated purpose was to "memorialize immigration court practices" during the period of the national emergency and outbreak. The memorandum does not state or suggest that it was subject to change, and by its title, indicates final agency action for how immigration court

[15] https://www.justice.gov/eoir/file/1259226/download (March 18, 2020 EOIR Policy Memorandum). To the extent Defendants argue that the memorandum addressed Plaintiffs' concerns, then this Court may review the agency action under the *Accardi* doctrine, which requires federal agencies to "follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions." *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 246-47 (D.C. Cir. 2003) (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

practices will be handled for the duration of the national emergency. *See Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 41 (D.D.C. 2018) (finding policy memorandum "clearly represents the consummation of the agency's decision-making" in context).

Second, legal consequences flow from the policies that were put in place instead. *See Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (determining whether legal consequences will flow is "based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it."). Here, as the declarations Plaintiffs submitted established, the concrete and real result of EOIR and ICE's policies is that rights of detained persons and their counsel are being infringed upon by endangering their health and well-being along with restricting access to counsel, which limits the ability to properly prepare for and attend important immigration proceedings.[16] EOIR and ICE's actions are therefore final agency actions subject to judicial review under the APA.[17]

3. EOIR's And ICE's Denial Of The Requested Relief Is Arbitrary and Capricious Under 5 U.S.C. § 706(2)

Defendants contend that they have "reasonably exercised discretion and authority" and therefore their decisions are "not arbitrary and capricious." Opp. at 32. But Defendants' discretion

[16] Defendants seek to distract the Court with the argument that a decision by an immigration judge in an individual case is the only one with "the force and effect of law." Opp. at 30. However, the decision to "defer[] hearings for all non-detained cases in immigration court" came from EOIR in the March 2018 Policy Memorandum, and not from individual judges. Likewise, the decision to continue holding in-person hearings during the COVID-19 national emergency was a final agency decision by EOIR and holds the force and effect of law. Thus, the situation here is distinct from *DRG Funding Corp. v. HUD*, in which a corporation received a partial administrative review of its claims and sought to "short-circuit" the "pending administrative proceedings." *See DRG Funding Corp. v. HUD*,76 F.3d 1212, 1214 (D.C. Cir. 1996).

[17] For the reasons stated in the sections addressing jurisdiction, 8 U.S.C. §1252(b)(9) does not apply to this action, and therefore does not provide an "other adequate remedy in a court." *See* 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review").

to act is not reasonable when it runs afoul, as it has here, of statutorily conferred rights to counsel and creates unwarranted risk to health. Defendants' decisions were not reasonable when looking to the facts before it, and the Court should "hold unlawful and set aside" their arbitrary and capricious agency actions. *See* 5 U.S.C. § 706(2).

Detained persons unequivocally have the right to counsel of choice, *see* 8 U.S.C. § 1362, that "must be respected in substance as well as in name." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554, 566-67 (9th Cir. 1990) (affirming remedial injunction based, in part, on findings that asylum-seekers had been denied telephone access to their attorneys). EOIR has an obligation therefore to exercise its discretion in such a way that a detained person's right to counsel of choice is preserved (which must include not jeopardizing the health and safety of such counsel), and EOIR has no discretion to adopt policies that "fail[] to consider" an issue whose importance is reflected in Congressional and constitutional mandate. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Dist. Hosp. Partners v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015). The need to ensure that detained individuals and their attorneys can properly interact certainly represents "an important aspect of the problem" of addressing the COVID-19 pandemic. [18]

[18] To the extent Defendants suggest EOIR does not have authority to implement the requested relief because it would interfere with the independence and discretion of immigration judges in adjudicating individual cases, *see, e.g.*, Opp. at 5, 33, this is a strawman. Nothing Plaintiffs have asked for relates to the adjudication of the merits of any individual case and Director McHenry has broad supervisory and management powers over the immigration courts and judges, *see* 8 C.F.R. § 1003.0(b)(1), and specifically has the authority to "issue operational instructions and policy," "direct that the adjudication of certain cases be deferred" and "manage the docket of matters." *See id*. § 1003.0(b)(1)(i)-(ix). To wit, as Defendants repeatedly note, in the exercise of this express authority, Director McHenry has already postponed all non-detained hearings due to the pandemic. Opp. at 1.

