

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

This Court should deny Plaintiffs’ extraordinary request for this Court to broadly suspend in-person immigration-court hearings, assume oversight over the immigration-detention system, and order the release of tens of thousands of aliens despite the laws enacted by Congress. The federal government is responding expeditiously, carefully, and thoroughly to address the challenges presented by COVID-19. That comprehensive response includes tailored and effective measures taken by the Executive Office for Immigration Review (EOIR) over the immigration courts and by U.S. Immigration and Customs Enforcement (ICE) over immigration detention facilities.

The United States’ immigration courts, which adjudicate removability and claims for relief from removal of hundreds of thousands of aliens, have faced the same considerable challenges as other court systems have from the COVID-19 pandemic. The immigration courts have responded swiftly to those challenges by postponing all immigration hearings for non-detained aliens through May 1, 2020; limiting in-person appearances in courts where possible; and, reminding immigration judges—who are independent administrative judges—of their authority to waive appearances, grant continuances, decide cases on the papers, and conduct hearings by video or telephone where possible to limit the risk of exposure. *See* Ex. 1, Decl. of EOIR Director James McHenry ¶¶ 44–54, 68–70; Ex. 2, EOIR Policy Mem. 20-10, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak (EOIR Mem.). Similarly, ICE “is taking necessary and prompt measures” to curb the spread of COVID-19 while still permitting robust access to counsel and ensuring the safety of staff, detainees, and legal representatives. Ex. 3, E COVID-19 Pandemic Response Requirements (ICE Pandemic Response) 1; Ex. 4, Decl. of Russell Hott, Acting Asst. Director of ICE’s Custody Management Division ¶¶ 19–30. Such steps potentially include “[a]dding all immigration attorneys of record to the Talton Pro-bono platform,”

“[l]everaging technology (e.g., tablets, smartphones) to facilitate attorney/client communication” and “[w]orking with the various detention contractors and telephone service providers to ensure that all detainees receive some number of free calls per week.” ICE Pandemic Response 12–13.

Against these efforts, Plaintiffs—three organizations and five detained aliens—move for an extraordinary order that would shut down all remaining immigration-court operations *everywhere* and require the release of tens of thousands of criminal and other aliens unless ICE immediately implements Plaintiffs’ preferred policies. Their TRO Motion centers on the first three claims in their Complaint alleging that EOIR’s and ICE’s COVID-19 responses are arbitrary and capricious under the Administrative Procedure Act (APA), violate the Individual Plaintiffs’ statutory right to counsel under the Immigration and Nationality Act (INA), and violate the Individual Plaintiffs’ right to procedural due process. *See* Mot. for Temporary Restraining Order (Mot.; ECF No. 7); Compl. ¶¶ 66–82. And although they ask for universal relief applicable to all immigration courts and all immigration detention facilities (including, apparently, those operated by state and local authorities), Plaintiffs do not purport to represent a class or raise class claims.

Like the only other court to address similar claims seeking universal relief, *see Las Americas v. Trump*, No. 19-cv-2051, 2020 WL 1671584, at *2 (D. Or. Apr. 2, 2020), this Court should reject this request.

To start, this Court does not have jurisdiction to grant Plaintiffs’ TRO Motion. *First*, the Individual Plaintiffs lack Article III standing to bring their APA claim and their access-to-counsel and procedural-due-process claims because their requests rest on speculation. Plaintiffs are either unrepresented or have not explained why remote communication is insufficient, and none of them have imminent immigration-court hearings that cannot be conducted by remote means. *Second*, the Organizational Plaintiffs fail to establish standing because they do not identify a specific

“legally protected interest” of the organizations or their members that has been impinged upon and do not establish that the relief they seek is likely to redress their alleged injuries. They also cannot state an APA claim because their interests are not within the INA’s zone of interests. *Third*, this Court lacks jurisdiction over all claims because the INA requires “all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States” to be reviewed exclusively in federal courts of appeals—not district courts—after exhausting administrative proceedings, 8 U.S.C. §§ 1252(b)(9), 1252(a)(5), including Plaintiffs’ “policies-and-practices challenges,” right-to-counsel claims, and procedural-due-process challenges, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029, 1033, 1035 (9th Cir. 2016); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 76 (D.D.C. 2018). *Fourth*, Congress has prohibited this Court from granting Plaintiffs’ requested injunctive relief against the operation of statutes governing removal proceedings and alien detention. *See* 8 U.S.C. § 1252(f)(1) (“Limit on Injunctive Relief”). *Finally*, the INA prohibits this Court from requiring EOIR to conduct immigration proceedings exclusively by remote means—which, in any event, EOIR has already “remind[ed]” its immigration judges that they may do. EOIR Mem. 2. The use of video- or teleconferencing in immigration proceedings is committed by statute to the government’s discretion, *see* 8 U.S.C. § 1229a(b)(2)(A), and the INA prohibits district-court review of the government’s discretionary determinations, *id.* § 1252(a)(2)(B)(ii).

Even if this Court possesses jurisdiction, it should still deny a TRO because all injunctive factors favor the government. *First*, Plaintiffs cannot succeed on the merits of their APA claim or their right-to-counsel and procedural-due-process claims. The APA may not be invoked to demand “day-to-day agency management,” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004), which is committed to agency authority and is entitled to deference, *see Vermont Yankee*

Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978), particularly in the immigration context. EOIR and ICE are exercising that authority soundly, and Plaintiffs provide no basis to hamstring these agencies’ abilities to respond to the evolving health crisis. Plaintiffs also fail to explain how EOIR’s decision not to suspend certain essential in-person immigration hearings nationwide or ICE’s disease-prevention or attorney-access protocols are “tantamount to denial of counsel.” *Biwot v. Gonzalez*, 403 F.3d 1094, 1098 (9th Cir. 2005). Nor could they, since such claims require a backward-looking inquiry into “the actual substance of the hearing[s],” *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004)—which, here, have not occurred—to determine whether there was a prejudicial violation. *Second*, Plaintiffs’ speculative claims of future injury do not outweigh the public interest in retaining EOIR’s and ICE’s flexibility to respond to changing circumstances. And even if emergency relief were appropriate, the scope of Plaintiffs’ requested relief is overbroad and risks harm to individuals who Plaintiffs purport to help. At a minimum the Court must limit any relief to the Individual Plaintiffs named in the complaint and any actual clients of the Organizational Plaintiffs’ members whom they can identify as having imminent immigration-court hearings.

BACKGROUND

A. The Executive Office for Immigration Review and Its Response to COVID-19.

Immigration-Court System. EOIR is a component of the U.S. Department of Justice (DOJ) that oversees a system of 69 immigration courts located across the country. McHenry Decl. ¶ 9. Generally, when the U.S. Department of Homeland Security (DHS) seeks to remove an alien from the United States, DHS issues a “notice to appear” that explains the “charges against the alien and the statutory provisions alleged to have been violated.” 8 U.S.C. § 1229. The INA sets out a range of grounds that can make an alien removable from the United States. *See id.* §§ 1182, 1227. Under 8 U.S.C. § 1229a, immigration judges decide whether aliens are removable and resolve claims

from individual aliens seeking relief from removal. *Id.* § 1229a(a)(1). Congress has mandated that certain categories of aliens must be detained during removal proceedings. *See, e.g., id.* § 1226(c). For other categories of aliens, immigration judges may conduct bond hearings and grant release on bond in certain circumstances. *See id.* § 1226(a); *see also* McHenry Decl. ¶¶ 8–43 (describing proceedings in immigration court). Aliens may appeal from the immigration judges’ decisions, including decisions on custody and bond, to the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.38. An alien may seek judicial review of a BIA decision by filing a petition for review in the court of appeals for the circuit where the immigration court that heard the claim is located. 8 U.S.C. §§ 1252(a)(5), (b)(9).