ICE's discretion to manage immigration detention is similarly limited by 8 U.S.C. § 1228, which requires that when the Attorney General selects facilities for the detention of certain noncitizens, he employ "reasonable efforts to ensure that the alien's access to counsel and right to counsel under [8 U.S.C. § 1362] are not impaired." Whatever deference may be owed to ICE in the administration of immigration detention, that deference stops where the agency fails to meaningfully address the Congressional requirement that persons in immigration detention are afforded meaningful access to counsel. By implementing policies that put detained persons and their counsel at risk of contracting COVID-19 without adequate alternatives to in-person hearings and meetings, Plaintiffs have established that the Congressional requirement of meaningful access to counsel has been compromised, and Defendants have not offered evidence to the contrary. *See, e.g.*, Ex. 3, Church Decl. ¶ 15; Ex. 34, Sud-Devaraj Decl. ¶ 8; Ex. 35, Boyle Decl. ¶ 6; *see also supra*, at 13, n.10, n.11 and accompanying text. EOIR and ICE's agency action thus is not within their discretion and is arbitrary and capricious.[19] *See Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999)(where the agency "has failed to provide a reasoned explanation, or where the record belies the agency's conclusion," the court "must undo its action").

EOIR self-servingly attempts to argue that its ability to implement Plaintiffs' requested relief is limited by "statutory and court-ordered strictures by which it is bound." *See* Opp. at 33; *see also* Opp. at 8. But Defendants' suggestion that granting Plaintiffs' requested relief would

[19] To the extent Defendants suggest that Plaintiffs' requested relief is unnecessary since they have already acted in a way that is sufficient to safeguard Plaintiffs' health and attorney-client relationships, *see, e.g.*, Opp. at 1, their platitudes should be rejected. Plaintiffs have submitted concrete evidence addressing common and systematic issues on-the-ground at nearly half of the country's immigration courts, and many detention facilities, despite Defendants' existing actions and guidance purportedly aimed at ameliorating those issues.

cause EOIR to violate certain laws or would harm detained persons more than help them rests on sheer speculation and appears to presuppose that the government will shirk its preexisting obligations if relief is granted. For instance, Defendants present no evidence that temporarily halting in-person bond hearings would in any way render detained persons unable to challenge their detentions, including because detained persons can request bond hearings by writing, at a remote proceeding, or via telephone, 8 C.F.R. § 1003.19(b), and the government is obligated to facilitate bond hearings for detained minors by, among other things, ensuring adequate access to counsel. *See* Flores Settlement, ¶ 12.A; 8 U.S.C. § 1232(c)(5). And Defendants' suggestion that granting the relief Plaintiffs' request would prevent asylum seekers from obtaining judicial review of a negative "credible fear" determination within the seven-day requirement, 8 U.S.C. § 1225(b)(1)(B)(iii)(III), again appears to presuppose the government will fail to properly implement and utilize technology that would allow these hearings to occur remotely – expressly authorized by the statute – within the statutory timeframe.

4. Even If EOIR's And ICE's Denial Of The Requested Relief Is Deemed Only To Be Agency Action Unlawfully Withheld or Unreasonably Delayed Their Failure to Act is Reviewable

Defendants incorrectly argue that "Plaintiffs cite no provision requiring the government to take any particular action or that otherwise cabins the agencies' discretionary choices on how to best respond to a pandemic." Opp. at 31. Plaintiffs described the statutory authority requiring access to counsel and counsels' ability to provide adequate representation, as well as the statutory limits on Defendants' discretion. *Supra,* TRO Br. at 31-37; IV.A.1-3; *see also Center for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D. C. 2017) (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)) (A claim based on failure to act can proceed "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."). Defendants are required to ensure detained persons have meaningful access to

counsel—that is the heart of the right to counsel. That detained persons and attorneys must put their health and welfare at risk to fulfill that right in the absence of uniform guidance for immigration court proceedings and attorney-client visits in detention facilities strikes at the heat of the right to counsel. If it is a violation of the right to counsel to refuse a five-day continuance to secure counsel, as Defendants concede, Opp. at 38 (citing *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005)), it is without question a failure to take action to protect that right here. To the extent EOIR's and ICE's decisions are failures to act, they are reviewable under 5 U.S.C. § 706(1), and should be set aside because the agencies failed to act so as to afford the effective right to counsel required by law. *See* 5 U.S.C. §§ 706(1), 704. And the APA authorizes the Court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), which is precisely what is needed here to remedy EOIR's and ICE's failures.

B. Plaintiffs Are Likely To Succeed On Their Claim That Defendants' Policies Restrict Access To Counsel In Violation Of Constitutional And Statutory Rights

Both the Fifth Amendment and the INA guarantee Detained Plaintiffs the right to counsel in immigration proceedings. *See* 8 U.S.C. § 1362; *Maldanado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) (noting that non-citizens have a statutory right to counsel at deportation proceedings but not at government expense); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified" in the INA.). Indeed, the Supreme Court has noted that *"*[t]he severity of deportation . . . underscores how critical it is" for immigrants to have effective counsel. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). This is all the more true in a period of a global public health crisis, where the consequences of immigration proceedings can have direct impacts on an individual's health and access to health care. Yet it is precisely in the wake of this public health crisis, when

Defendants have refused to institute policies that appropriately ensure the vindication of Detained Plaintiffs' constitutional and statutory rights.

Defendants wrongly argue that denial of Plaintiffs' right to counsel can only be evaluated "after the fact," in a "backward-looking inquiry." Opp. at 37-38. They argue that "it is impossible to know whether Plaintiffs' allegation will have any effect on their rights . . . before their immigration hearings have been held." *Id.* at 38. It is not clear from where Defendants have concocted this rule, but it is certainly not supported by case law. *See, e.g.*, *Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020) at 8-9 (issuing a temporary restraining order to ensure detained persons' right to counsel was not violated in anticipation of future hearings); *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1165 (D. Or. 2018) (same). Defendants' apparent suggestion that Plaintiffs may only seek a remedy *after* a hearing is both inefficient and unreasonable solution, *see Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020) at 11 ("[T]he public has an interest in . . . preventing needless administrative appeals . . . produced by the denial of access to counsel.") and insufficient to address the health injury that accompanies the right-to-counsel deprivation.

Defendants also falsely suggest that Plaintiffs fall "short of showing that they were effectively denied access to counsel during immigration proceedings" and "specifying [why] Defendants are responsible for the issues they complain of." Opp. at 37, 38. Quite the opposite, Plaintiffs show that Defendants' policies limit the ability of immigration attorneys—organizational Plaintiff members—to effectively prepare for hearings and filings. *See* Ex. 42, Weiner Decl. ¶¶ 8-9 (attorney forced to submit incomplete asylum application without full information because of inability to communicate with client); Ex. 41, Lingat Decl. ¶¶ 10, 20 ("impossible" to effectively prepare a client for hearing because of limited access); *see also Biwot v. Gonzales*, 403 F.3d 1094,

1098-99 (9th Cir. 2005) (finding that "permit[ting] counsel to prepare for the hearing" is included in the right to counsel). In the face of evidence that *effective* counsel is being denied, Defendants are guilty of advancing a "myopic" understanding of the right to counsel which "render[s] the right . . . an empty formality." *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005) (internal quotations omitted).

Recognizing the urgency of access to counsel in light of the pandemic, the Central District of California recently held that Defendants' failure to implement reasonable policies to ensure access to counsel for persons in immigration detention in one detention facility likely violated those individuals' statutory and constitutional rights. *Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020) at 8-10. In *Torres*, the court issued a temporary restraining order directing Defendants to institute policies safeguarding detained persons' access to counsel, particularly in regards to confidential and accessible telephone communication with counsel. *Id.* at 14-15.