The Attorney General oversees EOIR, and he has authority to establish regulations governing the operation of the immigration courts and to carry out the provisions of the INA. *See* 8 U.S.C. § 1103(g). “[T]o assist in the expeditious, fair, and proper resolution of matters” before the immigration courts, 8 C.F.R. § 1003.12, there are various regulations that govern the conduct of removal proceedings, including regulations giving immigration judges authority over “scheduling cases,” *id.* § 1003.18; and to make custody determinations, *id.* § 1003.19; grant continuances “for good cause shown,” *id.* § 1003.29; waive the “presence of the parties” in certain circumstances or permit telephonic or video hearings, *id.* § 1003.25; limit public access to hearings, *id.* § 1003.27; “set and extend time limits” for filings, *id.* § 1003.31; and “establish local operating procedures,” *id.* § 1003.40. Immigration judges “exercise the powers and duties delegated to them by the [INA] and by the Attorney General through regulation,” and “[i]n deciding the individual cases before them,” “exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.” *Id.* § 1003.10(b). “In all cases,

immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.” *Id.*

Immigration-Court Response to the Pandemic. In response to the outbreak of COVID-19, EOIR “has followed a path similar to that of other courts” that have “grappled with the operational challenges posed by the outbreak,” and have not closed entirely but have scaled back operations to “what may be characterized as essential or critical services,” including processing filings by mail and email, adjudicating motions or filings that can be resolved without a hearing, “conduct[ing] critical hearings of individuals in custody,” and issuing announcements on operational status as facts develop. McHenry Decl. ¶¶ 44–45.

On March 18, 2020, EOIR “postponed all removal hearings of non-detained aliens through at least April 10, 2020,” and later postponed hearings for non-detained aliens through May 1. McHenry Decl. ¶¶ 53, 68. On March 18, the Director of EOIR also issued a Policy Memorandum modeled on orders issued by federal district courts adopting guidance for “all immigration court cases effective immediately” to “promote the safety of immigration court personnel, representatives, aliens, attorneys for [DHS], and the general public during the ongoing national emergency related to the COVID-19 outbreak.” *Id.* ¶¶ 47–49; EOIR Mem. 1–4.

Among other things, EOIR restricted access to immigration courts for individuals at risk of having COVID-19. EOIR Mem. 2; McHenry Decl. ¶¶ 47–48. EOIR also reminded immigration judges of their authority to take a range of actions “for preventative purposes to minimize contact among individuals involved in immigration proceedings,” and advised that immigration judges “may consider applicable public health guidance in exercising these authorities.” EOIR Mem. 2; *see also* McHenry Decl. ¶¶ 47–49. To this end, the Director advised immigration judges that they “may waive the presence of represented aliens”; “grant a motion for a continuance upon a showing

of good cause”; “place reasonable limitations upon the number in attendance at a hearing” or “hold a closed hearing”; “issue standing orders, including orders regarding telephonic appearances by representatives”; waive various requirements that would normally apply to the proceedings; conduct “hearing by video teleconferencing (VTC) where operationally feasible” or by telephone in certain circumstances; and, “encourage[d] immigration judges to resolve as many cases as practicable without the need for a hearing and, thus, to minimize contact among individuals involved in immigration proceedings.” EOIR Mem. 2–3; *see also* McHenry Decl. ¶¶ 47–49.

The Director also noted that while “the ultimate disposition of any particular case remains committed to the immigration judge in accordance with the law,” he “encouraged [parties] to resolve cases through written pleadings, stipulations, and joint motions” where possible, noted holding certain categories of hearings was “disfavored,” and provided that hearings that must go forward, such as for detained aliens, should be conducted by remote means “to the maximum extent practicable in accordance with the law.” EOIR Mem. 3–4; McHenry Decl. ¶¶ 47–49. EOIR thus committed to “using alternative hearing mediums” as much as possible to “further minimize in-person interaction and reduce the risk of spread of COVID-19.” EOIR Mem. 3.

Although the immigration courts have significantly scaled back operations, they continue to carry out essential functions such as holding bond hearings for detained aliens or other hearings that may lead to an alien’s release. McHenry Decl. ¶¶ 31–36. The outbreak has generated demand for EOIR to hold more or more-immediate hearings, including litigation and threatened litigation in other district courts requesting that immigration courts expedite certain types of hearings. *See id.* ¶¶ 34, 67. For hearings that must proceed, EOIR has developed court-specific plans to ensure that the hearings can take place through remote means and are consistent with social-distancing practices even when individuals are in the same location, such as where immigration courts are

located in detention facilities. Ex. 5, Decl. of Acting Chief Immigration Judge Christopher Santoro ¶¶ 6–11. Immigration courts must also remain open to accept certain urgent filings, including motions to reopen or stay removal, and EOIR has now provided means for aliens to file such motions electronically in every immigration court and the BIA. *Id.* ¶¶ 61, 71, 93. Closing courts to such motions would leave aliens without the ability to seek urgent relief from removal. *Id.* ¶ 61. Various statutes and court orders require immigration judges to take certain actions within strict timelines, and closing the immigration courts completely may violate those orders. *Id.* ¶ 67.

Immigration judges have authority to extend deadlines if necessary and to excuse untimely filings caused by the outbreak where appropriate, as courts have done with other emergencies. McHenry Decl. ¶¶ 21–26; *see also* 8 C.F.R. §§ 1003.18, 1003.29, 1003.31. Immigration judges also have authority to issue standing orders and adopt local operating procedures, and many courts “have done so over the past three weeks in response to the COVID-19 and have tailored them to the particular circumstances of their respective dockets.” McHenry Decl. ¶ 40. For aliens who receive *in absentia* orders, immigration judges can reopen the proceedings for aliens who show that they did not attend the hearing because they did not receive proper notice or for other exceptional circumstances. *Id.* ¶ 18.

Finally, EOIR has set up systems and methods for communicating updates and changes to immigration-court operations as they develop, including through posting updates on EOIR’s website. McHenry Decl. ¶¶ 73–78. EOIR has also worked to correct any earlier inconsistent communications and has developed additional procedures for ensuring clear, consistent, and easily accessible communications going forward. *Id.* ¶¶ 59–60.

B. U.S. Immigration and Customs Enforcement and Its Response to COVID-19.

ICE is a DHS agency charged with protecting the United States from cross-border crime and illegal immigration that threatens national security and public safety. Hott Decl. ¶ 5. ICE’s

Enforcement and Removal Operations’ (ERO) mission is “to identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts.” *Id.* ¶ 6. Congress mandated that certain aliens must be detained during removal proceedings or pending their removal, *see, e.g.*, 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1225(b)(2)(A), 1226(c), 1231(a)(2), and ICE retains discretion to “arrange for appropriate places of detention” during removal proceedings or prior to removal, *id.* § 1231(g)(1). ICE houses these aliens in ICE Health Service Corps (IHSC)-staffed facilities; non-IHSC-staffed, ICE-dedicated facilities; or contract facilities while they await adjudication of their case or removal. *See Hott Decl.* ¶¶ 6, 11–13.

ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention-and-control protocols, and issuing guidance to staff for the screening and management of potential exposure among detainees. *See Hott Decl.* ¶ 20. ICE directed its field leadership to review their detainees’ cases and consider release for those who are vulnerable to COVID-19. Ex. 6, Assistant Director Peter Berg., Field Operations, “Updated Guidance: COVID-19 Detained Docket Review” 1–2 (ICE Docket Guidance). Such detainees include those who are over 60, pregnant or who have recently given birth, and those with a chronic illness that makes them immune-compromised. *Id.* The presence of any of these factors is a “significant discretionary factor weighing in favor of release” for those who are eligible. *Id.*

To safeguard those in its custody, ICE has implemented multiple measures that are in compliance with CDC guidance. *See ICE Pandemic Response* 5. These CDC-compliant measures include robust screening of detainees for COVID-19 symptoms or potential exposure and follow-on monitoring, treatment, and cohorting for those detainees who display symptoms or test positive,

and other measures to limit exposure to COVID-19 from individuals entering these facilities. *See* ICE Pandemic Response 5–16; Hott Decl. ¶¶ 19–23.