In this case, Defendants' failure to promulgate reasonable and uniform rules to ensure public safety in the wake of this unprecedented global health crisis effectively prevents many lawyers from meaningfully being able to represent their clients. While "the difficulty of adhering to" Plaintiffs' constitutional and statutory rights "inclines with the pandemic's curve," "the urgency of access to counsel . . . increases to the same degree." *Id.* at 11.

C. This Court May Grant The Requested Injunction

Defendants implicitly concede that relief can only be fully afforded to the Organizational Plaintiffs on a national basis. They do not contest that, because they are national organizations

whose members practice in immigration courts across the country,[20] there is no way to remedy the injuries the Organizational Plaintiffs' members face without providing nationwide relief. Rather, the Defendants argue that the Organizational Plaintiffs cannot obtain any injunctive relief at all under section 1252(f)(1), and thus any preliminary injunctive relief must somehow be limited to the Individual Plaintiffs and certain clients of the Organizational Plaintiffs. Defs. Opp'n 42, 45.

As discussed above, section 1252(f)(1) does not prevent the Organizational Plaintiffs from seeking injunctive relief. This is enough to dispense with the argument that relief must be limited to the Individual Plaintiffs. But even if this were not so, courts in this district have repeatedly rejected Defendants' argument that Article III, equitable practice, and the APA do not authorize a court to enjoin an agency from implementing unlawful policies, even when that injunction would affect the rights of parties not before the court. *See District of Columbia v. USDA*, -- F. Supp. 3d --, 2020 WL 1236657, *32 (D.D.C. March 13, 2020); *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 66-72 (D.D.C. 2019).

First, Defendants argue that Article III forbids the court from enjoining unlawful agency policy where that injunction might benefit third parties not before the court. But this argument confuses Article III's requirement that a party have standing to sue for injunctive relief with the question of an appropriate equitable remedy. "After one plaintiff in a suit satisfies [these standing] requirements . . . Article III's demands are exhausted." *USDA*, 2020 WL 1236657, at *38 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)). Article III does not, of itself, bar injunctive relief that affects the rights of nonparties. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963) (declining to invalidate rule only as to parties before

[20] To avoid any potential ambiguity, Plaintiffs are submitting an additional declaration from Kate Voigt on behalf of Plaintiff AILA making clear that AILA's 15,000 members practice in each U.S. state and territory in which there is an immigration court. *See* Ex. 50, Voigt Decl.

the court because inconsistent application of rule would give those parties "an unconscionable bargaining advantage over other firms in the industry). For example, so long as the plaintiff had standing to sue, public nuisance suits and class actions may lead to injunctions that may benefit nonparties. 2020 WL 1236657, at *39.

Second, Defendants urge that an injunction directed to general agency policy is inconsistent with "the tradition of equity," which requires that equitable relief be provided "only to parties." Opp'n at 43 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (Thomas, J., concurring)). This is not the law in the D.C. Circuit. *See Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (noting that when agency policies are determined to be "unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed" (citation omitted)). Where, as here, plaintiffs challenge facially unlawful agency action, "the agency has breached the plaintiff's (and the public's) entitlement to non-arbitrary decisionmaking," and the wrong alleged cannot be remedied without setting aside the policy itself. *Make the Road*, 405 F. Supp. 3d at 72.

For the same reason, Defendants' argument that the APA does not authorize the court to set aside an unlawful agency regulation, Opp'n at 43, has been rejected as inconsistent with decades of D.C. Circuit precedent. *See USDA*, 2020 WL 1236657, at *32-33. And, as the D.C. Circuit has recognized, a crabbed injunction that limits relief to specific parties is likely to invite a "flood of duplicative litigation" as other parties seek relief from agency action the court has recognized as facially unlawful. *Nat'l Min. Ass'n*, 145 F.3d 1399, 1409-10. Especially at the TRO stage, this problem outweighs Defendants' concern about limited factual differences among the immigration courts and detention centers. *See* Opp'n at 44.