ICE remains committed to ensuring that detainees are able to communicate with legal representatives and has issued guidance to the facilities to that effect. Hott Decl. ¶¶ 24–27. Individual facilities have implemented ICE guidance in various ways to correspond to each individual facility’s options for providing robust access to attorney-client communication by various means. For example, the La Palma Correctional Center in Eloy, Arizona, where Plaintiffs Napoles Vaillant, Rodriguez Ceden, and Guerrero-Cornejo are detained, Compl. ¶¶ 14, 15, 17, allows in-person and telephonic attorney conferences. *See* Ex. 7, Decl. of Jason Ciliberti ¶¶ 25–33. In-person visits are permitted on Monday through Friday from 8:00 AM to 5:00 PM, and on weekends from 8:00 AM to 12:00 PM, and can be scheduled based on an attorney’s request. *Id.* ¶ 25. Any visitors—including attorneys, consular officers, and legally mandated Congressional visitors—must wear personal protective equipment (PPE) and be screened for COVID-19 exposure prior to entering. *Id.* ¶ 19. Attorneys can also request that their clients call them by sending an email to a dedicated inbox, which will be delivered to the detainee by facility staff. *Id.* ¶ 27.a. Phones are available throughout the facility, and attorney call are not recorded. *Id.* ¶¶ 28.a, 29.a, 31. For example, on April 6, 2020, Plaintiff Guerrero-Cornejo was given a message to call his attorney that provided the phone number he should call. *Id.* ¶ 30. Since January 3, 2020, Plaintiff Rodriguez Ceden has had 19 official attorney visits, with the four most recent occurring between March 4 and March 12, 2020. *Id.* Since January 3, 2020, Plaintiff Enrique Napoles Vaillant has had 18 official attorney visits, with the four most recent occurring in the first two weeks of March. *Id.*

The Eloy Detention Center in Eloy, Arizona, where Plaintiff Arliaga-Cobas is detained,

Compl. ¶ 16, allows in-person and telephonic attorney conferences. *See* Ciliberti Decl. ¶¶ 25–33. In-person visits are permitted daily from 8:00 AM to 5:00 PM, or outside those hours if requested. *Id.* ¶ 25. Any permitted visitors must wear PPE and be screened for COVID-19 exposure prior to entering the facility. *Id.* ¶ 19. Attorneys can also request that their clients call them by sending a message to a dedicated inbox, which will be delivered to the detainee by facility staff. *Id.* ¶ 27.b. Phones are available throughout the facility, including in private booths. *See id.* ¶¶ 28.b, 29.b. Calls with attorneys are not recorded. *Id.* ¶ 31.

The Pine Prairie ICE Processing Center in Pine Prairie, Louisiana, where Plaintiff Velasquez Quiala is detained, Compl. ¶ 18, allows in-person, telephone, and VTC attorney-client conferences. Ex. 8, Decl. of Alcide R. Benoit ¶¶ 27–38. Attorneys can schedule phone or VTC conferences with their clients by emailing a request to a dedicated inbox the preceding day, along with the date and time of the requested conference, some basic information about the detainee and the attorney, and a Skype address and phone number. *Id.* ¶ 28. In-person visits are scheduled similarly. *Id.* ¶ 31. Detainees may request to call their attorneys through their case manager, who contacts the attorney and schedules a call. *Id.* ¶ 30. Attorneys who visit the facility in-person must wear PPE and be screened for COVID-19 exposure prior to entering the facility. *Id.* ¶ 33–34. Attorney visits occur in the open-space visitation area, where attorneys and their clients are seated six feet apart with a table in between. *Id.* ¶ 36. Plaintiff Velasquez Quiala had a VTC conference with his attorney on March 6, 2020. *Id.* ¶ 42.

Other facilities discussed in Plaintiffs’ motion papers also have facilitated attorney access. The Otay Mesa Detention Center in California allows attorneys and detainees to meet via 26 VTC units in the facility’s lobby or by telephone. Ex. 9, Decl. of Kelley Beckhelm ¶¶ 24–25. Attorneys may meet their clients at the Stewart Detention Center in Georgia in person with a secure divider

in between, or communicate confidentially by telephone or VTC. Ex. 10, Decl. of John Bretz ¶ 18. The Elizabeth Contract Detention Facility in Newark, New Jersey, can accommodate nine one-hour telephonic legal visits in three private rooms per day, for a total of 27 timeslots for its detainees. Ex. 11, Decl. of Jose Simao ¶ 11. The Butler County Jail in Hamilton, Ohio, allows attorneys with PPE to visit clients in person and provides detainees with surgical masks, or allows to meet with clients through closed circuit audio/video equipment from the lobby. Ex. 12, Decl. of Christopher L. LaBier ¶ 22. And the Folkston ICE Processing Center gives detainees access to telephones, mail, and Skype-enabled devices. Ex. 13, Decl. of Brian Allen ¶ 17.

C. This Lawsuit

Plaintiffs are three organizations that assist immigration attorneys (the Organizational Plaintiffs) and five individuals housed at three immigration detention facilities in Arizona and Louisiana (the Individual Plaintiffs). Compl. ¶¶ 10–18. They filed this lawsuit on March 30, 2020, alleging that EOIR has failed to enact nationwide policies to address COVID-19 in immigration courts and that ICE has failed to enact nationwide policies with respect to attorney-client visitation and participation in court proceedings while in detention facilities, and that EOIR’s and ICE’s existing policies (which differ by locality) violate certain statutory and constitutional provisions. Compl. ¶¶ 36–65, 70, 77, 81, 91–93, 100, 109. Plaintiffs do not assert any class claims, but they ask the Court to suspend in-person immigration hearings nationwide and order EOIR and ICE to promulgate a variety of nationwide procedures or, in the alternative, to temporarily release tens of thousands of detained aliens. *Id.* at 27–28. The Individual Plaintiffs assert claims under the INA, the Administrative Procedure Act (APA), the First Amendment, and the Fifth Amendment’s Due Process Clause. *Id.* ¶¶ 66–82, 86–93, 101–09. The Organizational Plaintiffs assert claims under the APA, the First Amendment, and the Due Process Clause. *Id.* ¶¶ 66–72, 83–85, 94–100.

On April 8, 2020, Plaintiffs moved for a TRO on only their APA claim (raised by all

Plaintiffs) and their right-to-counsel and procedural-due-process claims (raised only by the Individual Plaintiffs). Mot. 30 n. 58; see Compl. ¶¶ 73–77. They seek an order requiring EOIR to “[s]uspend all in-person non-bond hearings and immediately convert all in-person bond hearings to remote hearings; [p]romulgate policies and procedures that, at a minimum, permit remote court appearances by all necessary participants (*e.g.*, court personnel, detained persons, counsel, interpreters, transcription); and [p]ermit continuances as of right due to COVID-19,” Mot. 2–3, and requiring ICE to “[p]romulgate policies and procedures enabling remote interconnection by and with all necessary participants in court appearances; [f]acilitate communications between detained persons and immigration courts to enable the submission of requests for rescheduling and for continuance; and [d]evelop policies, procedures, and facilities that will enable those who are detained to obtain, and counsel to provide legal advice remotely and without monitoring, and with adequate protection of human health,” Mot. 3; *see also* Proposed Order 1–6 (ECF No. 7-37).

LEGAL STANDARD

“A temporary restraining order is an extraordinary remedy, one that should be granted only when the moving party, by a clear showing, carries the burden of persuasion.” *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011). “The court considers the same factors in ruling on a motion for a temporary restraining order and a motion for a preliminary injunction.” *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001). The movant must demonstrate (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that the proposed injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The All Writs Act, 28 U.S.C. § 1651(a), does not absolve a party seeking a TRO from satisfying the four-factor test for preliminary relief. *See Belbacha v. Bush*, 520 F.3d 452, 457 (D.C. Cir. 2008); *Kiyemba v. Obama*, 561 F.3d 509, 513 n.3 (D.C. Cir. 2009).