Finally, Defendants argue that nationwide relief is not "warranted based on the harms alleged," but Defendants' boilerplate argument about the general importance of the immigration laws fails to address the specific features of the present crisis. *See* Opp'n at 45. The nature of a pandemic is that an individual's chances of contracting a disease depend on the actions of others. If the Court suspended removal proceedings for only a limited number of persons in immigration detention, others would still be moving between detention facilities and immigration courts, potentially bringing COVID-19 in and out of those facilities. *See* Ex. 27, Jha Decl. ¶ 6 ("[H]olding immigration hearings may spread the disease to detention facilities."). Unless all such proceedings are suspended, the Detained Plaintiffs still face an imminent risk of disease and death. *See id.* (noting CDC warnings that in-person court appearances create risk of "outbreaks in detention centers"). Aside from hazy allusions to the general "public interest" in enforcing the immigration laws, Defendants do not identify any harm that would be done by a brief pause in removal proceedings to allow EOIR and ICE to develop consistent and rational approaches to the present public health crisis. Accordingly, the Court must order the comprehensive temporary relief Plaintiffs seek.

V. Failure To Implement The Requested Relief Will Immediately And Irreparably Injure Plaintiffs

Defendants give short shrift to the question of irreparable harm. Instead of directly addressing Plaintiffs' arguments as to this prong, Defendants assert that they have sufficiently implemented policies to safeguard public health and detained persons' rights. Def. Opp. at 41. But assertion is belied by the voluminous evidence submitted by Plaintiffs. And by arguing that their chaotic, "flexible" approach is superior, Defendants in effect concede that they have failed to ensure a uniform, minimum limit to the health risks that are the subject of this motion.

EOIR's failure to uniformly postpone in-person court proceedings and other deadlines as

appropriate is causing irreparable harm to Plaintiffs' health and safety from increased exposure to COVID-19 and deprives detained persons of adequate representation by counsel. Thus far, EOIR's failures have caused and will continue to cause at least the following irreparable injuries:

- **Participants and Counsel who attended in-person hearings, and members of their households, have tested positive for COVID-19 close in time to those court appearances.** Ex. 40, Terezakis Decl. ¶ 5 (explaining that client described in earlier declaration who was transported to court because motion for continuance was denied began showing symptoms of COVID-19 within one week of court appearance and tested positive within two weeks of court appearance); Ex. 1, Arce Decl. at 1–2; Ex. 3, Church Decl. ¶¶ 9–17; Ex. 9, Terezakis Decl. ¶¶ 39–42.

- **In-person hearing continue to occur because motions to continue have been denied or not been timely decided**. Ex. 9, Terezakis Decl. ¶ 32 (explaining client appeared in person to hearing that he had requested to continue); Ex. 35, Boyle Decl. ¶¶ 8-10 (appearing in person after motion to continue denied despite attorney being unable to procure medical records central to the case due to hospitals' focus on COVID-19 patients, client ultimately denied relief); Ex. 31, Steiner Decl. ¶ 5.

- **In-person hearings continue to occur because motions to appear telephonically have been denied or not been timely decided.** Ex. 31, Steiner Decl. ¶ 10; *see also* Ex. 36, Charles Green Decl. ¶ 6 (driving to courthouse after court failed to call for scheduled hearing).

- **In the absence of uniform policies, practices, and procedures, remote communication is not always functional and does not substitute for in-person hearings.**

- **In-person hearings continue to occur because current remote participation options are inadequate to represent detained persons and attorneys must choose between their health and professional obligations.** *See, e.g.*, Ex. 48, Marzouk Decl. ¶¶ 4-6 (remote teleconference by court failed and attorney attended continued hearing in-person); Ex. 10, Morgan Decl. ¶ 4 (appearing in person out of concern judges files would be missing documents, which turned out to be the case); Ex. 6, Rivera Decl. ¶ 23 (describing unacceptable waiver of right if participating telephonically); Ex. 17, Manzanarez Decl. ¶ 19 (same); Ex. 26, Mendez Decl. ¶ 19 (same); Ex. 3, Church. Decl. ¶ 12 (same); Ex. 33, Scott Decl. ¶ 14 (same); Ex. 13, Bittner Decl. ¶ 27–28 (same); Ex. 38, Bennion Decl. ¶ 4 (describing how witness was neither permitted to appear telephonically nor permitted to appear in-person at the courthouse); Ex. 45, Moccio Decl. ¶ 7 (explaining standing order requiring written statements instead of live testimony, which prejudices low-income witnesses); Ex. 13, Bittner Decl. ¶ 26 (explaining repeated loud, screeching feedback throughout telephonic hearing); Ex. 39, Ford Decl. ¶ 5 (explaining court never called for hearing); Ex. 38, Murtagh Decl. ¶ 4 (court never called for hearing).