When the movant seeks mandatory, rather than prohibitory, injunctive relief, the movant “must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction.” *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997) (quotation makes and citation omitted), *aff’d*, 159 F.3d 636 (D.C. Cir 1998). A mandatory preliminary injunction “should not issue ... unless the facts and the law clearly favor the moving party.” *Nat’l Conference on Ministry to Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (internal quotations omitted).

ARGUMENT

I. This Court Does Not Have Jurisdiction to Grant Plaintiffs’ TRO Motion.

A. The Individual Plaintiffs Lack Article III Standing.

The Individual Plaintiffs lack Article III standing to bring their APA claim (Claim I) or access-to-counsel claims (Claims II & III) because they do not “satisfy the threshold requirement” of “alleg[ing] an actual case or controversy.” *O’Shea v. Littleton*, 414 U.S. 488, 493 (1974). Where, as here, the relief sought is prospective relief only, a plaintiff must demonstrate a risk of future injury that is both “real” and “immediate” and neither “conjectural” nor “hypothetical.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983). A plaintiff seeking forward-looking relief bears the burden of proving the existence of a future “threatened injury [that is] certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013). Plaintiffs’ requests for relief fall short because they rest on speculation related to immigration-court hearings and access to counsel, and the speculative effect of EOIR’s and ICE’s policies on those events, but Plaintiffs are either unrepresented or have not explained why telephonic communication is insufficient, and none of them have imminent immigration-court hearings that cannot be conducted by remote means.

Plaintiffs’ speculative allegations of harm do not raise any concrete injury sufficient to

establish standing or obtain injunctive relief. Only two Plaintiffs have submitted declarations in support of the TRO motion, and neither identifies any impending or concrete injury. *See* Pls.’ Ex. 5, Rodriguez Cedenó Decl. (ECF No. 7-6); Pls.’ Ex. 21, Napoles Vaillant Decl. (ECF No. 7-22). Neither of them is represented by counsel or has an imminent hearing in immigration court—Napoles Vaillant’s hearing is not until June 22, and is set to be done “by video,” Vaillant Decl. ¶ 6; Rodriguez Cedenó alleges he had a hearing set for April 2, Cedenó Decl. ¶ 6, but it has been continued until August 5, 2020, Ex. 14, Decl. of Elizabeth Burgus ¶ 3.¹ As to the three remaining Individual Plaintiffs: Aliaga-Cobas does not have counsel and does not have a hearing until June, Compl. ¶ 16; Guerrero-Cornejo has counsel but has not given any reason why telephone access at the La Palma facility is insufficient, *id.* ¶ 17, and Velasquez Quiala has counsel but does not allege that telephone access at the Pine Prairie facility is somehow inadequate, *id.* ¶ 18. *See also* Ciliberti Decl. ¶ 28.a. (“[D]etainees [at La Palma] can schedule a free call with a legal representative from the telephone in [the] visitation [area]. ... There is no limitation placed on the length of the call.”); Benoit Decl. ¶¶ 27–32 (attorneys visits at Pine Prairie can occur in person, by telephone, or Skype).

Claims based on potential exposure to diseases are generally limited to cases where the disease has been shown to exist in a particular facility and is “sure or very likely” to spread and cause injury, *see Helling v. McKinney*, 509 U.S. 25, 32 (1993), as opposed to Plaintiffs’ speculation about hypothetical future exposure to a virus that has not been shown to be spreading in the facilities at issue, *see Dawson v. Asher*, No. 20-cv-0409, 2020 WL 1304557, at *2 (W.D. Wash. Mar. 19, 2020) (denying TRO because “there is no evidence that anyone at [the ICE facility] has COVID-19, and Plaintiffs do not address the measures Defendants are taking to prevent such

¹ Plaintiffs also submitted a declaration from one other alien, but he is not a Plaintiff and his allegations about an April 2 hearing are out-of-date, *see* Pls.’ Ex. 18, Estrada Fernandez Decl. ¶ 7 (ECF No. 7-19), as that hearing was postponed, Ex. 15, Decl. of Elizabeth Burgus ¶ 3.

a spread from occurring”). Given the extensive measures Defendants have taken in response to the outbreak to limit exposure and expand options for attorney-client communications and immigration-court hearings and filings by remote means, Plaintiffs cannot show a standing-conferring injury here. Ciliberti Decl. ¶ 28.a; Benoit Decl. ¶¶ 27–32; McHenry Decl. ¶¶ 44–72. Moreover, even if Plaintiffs could otherwise satisfy Article III, their claims are not ripe because there is no actual, imminent controversy or any indication that Defendants’ actions will be insufficient to stem the spread of COVID-19 while still allowing for sufficient access to counsel and the courts. *See Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732–34 (1998) (holding challenge to agency plan not ripe for review “until a site-specific action occurs” that makes the harm “more imminent and more certain”).

B. The Organizational Plaintiffs Lack Article III Standing and Are Outside of the INA’s Zone of Interests.

The Organizational Plaintiffs appear to assert (as best as Defendants can discern) two standing theories tied to their APA claim: associational standing and third-party standing. *See, e.g.*, Compl. ¶ 5, Mot. 7, 12, 33 n.62. Plaintiffs thus “forfeit [any] claim that [the Court] possess jurisdiction” on other grounds. *Scenic America, Inc. v. DOT*, 836 F.3d 42, 53 (D.C. Cir. 2016). To establish associational standing, the Organizational Plaintiffs must show through competent evidence that: “(1) at least one of their members has standing to sue in her or his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit.” *American Library Ass’n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005).

Plaintiffs fail this test because they have not identified a single member of their organizations who themselves has Article III standing. As with the Individual Plaintiffs, this turns on whether the members can demonstrate injury, causation, and redressability. *See Ark Initiative*

v. Tidwell, 749 F.3d 1071, 1075 (D.C. Cir. 2014). Plaintiffs’ APA claim does not identify a “legally protected interest” that has been impinged upon. Rather, Plaintiffs contend that EOIR’s and ICE’s policies have violated some vague combination of “statutory, regulatory, and constitutional rights.” Compl. ¶ 70. In support, the Organizational Plaintiffs submit several declarations from member attorneys who generally allege that in-person hearings may be detrimental to their health, while remote hearings and consultation are insufficient to allow them to adequately represent their clients. Mot. 1–2. But the member attorneys do not establish any “concrete and particularized” injury stemming from Defendants’ responses to the pandemic. For example, one attorney says that she attended an immigration hearing in New York on March 11, and she tested positive for COVID-19 on April 2, speculating that she “might have been exposed” while at the immigration court. Pls.’ Ex. 1, Arce Decl. at 1. It is unclear why she places full blame on the immigration court for her positive diagnosis: She does not say it is the only place she visited outside her home during those three weeks, and she admits that she “*felt* compelled”—not that she *was* compelled—to appear at the court in person. *Id.* (emphasis added); *see also* Pls.’ Ex. 3, Church Decl. ¶ 9 (attorney chose to attend hearings in person, rather than utilize telephonic option, on March 30). Another immigration attorney protests the challenges of communicating telephonically with a detained client. Pls.’ Ex. 2, Erlich Decl. ¶ 1 (“Even several one-hour telephone meetings are far inferior to the face-to-face meetings, not limited in time, that were available in the EDC before the pandemic.”). But attorneys do not have some general right to represent clients in a particular way, especially during a public health crisis. That the attorneys may have to expend some effort to communicate with detained clients within the bounds of Defendants’ responses to the public health crisis is insufficient to establish Article III standing.