- **Continuances are being denied even when sought for reasons relating to COVID-19, prejudicing detained persons' rights**. Ex. 31, Steiner ¶ 10 (reports of attorney's request to postpone or appear telephonically denied); Ex. 42, Weiner ¶ 9 (motion to continue denied causing attorney to submit incomplete asylum application due to inability to communicate with clients); Ex. 41, Lingat ¶¶ 3-15 (denying motion to continue even when attorney explained inability to communicate with client and refusing to reconsider after attorney tested positive for COVID-19 without resubmission with a doctor's note, which attorney was unable to obtain).

At the same time, ICE's current policies do not uniformly prevent the following, causing irreparable harm to Plaintiffs' constitutional and statutory rights:

- Attorneys face tremendous difficulty making remote contact with their detained clients.[21]
- Detained persons experience excessively long wait times when attempting to remotely contact their counsel.[22]
- Legal calls are not uniformly free.[23]
- Legal calls are sometimes monitored or otherwise not confidential.[24]
- Video teleconference options are not uniformly available or adequate.[25]

[21] *See, e.g.*, Ex. 3, Church Decl. ¶ 5; Ex. 4, Lopez Decl. ¶ 5; Ex. 6, Rivera Decl. ¶ 9; Ex. 11, Miller Decl. ¶ 10; Ex. 20, Pengilley Decl. ¶¶ 7-11; Ex. 45, Moccio Decl. ¶¶ 3-5.

[22] *See, e.g.,* Ex. 5, Rodriguez Cedeno Decl. ¶¶ 10; Ex. 6, Rivera Decl. ¶ 7; Ex. 16, Lunn Decl. ¶ 6.

[23] *See, e.g.,* Ex. 3, Church Decl. ¶ 7; Ex. 8, Saenz Decl. ¶ 11; Ex. 11, Miller Decl. ¶ 10; Ex. 14, Ziesemer Decl. ¶ 6; Ex. 15, Greenstein Decl. ¶ 7; Ex. 17, Manzanarez Decl. ¶ 16; Ex. 18, Estrada Fernandez ¶¶ 9-10; Ex. 20, Pengilley Decl. ¶ 4.

[24] *See, e.g.,* Ex. 3, Church Decl. ¶ 7; Ex. 6, Rivera Decl. ¶ 12; Ex. 8, Saenz Decl. ¶ 11; Ex. 15, Greenstein Decl. ¶¶ 7-8; Ex. 16, Lunn Decl. ¶ 5; Ex. 17, Manzanarez Decl. ¶ 17; Ex. 18, Estrada Fernandez Decl. ¶¶ 9-11; Ex. 35, Boyle Decl. ¶ 5; Ex. 41, Lingat Decl. ¶¶ 4-6; Ex. 42, Weiner Decl. ¶ 7.

[25] *See, e.g.,* Ex. 4, Lopez Decl. ¶ 6; Ex. 8, Saenz Decl. ¶ 10; Ex. 13, Bittner Decl. ¶ 11; Ex. 15, Greenstein Decl. ¶ 8; Ex. 16, Lunn Decl. ¶¶ 4, 6.

- Teleconference technology is inconsistent to the point of rendering some conversations impossible.[26]

Together, these failures by EOIR and ICE effect a deprivation of the right to counsel. Detained persons are unable to communicate with their attorneys, including to effectively prepare for hearings. *See, e.g.* Ex. 3, Church Decl. ¶ 15 (client denied bond and attorney felt she was unable to adequately prepare client because she could not conduct in-person pre-hearing meeting); Ex. 8, Saenz Decl. ¶ 15 (attorneys concerned that without continuances they will be forced to proceed with cases where they've been unable to adequately prepare for hearings); Ex. 42, Weiner Decl. ¶ 9 (motion to continue denied causing attorney to submit incomplete asylum application due to inability to communicate with client); Ex.41, Lingat Decl. ¶¶ 3-15; Ex. 34, Sud-Devaraj Decl. ¶ 8.

The lack of adequate remote communication also denies detained persons a reasonable opportunity to obtain counsel in the first place. *See* Ex. 46, Matthew Green Decl. ¶¶ 3–4 (attorney reporting inability to schedule calls with two separate potential clients, resulting in these detained persons having to proceed unrepresented); Ex. 21, Napoles Vaillent Decl. ¶¶ 7–8 (detained persons describing inability to obtain counsel due to unavailability of alternatives to in-person meetings with attorneys); Ex. 5, Rodriguez Cedeno Decl. ¶ 7–8 (same). Contrary to Defendants' arguments, these harms are not "speculative." As demonstrated through the declarations cited above, they are actually occurring.

As to the risk to health, Defendants repeatedly assert that in the absence of "specific facts showing that the particular facility had any confirmed cases [of COVID-19]," relief is not

[26] *See, e.g.,* Ex. 4, Lopez Decl. ¶ 8; Ex. 15, Greenstein Decl. ¶ 8; Ex. 16, Lunn Decl. ¶ 4; Ex. 18, Estrada Fernandez Decl. ¶¶ 9-12; Ex. 42, Weiner Decl. ¶ 8.

warranted. *See, e.g.*, Def. Opp. at 41.[27] Even if this were true—which it is not—ICE has now reported 77 confirmed cases in 24 facilities. These include the facilities in which four of five Plaintiffs are detained, and the fifth Plaintiff is detained in the same town as an ICE detention center which has two reported cases—to say nothing of the unreported cases that may exist in any of these facilities, especially in light of the high proportion of infected people who are asymptomatic and the widespread lack of testing.[28]

Nor can injuries to health necessarily be remedied on appeal. Some persons who contract COVID-19 will die, and some will suffer lasting health effects; there are also broader societal impacts when hospital capacity is exceeded. These facts weigh decisively in favor of granting Plaintiffs' requested interim relief. Order Granting Plaintiffs' TRO at 11, *Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020). In *Torres*, plaintiffs sought a TRO against ICE seeking substantially similar relief to what Plaintiffs seek here. On Saturday, April 11, the court granted the requested relief, finding:

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[27] To support their contention that Plaintiffs' risk of COVID-19 infection is merely "conjectural," Defendants cite cases in which the risk of injury was far less certain, and was factually a far cry from the risks of infection that have forced hundreds of millions of Americans into near-lockdown conditions. *See Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 21-22 (2008) (questioning likelihood of irreparable injury to sea life where sonar training program at issue had been conducted for forty years without any documented injury to marine mammals); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (finding likelihood and imminence not demonstrated where injury arose from reduction of number of senior positions into which Navy chaplains might be promoted in the future); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674-75 (D.C. Cir. 1985) (finding injury not shown to be likely where it depended on hypothetical chain of causation involving multiple economic actors). Defendants' reliance on *Dawson v. Asher*, No. 20-cv-0409, 2020 WL 1304557, at *2 (W.D. Wash. Mar. 19, 2020), is also misplaced, as it is already out of date and factually inapplicable. Here, unlike in *Dawson*, the Detained Plaintiffs are detained in facilities with confirmed cases. Moreover, the spread of COVID-19 has become more overwhelming in the weeks since *Dawson* was decided, which merely served to emphasize the need for immediate relief to stop irreparable harm.

[28] U.S. Immigrations and Customs Enforcement, Ice Guidance on COVID-19, https://www.ice.gov/coronavirus (Apr. 14, 2020).

> Plaintiffs have shown a likelihood of irreparable harm, given the high stakes of immigration proceedings. Plaintiffs claim that without access to counsel, they are likely to face denial of asylum and ultimately to be deported, despite meritorious claims. (App. at 28.) Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("The severity of deportation. . . underscores how critical it is" for immigrants to have effective counsel). Irreparable harm is also established, because the health of detainees may depend on their ability to petition for release. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011); *see also Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005). The harm to the attorney plaintiffs is of a different order, but is the flip side of the same constitutional coin, and is irreparable. "The deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted).