Plaintiffs also do not establish that the relief they seek is likely to redress these alleged

injuries. They ask for EOIR and ICE to implement “uniform policies” in response to the COVID-19 pandemic. Mot. 28. But whatever uniform policies might be adopted, Plaintiffs have not shown that they would better prevent the member attorneys from contracting the virus or that they would allow member attorneys unfettered access to their clients at any time and manner of their choosing. Plaintiffs’ speculative assertions about Defendants’ responses are insufficient to establish Article III standing. *See Abulhawa v. U.S. Dep’t of Treasury*, 239 F. Supp. 3d 24, 36 (D.D.C. 2017).

Plaintiffs also fail to demonstrate third-party standing. To the extent that the Organizational Plaintiffs rely on alleged harms to detained aliens to justify their own standing, “a party must assert his own legal rights and cannot rest his claim to relief on the legal rights of third parties.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). The Organizational Plaintiffs cannot assert third-party standing based on any purported right that detained aliens have to access counsel or to challenge the impact of EOIR or ICE policies on aliens. *See Am. Immigration Lawyers Ass’n v. Reno (AILA)*, 199 F.3d 1352, 1364 (D.C. Cir. 2000) (rejecting third-party standing “to raise claims, whether statutory or constitutional, on behalf of aliens,” noting “the judicial presumption against suits seeking relief for a large and diffuse group of individuals, none of whom are party to the lawsuit”). That is especially so where Plaintiffs purport to speak on behalf of tens of thousands of aliens, none of whom they identify by name. *See Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004). In particular, an attorney’s putative “future attorney-client relationship with as yet unascertained” clients is not a permissible basis for standing. *Id.* at 130; *see Cuban Am. Bar Ass’n, Inc. v. Christopher*, 43 F.3d 1412, 1422–23 (11th Cir. 1995) (legal organization lacked standing to assert alleged injury to aliens it did not represent); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 809–10 (D.C. Cir. 1987) (similar). The Organizational Plaintiffs reference clients of their member attorneys, Mot. 7, 13, yet never identify any actual client of the Plaintiffs, let alone one who is

subject to and allegedly harmed by the challenged EOIR and ICE actions. Organizations cannot demonstrate third-party standing based on alleged injury to “the rights of some hypothetical claimant.” *Kowalski*, 543 U.S. at 134 n.5. If Plaintiffs have an attorney-client relationship with any actual alien affected by the challenged policies, they can represent the alien in a first-party challenge to the policies. Indeed, five detained aliens are Plaintiffs in this lawsuit, so an individual alien plainly can “protect his or her own interests.” *AILA*, 199 F.3d at 1358, 1362; *see Kowalski*, 543 U.S. at 129 (party invoking third-party standing must show that “the party asserting the right ha[d] a ‘close’ relationship with the person who possesses the right,” and “there [was] a ‘hindrance’ to the possessor’s ability to protect his own interests”).²

Even if they had constitutional standing, the Organizational Plaintiffs cannot obtain review under the APA of EOIR’s and ICE’s actions because their interests are not within the zone of interests protected by the INA. The APA does not “allow suit by every person suffering injury in fact.” *Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 395 (1987). It provides a cause of action only to one “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. To be “aggrieved,” “the interest sought to be protected” must “be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Clarke*, 479 U.S. at 396 (modifications omitted).

Nothing in the INA suggests that it is meant to protect the interests of immigration attorneys. Although the Organizational Plaintiffs suggest that they are seeking to challenge “limitations on access to counsel” through their APA claim, Mot. 33 n.62, they point to no

² The sole case Plaintiffs rely on for third-party standing, *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150 (D. Or. 2018), Mot. 33 n.62, is contrary to this Circuit’s controlling *AILA* and *Gracie* precedents, as well as the Supreme Court’s *Kowalski* decision.

particular regulation or statute that arguably protects or regulates their interests in this regard.³ And Plaintiffs themselves recognize that the INA provisions regarding the ability of an alien to retain counsel relates to the *alien's* interests, not the interests of the immigration bar. Compl. ¶¶ 73–77 (asserting statutory claims regarding access to counsel only on behalf of the Individual Plaintiffs); *see, e.g., Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900–04 (D.C. Cir. 1996) (immigration advocacy organizations are outside immigration statutes' zone of interests).

Congress similarly made clear that no party other than the United States could litigate challenges to removal proceedings in the district courts by withdrawing jurisdiction for such causes of action that had previously existed. Until Congress amended the INA to include the claim-channeling provisions of § 1252, a separate provision, 8 U.S.C. § 1329, provided jurisdiction for suits in federal district courts filed by any alien or organization challenging implementation of the immigration laws. *See, e.g., Bains v. Schiltgen*, No. 97-cv-2573, 1998 WL 204977, at *3 (N.D. Cal. Apr. 21, 1998) (describing statute's prior version). But Congress amended § 1329 in 1996, “making clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government.” *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). This provision makes clear that organizations have no cause of action under the INA to raise challenges related to removal proceedings.

C. The INA Prohibits District-Court Review of Plaintiffs' Claims Arising From Removal Proceedings.

Plaintiffs argue that “ICE's failure to act to increase detained persons' access to robust remote communication and EOIR's failure to suspend in-person hearings and grant continuances

³ For this reason, the analysis in *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, No. 19-1778, 2020 WL 1320886 (2d Cir. 2020), that Plaintiffs invoke, *see* Mot. 33 n.62, is not applicable here. In that case, the Second Circuit held that the attorneys' APA claim fell within the zone of interests of the BOP's regulations on inmate-attorney visits. *Id.* at *9. There is no similar regulation or statute that could possibly apply to the Organizational Plaintiffs here.

as a matter of course together deprive detained persons of their right to access to counsel” in removal proceedings and to procedural due process. Mot. 37; *see also id.* at 34–37. But the INA divests district courts of jurisdiction to review those claims because they “aris[e] from” removal proceedings. 8 U.S.C. § 1252(b)(9). Therefore, those claims cannot form the basis for a TRO. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008).

The INA states that “a petition for review filed with an appropriate court of appeals in accordance with [8 U.S.C. § 1252] shall be the sole and exclusive means for judicial review of an order of removal.” 8 U.S.C. § 1252(a)(5). The same section permits “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States ... *only* in judicial review of a final order.” *Id.* § 1252(b)(9) (emphasis added). Through § 1252, “Congress has clearly provided that all claims—whether statutory or constitutional—that ‘aris[e] from’ immigration removal proceedings can only be brought through the petition for review process in federal courts of appeals.” *J.E.F.M.*, 837 F.3d at 1029. Section 1252(b)(9)’s channeling provisions are “breathtaking” in scope and “vise-like” in grip, swallowing up “virtually all claims that are tied to removal proceedings.” *Id.* at 1031 (quoting *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007)). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process.” *Id.*; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (§ 1252(b)(9) is a “jurisdiction bar” to challenges to “any part of the process by which [an alien’s] removability will be determined”); *id.* at 841 n.3 (“the question is not whether [the *challenged action*] is an action taken to remove an alien but whether *the legal questions* in this case arise from such an action” (emphases in original)). These channeling provisions include “right-to-counsel claims” and

“challenges to agency policies,” *J.E.F.M.*, 837 F.3d at 1035, and any challenge arising from any aspect of the processes or practices that apply to aliens in immigration court, *see Vetcher*, 316 F. Supp. 3d at 76; *Sophia v. Decker*, No. 19-cv-9599, 2020 WL 764279, at *2 (S.D.N.Y. Feb. 14, 2020); *Asylum Seeker Advocacy Project (ASAP) v. Barr*, 409 F. Supp. 3d 221, 225–26 (S.D.N.Y. 2019).

Section 1252(b)(9) channels the Individual Plaintiffs’ claims against EOIR into the courts of appeals. All Plaintiffs challenge how EOIR is conducting immigration proceedings and their ability to retain or consult with counsel. *See, e.g.*, Mot. 8–20, 30–37. Those claims are covered by § 1252(b)(9) and so are outside this Court’s jurisdiction. *See J.E.F.M.*, 837 F.3d at 1029, 1033, 1035 (constitutional and statutory “policies-and-practices challenges” and “right-to-counsel claims must be raised through the PFR process because they “arise from” removal proceedings”); *Vetcher*, 316 F. Supp. 3d at 76 (similar). That includes Plaintiffs’ claims that EOIR’s implementation of its video-teleconference or telephonic-hearing policies violates their statutory or due-process rights. *P.L. v. ICE*, No. 19-cv-1336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019) (“Plaintiffs’ challenge to Defendants’ VTC policy arises from ‘proceeding[s] brought to remove [undocumented immigrants] from the United States.’”).

Section 1252(b)(9) also channels all Plaintiffs’ claims against ICE into the courts of appeals. Plaintiffs argue that ICE’s disease-prevention and attorney-access protocols violate their statutory right to counsel and their procedural-due-process rights. *See* Mot. 12–16, 34–37. But the right to counsel exists only “[i]n any removal proceedings,” 8 U.S.C. § 1362, so any challenge based on the deprivation of that right (and its attendant procedural-due-process challenge), “however it is framed,” is reviewable only as part of the review of a final removal order. *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012); *see J.E.F.M.*, 837 F.3d at 1035 (§ 1252(b)(9)

bars constitutional and statutory “right-to-counsel claims”); *Aguilar*, 510 F.3d at 18 (right-to-counsel and procedural-due-process claims, like claims involving “difficulties in calling witnesses and in presenting evidence at the removal proceedings,” are subject to § 1252(b)(9)); *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048 (N.D. Cal. 2018) (“Petitioners’ challenge based on the potential loss of counsel ‘arises from’ their removal proceedings and can only be raised through the PFR process, as required by § 1252(a)(5) and § 1252(b)(9).”). In their reply, Plaintiffs may cite to *Arroyo v. DHS*, No. 19-cv-815, 2019 WL 2912848, at *12 (C.D. Cal. June 20, 2019), and argue that § 1252(b)(9) does not apply to claims regarding an existing attorney-client relationship. They would be wrong. Section 1252(b)(9) applies to existing *and* prospective attorney-client relationships. *See Avilez v. Barr*, No. 2020 WL 570987, at *3 (N.D. Cal. Feb. 5, 2020) (following *Alvarez* instead of *Arroyo* because *Arroyo* is inconsistent with circuit precedent and “is not persuasive”).

Section 1252(b)(9) also divests this Court of jurisdiction over the Organizational Plaintiffs’ claims. “[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.” *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Congress’s decision to consolidate review of claims “arising from” removal proceedings, 8 U.S.C. § 1252(b)(9), into review of the final removal order itself bars organizations from challenging practices in removal proceedings or right-to-counsel claims in those proceedings on an individual alien’s behalf. *See, e.g., ASAP*, 409 F. Supp. 3d at 227 (dismissing “action for declaratory and injunctive relief brought by organizational plaintiffs”); *P.L.*, 2019 WL 2568648, at *1 (dismissing claims brought by “Organizational Plaintiffs” who “represent” “detained immigrants in removal proceedings”).

And, another provision of the INA independently prevents Plaintiffs from establishing jurisdiction over their right-to-counsel claims against EOIR: 8 U.S.C. § 1252(g) provides that, apart from a petition for review to the appropriate court of appeals, “no court shall have jurisdiction to hear 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,” “notwithstanding any other provision of law (statutory or nonstatutory).” This jurisdictional bar on claims that relate to the manner in which EOIR “adjudicate[s] cases” covers claims related to the “prosecution” of any “of the various stages in the deportation process” and is aimed at preventing the type of piecemeal litigation that Plaintiffs have initiated here, challenging certain aspects of immigration-court procedures outside the context of the specific cases where their claims allegedly arise. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483, 487 (1999) (Congress enacted § 1252(g) to prevent “deconstruction, fragmentation, and hence prolongation of removal proceedings”). Thus, §§ 1252(a)(5), (b)(9), and (g) divest this Court of jurisdiction over Plaintiffs’ right-to-counsel claims.

Rather than explain why their claims are exempt from section 1252’s reach, Plaintiffs assert—in a footnote—that “[t]his Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331,” and that “[t]hat jurisdiction is not limited by 8 U.S.C. §§ 1252(a)(5) or (b)(9) because this action is not arising from removal proceedings.” Mot. 33 n.62. This Court “need not consider cursory arguments made only in a footnote.” *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999). But even if credited, Plaintiffs’ assertion is wrong: Plaintiffs’ claims “are not independent or ancillary to the removal proceedings. *J.E.F.M.*, 837 F.3d at 1033. Plaintiffs allege that EOIR’s and ICE’s actions (or non-actions) violate the APA, their statutory right to counsel in removal proceedings, and their right to procedural due process (as well as the other claims not

relied on in this Motion). *See, e.g.*, Compl. ¶ 14 (Napoles Vaillant “is afraid that being forced to appear at his hearing unrepresented will result in a worse outcome for his case.”); *id.* ¶ 15 (Rodriguez Cedeno “is concerned about *his ability to represent himself in complicated immigration proceedings* during this time.”); *id.* ¶ 16 (Aliaga-Cobas fears “*proceeding without an attorney in her case.*”); *id.* ¶ 17 (Guerrero-Cornejo is allegedly “unable to see his attorney in person because of the policies Defendants have put in place restricting access to the facilities, and his phone access *is not sufficient to fully prepare him for the hearing.*”); *id.* ¶ 18 (Velasquez Quiala “is currently unable to see his attorney *in order to prepare for the hearing*, and he is limited to 30 minutes a day for attorney calls.”) (all emphases added). These claims “are bound up in and an inextricable part of the administrative process” and can be raised only in a petition for review. *J.E.F.M.*, 837 F.3d at 1033; *Vetcher*, 316 F. Supp. 3d at 77.

Plaintiffs cite to *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019), and *Martinez v. Nielsen*, 341 F. Supp. 3d 400 (D.N.J. 2018), to argue that §§ 1252(a)(5) and (b)(9) do not apply to their claims, *see* Mot. 33 n.62, but neither case helps them. In both cases, the district courts held that §§ 1252(a)(5) and (b)(9) did not apply because the challenges “‘ar[ose] from’ a rulemaking of general applicability,” *O.A.*, 404 F. Supp. 3d at 132, 133, and from the government’s arrest of an alien following an interview for a waiver of inadmissibility, *Martinez*, 341 F. Supp. 3d at 408, rather than “from any action taken or proceeding brought to remove an alien from the United States,” 8 U.S.C. § 1252(b)(9). Those cases were wrongly decided, but in any event do not help Plaintiffs here because their challenges *are* to the (speculative) effect of EOIR’s and ICE’s actions on their removal proceedings. *See* Compl. ¶¶ 14–18. As explained, review of these claims is available only in the courts of appeals.

Finally, these provisions expressly supersede the All Writs Act, 28 U.S.C. § 1651(a), as a

basis for a TRO. *See* 8 U.S.C. § 1252(b)(9) (“no court shall have jurisdiction ... by section ... 1651 of [title 28, the All Writs Act], or by any other provision of law”); *id.* § 1252(g) (same).

D. The INA Bars This Court From Enjoining or Restraining Operation of Immigration-Court Proceedings or the INA Detention and Removal Provisions.

Plaintiffs’ requested relief also runs afoul of 8 U.S.C. § 1252(f)(1), which bars district courts from awarding injunctive relief enjoining or restraining operation of 8 U.S.C. §§ 1221–1232, including the provisions governing operation of removal proceedings, *see* 8 U.S.C. §§ 1229, 1229a, and detention and removal of aliens, *id.* §§ 1225, 1226, 1231. Title 8 U.S.C. § 1252(f)(1) provides that “[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–1232, which include provisions governing the conduct of removal proceedings], *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*” (Emphasis added.)