Id. at 11.

This Court should do the same.

VI. The Balance Of Equities Weighs In Plaintiffs' Favor

The relief Plaintiffs seek is limited and not overbroad. Plaintiffs ask this Court to temporarily postpone in-person detained hearings and ensure that adequate remote access is made available. The National Association of Immigration Judges has stated that such measures "can be readily accomplished." Ex. 32 at 3. Courts around the country have implemented similar procedures, postponing hearings and replacing in-person hearings with robust remote hearings. *See* TRO Mot. at 20-21. Unsurprisingly, Defendants never explain why ensuring uniform access to minimally functional remote communication technology would constitute a harm to them or to anyone, much less how any such harm could outweigh the considerations detailed herein;[29] nor do Defendants concretely explain why the short stay of in-person detained hearings (which can be

[29] Furthermore, while Plaintiffs request this Court to order Defendants to implement sensible procedures to postpone or replace in-person detention hearings, "any administrative burden will be minor based on the limited scope" of Plaintiffs' relief, relief which already apparently "mirror[s] policies already envisioned by Defendants' own regulations and guidance." Order Granting Plaintiffs' TRO at 11, *Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020); *see, e.g.*, Def. Opp. at 1-2 (describing EOIR's commitment to remote hearings and ICE's commitment to provide "some number" of free calls per week).

quickly rescheduled to take place remotely) can conceivably outweigh the immediate and exponentially growing risks to the health of Plaintiffs, their members, and of the general public.

VII. The Requested Relief Is In The Public Interest

As COVID-19 spreads across the United States, public health experts agree that the public interest requires slowing the pace of that spread by implementing social distancing policies. "Limiting face-to-face contact with others is the best way to reduce the spread of" COVID-19.[30] Yet Defendants never address the fact that their policies directly undermine this effort. Plaintiffs' requested relief—which would sharply decrease in-person contact in the immigration system—is "absolutely in the public's best interest" considering that "[t]he public has a critical interest in preventing the further spread of the coronavirus." *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020).

"[T]he public interest in promoting public health is served by efforts to contain the further spread of COVID-19, particularly in detention centers, which typically are staffed by numerous individuals who reside in nearby communities." *Ortuño v. Jennings*, No. 20-cv-2064-MMC, Docket No. 38 (N.D. Cal. Apr. 8, 2020) at 8. The same is true for immigration courts, which expose detained persons, witnesses, judges, staff, counsel, and the public at large to the coronavirus and risk these individuals spreading the virus further in their own communities.

Furthermore, Defendants' failure to ensure that detained persons have meaningful and effective access to counsel, so as to vindicate their constitutional and statutory rights, promotes the public interest because "the public has an interest in the orderly administration of justice and in preventing needless administrative appeals, delay, and expense produced by the denial of access

[30] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html

to counsel and by non-adherence to statutory and constitutional rights." *Torres v. Department of Homeland Security*, No. 18-cv-02604 (C.D. Cal. April 11, 2020) at 11.

Defendants fundamentally mischaracterize the nature of Plaintiffs' requested relief, and on that misunderstanding argue that the public interest favors "enforcement of United States immigration laws." Def. Opp. at 39-40. Plaintiffs do not seek the suspension of the enforcement of immigration laws. To the contrary, Plaintiffs agree that "[t]he public interest is . . . best served by" the implementation of "orderly processes and protocols designed to safeguard the essential functions of the immigration system." Def. Opp. at 39-40. The chaos created by Defendants' failure to implement sensible and uniform policies to respond to the health crisis is a far cry from the "orderly processes" which the public interest calls for; Plaintiffs' proposed relief ensures that such protocols are developed and implemented.

CONCLUSION

For the foregoing reasons, this Court should GRANT Plaintiffs' Motion for a Temporary Restraining Order.

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Washington, D.C.

Respectfully submitted,

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