The relief sought by the Organizational Plaintiffs falls squarely within the scope of injunctive relief that § 1252(f)(1) prohibits. Plaintiffs seek to enjoin the operation of the immigration courts nationwide (except for remote bond hearings), which means enjoining provisions of 8 U.S.C. § 1229a (governing how “[a]n immigration judge shall conduct proceedings”), 8 U.S.C. § 1229 (establishing processes within the immigration court), § 1225(b)(1)(B)(iii)(III) (requiring immigration judges to undertake “prompt review” of negative credible fear determinations “to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination.”), 8 U.S.C. § 1226 (providing for bond hearings for certain detained aliens), and 8 U.S.C. §§ 1231(a) and (g) (providing for detention following entry of a final removal order).

Plaintiffs’ requested TRO would, *inter alia*, require all immigration courts nationwide to “suspend all in-person non-bond hearing and immediately convert all in-person bond hearings to remote hearings” and require immigration judges to grant continuances. *See* Mot. 2. These requirements appear nowhere in sections 1225, 1226, 1229, 1229a, or 1231, and indeed these requirements would halt the operation of those provisions as written and read into them additional requirements. Plaintiffs’ requested relief thus seeks to rewrite these provisions via a TRO to include significant limitations on the government’s authority “that [do] not exist in the statute,” during a public health emergency, which is what § 1252(f) forecloses. *Hamama v. Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018); *see Vazquez Perez v. Decker*, No. 18-cv-10683, 2019 WL 4784950, at *6 (S.D.N.Y. Sept. 30, 2019) (similar).

Section 1252(f)(1) also forecloses Plaintiff’s suggestion (at Mot. 29 & n.57) that the All Writs Act, 28 U.S.C. § 1651(a), supplies jurisdiction to grant a TRO. Congress made clear that § 1252(f)(1)’s bar to injunctive relief is expansive and applies “[r]egardless of the nature of the action or claim.” 8 U.S.C. § 1252(f)(1) (emphasis added). Section 1252(f)(1)’s specific jurisdictional bar thus trumps the All Writs Act’s more general jurisdictional grant. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (in issues of statutory construction, “the specific governs the general”). Moreover, because Plaintiffs seek a TRO to prevent future injury (rather than to preserve this Court’s jurisdiction over the Complaint), the All Writs Act does not absolve Plaintiffs of their need to satisfy the traditional preliminary-injunction factors, *see Belbacha*, 520 F.3d at 457; *Kiyemba*, 561 F.3d at 513 n.3, including showing a likelihood of success on their underlying claims. They cannot make that showing where § 1252(f)(1) bars the relief they seek.

E. The INA Prohibits This Court From Compelling EOIR to Conduct Remote Immigration Proceedings Nationwide.

Plaintiffs seek an order requiring EOIR to “immediately convert all in-person bond hearings to remote hearings” and “[p]romulgate policies and procedures that, at a minimum, permit remote court appearances by all necessary participants (*e.g.*, court and court personnel, detained persons, counsel, interpreters, transcription).” Mot. 2. But the INA prohibits this Court from granting that relief too. As relevant here, 8 U.S.C. § 1252(a)(2)(B)(ii) states: “no court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.” This Court cannot order EOIR to conduct remote immigration hearings because the use of remote technology is specified to be in the government’s discretion. *See* 8 U.S.C. § 1229a(b)(2)(A) (“The proceeding *may* take place (i) in person, (ii) where agreed to by the parties, in the absence of the alien, (iii) through video conference, or (iv) subject to subparagraph (B), through telephone conference.” (emphasis added)). This grant of authority does not provide any statutory standard to apply—it calls for the exercise of “expertise and judgment unfettered by any statutory standard whatsoever.” *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005).

Plaintiffs may argue in their reply that the authority granted under § 1229a(b)(2)(A) is not “specified ... to be in the discretion” of the government. *Kucana v. Holder*, 558 U.S. 233, 239 (2010). They would be wrong. The fact that a specific provision does not use the word “discretion” does not mean § 1252(a)(2)(B)(ii) does not apply. *See Zhu*, 411 F.3d at 295 (“a decision may be ‘specified ... to be in the discretion of the Attorney General’ even if the grant of authority to make that decision does not use the word ‘discretion’”). Section 1252(a)(2)(B)(ii) applies because the decision whether to use remote technology is, by statute, “entirely within [the] judgment or

conscience” of the government. *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 690 (2003).

This Court has no jurisdiction to grant a TRO.

II. Plaintiffs Are Not Entitled to a TRO.

Even if this Court possesses jurisdiction to grant Plaintiffs’ TRO Motion, Plaintiffs fail to make a “clear showing” of their entitlement to relief for each of the preliminary-injunction factors. *Winter*, 555 U.S. at 20, 23.

A. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims.

1. EOIR’s and ICE’s Actions Are Not Subject to Review Under the APA and In Any Event Are Not Arbitrary and Capricious.

Plaintiffs assert that “Defendants have violated the APA by refusing to direct immigration courts to conduct proceedings in a manner consistent with the public health and protection of detained persons’ rights to counsel.” Mot. 30; *see also id.* at 30–34; Compl. ¶ 70. Plaintiffs are incorrect both on their factual assertions and on the law.

Plaintiffs cannot raise an APA claim because they do not identify any “final agency action,” subject to APA review. *See* 5 U.S.C. § 704; *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890–93 (1990). Plaintiffs argue that the “APA entitles ‘[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action’ to ‘judicial review thereof.’” Mot. 33 (citing 5 U.S.C. § 702). But the APA permits review only of *final* agency actions. 5 U.S.C. § 704. Generally, “two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and “second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

Here, Plaintiffs do not identify any specific final agency action from which they allege “legal consequences” flow. Plaintiffs’ APA claim seeks additional “guidance for immigration

court proceedings” and “attorney-client visits in detention facilities” to “preserve[] Plaintiffs’ statutory, regulatory, and constitutional rights” in removal proceedings in immigration court. Compl. ¶ 70. But the only decision in removal proceedings with actual “force and effect of law,” *Bennett*, 520 U.S. at 177–78, would be a decision by an immigration judge in an *individual case* and not any decision to adopt or not adopt particular practices for counsel access. *See, e.g., DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (“courts have defined a nonfinal agency order as one, for instance, that does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action” (internal quotations omitted)). There is no way to tell whether, for example, having an attorney visit with a client or attend a hearing telephonically to prevent the spread of COVID-19 will have any effect on the outcome of the proceedings or any legal consequences before the immigration judge even renders a decision. And Plaintiffs’ challenges related to access to counsel, scheduling of hearings, and practices for filings in immigration court, are all at bottom premised on speculative potential effects on these immigration-judge decisions.

Plaintiffs also cannot state an APA claim because, as explained above, Congress has set out a separate specific and exclusive mechanism for review of decisions of immigration judges, 8 U.S.C. § 1252(a)(5), and the APA provides a cause of action only for claims challenging “final agency action for which there is *no other adequate remedy in a court*,” 5 U.S.C. § 704 (emphasis added). To “determin[e] whether an adequate remedy exists,” courts “focus[] on whether a statute provides an independent cause of action or an alternative review procedure.” *El Rio Santa Cruz Neighborhood Health Ctr. v. HHS*, 396 F.3d 1265, 1270 (D.C. Cir. 2005). Here, APA review would impermissibly provide review that is duplicative of the specific alternative review procedure available in the courts of appeals under 8 U.S.C. § 1252(b)(9) over any challenge to how removal

proceedings are conducted. And “if an adequate remedy at law exists, equitable relief is not available under the APA.” *Cohen v. United States*, 650 F.3d 717, 731 (D.C. Cir. 2011).

Plaintiffs’ alternative argument, made in a footnote, is that, if Defendants’ “decisions are instead construed as a failure to act rather than agency action, their failures to act are also reviewable under 5 U.S.C. § 706(1).” Mot. 34 n.63. But this argument fares no better. To raise a claim under § 706(1), “[a]n agency must have failed to perform a non-discretionary duty to act.” *Norton*, 542 U.S. at 64. “Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*,” *id.*, and 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. And even if Plaintiffs could identify a basis to argue that the government is required to take some additional action, they still could not obtain an order directing agency operations in the particular ways they ask for; under § 706(1) a court can at most compel an agency “to take action upon a matter, without directing *how* it shall act.” *Cobell v. Norton*, 392 F.3d 461, 475 (D.C. Cir. 2004).

“The principal purpose of the APA limitations” in sections 702, 704, and 706(1) “is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.” *Norton*, 542 U.S. at 66. “If courts were empowered to enter general orders compelling” agencies to carry out their general mandates in particular ways not required by any specific statutory provision, as Plaintiffs ask the Court to do here, “it would ultimately become the task of the supervising court, rather than the agency” to oversee “day-to-day agency management,” raising the prospect of pervasive oversight by federal courts” that “is not contemplated by the APA.” *Id.* at 66–67. A “policy disagreement” with an agency’s decision or approach to a problem is not a

“basis for substituting [Plaintiffs’] views for the agency’s” even where “the record could have supported” Plaintiffs’ preferred approach. *Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004).

EOIR has reasonably exercised its discretion and authority here. EOIR has taken steps to delay certain categories of hearings that can reasonably be postponed, including continuing all hearings for aliens who are not detained through May 1, 2020, has restricted access to immigration courts for individuals at risk of having COVID-19, and continues to evaluate whether additional steps are necessary to respond to the outbreak as facts develop. McHenry Decl. ¶¶ 44–58. EOIR has issued guidance to all immigration courts encouraging them to take certain steps to respond to the outbreak, and EOIR’s decision to allow immigration courts some flexibility to respond to local concerns and immigration judges to make decisions about how to best manage individual proceedings for detained aliens, is not arbitrary and capricious. Those decisions are entitled to significant deference. *See Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543; *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004); *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). This is especially so in the immigration context where “flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

Plaintiffs also contend that “EOIR has not suspended non-essential in-person hearings” and “has refused to issue any uniform policy designed to minimize the COVID-19 health risks” or to follow CDC guidance “calling for ‘alternatives to in-person court appearances.’” Mot. 31. That too is wrong. On March 18, the Director of EOIR issued a Policy Memorandum adopting guidance for “all immigration court cases effective immediately” to “promote the safety of immigration court personnel, representatives, aliens, attorneys for [DHS], and the general public during the

ongoing national emergency related to the COVID-19 outbreak.” EOIR Mem. 1; McHenry Decl. ¶¶ 47–55. In doing so, EOIR reminded immigration judges of their broad authority to take certain steps that could help minimize the risk of exposure to COVID-19, such as waiving appearances, granting continuances, limiting physical presence in the courtroom, issuing standing orders providing for additional procedures in response to the outbreak, and conducting hearings telephonically or by video-teleconference. EOIR Mem. 2. EOIR has also encouraged immigration judges to resolve cases through written filings where possible and to establish policies for conducting hearings through VTC or by telephone to the maximum extent practicable consistent with the law, has waived the requirement for original signatures for certain filings, and has made electronic filing by email available for all 69 immigration courts. *Id.*

EOIR has taken reasonable steps to mitigate exposure and permit flexibility while still following the statutory and court-ordered strictures by which it is bound. Among other things, EOIR’s response allows for remote options for filings and hearings; ensures that aliens continue to timely receive what they are entitled to by statute and federal court orders; accords deference to immigration judges to manage their own dockets and respond to unique factors or considerations in individual cases; and allows detained aliens to continue to receive bond hearings to respond to the surge in requests for bond hearings in light of the COVID-19 outbreak, including requests made as part of litigation pending in other district courts. *See, e.g.,* McHenry Decl. ¶¶ 44, 67, 70, 92–93; *see also Las Americas*, 2020 WL 1671584, at *2 (noting “evidence” “demonstrating that [immigration courts] have taken significant steps to reduce in-person contacts and appropriately modify immigration court functions in the wake of the COVID-19 outbreak,” including postponing hearings, granting continuances, allowing email filings, and permitting appearances “by video or telephonically” in the hearings that have not been postponed because they involve “detained

individuals, who may favor earlier hearings due to their custody status”).

EOIR’s approach, including the deference given to individual immigration courts to exercise their expertise and discretion over certain local decisions, is no different than how the Administrative Office of the United States Courts has dealt with similar issues by encouraging jurisdiction-by-jurisdiction and case-by-case approaches for the judiciary. *See* Administrative Office of the U.S. Courts, *Judiciary Preparedness for Coronavirus (COVID-19)*, <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>. This similar approach by other courts shows EOIR’s approach is reasonable. *Cf. Liadov v. Mukasey*, 518 F.3d 1003, 1009 (8th Cir. 2008) (noting that the same rationale for strict filing deadlines in Article III courts applies in immigration courts). To the extent that Plaintiffs believe that additional COVID-19-related changes are needed to procedures in particular courts or cases, they can raise those requests with individual immigration judges. Defendants are not aware of any reasonable requests for continuances, extensions, or waivers of appearances being systematically denied. McHenry Decl. ¶ 88. This is a critical flaw with Plaintiffs’ demand for a sweeping TRO: the needs of an individual alien in the proceedings and any request related to COVID-19 must be judged based on that alien’s circumstances, and Plaintiffs cannot plausibly argue that every alien will be harmed by the absence of the policies they demand. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs thus cannot carry their burden for a TRO, *see Mendez v. Cooper*, No. 19-cv-01701, 2019 WL 2577477, at *1 (D. Ariz. Apr. 17, 2019), and their systemic claims cannot succeed. *See Las Americas*, 2020 WL 1671584, at *1–2 (noting that similar TRO motion attacked practices “outside of the District,” did not claim challenged practices were “occurring in every immigration court,” and finding no reason why “review of individual court practices” would not “suffice to address practices in those particular courts”). Thus, on the merits, Plaintiffs’ requests should be denied.

The same is true for Plaintiffs’ APA claim against ICE. Plaintiffs argue that “the CDC issued guidance on practices to implement in correctional and detention facilities” that calls for “decreasing ‘operational entrances and exits to the facility’ (e.g., for attorney visits and to attend hearings),” and claim that “ICE has refused to implement policies that are consistent with federal health mandates to facilitate limitations on unnecessary transfer of detained persons or on operational entrances and exits to detention facilities.” Mot. 30–31. But this is not true. ICE facilities have adopted policies to restrict unnecessary access to facilities, test individuals for signs of fever before permitting entry, and test detainees for COVID-19 before admitting them to a facility. *See* ICE Pandemic Response 12–13; Ciliberti Decl. ¶¶ 8–23; Benoit Decl. ¶¶ 13–26; Beckhelm Decl. ¶¶ 10–23; Bretz Decl. ¶¶ 9–16; Simao Decl. ¶¶ 6–7; LaBier Decl. ¶¶ 9–21; Allen Decl. ¶¶ 7–16. They have also adopted precautions to prevent the spread of the virus by maintaining or expanding options for remote attorney conferencing, by requiring any visits that must take place in person use protective gear or occur through glass barriers, and instituting practices for cleaning and sanitizing any shared spaces or communications equipment *See* Ciliberti Decl. ¶¶ 19–24; Benoit Decl. ¶¶ 21–42; Beckhelm Decl. ¶¶ 17–26; Bretz Decl. ¶¶ 16–23; Simao Decl. ¶¶ 8–15; LaBier Decl. ¶¶ 21–26; Allen Decl. ¶¶ 16–22. Like with their challenges against EOIR, Plaintiffs fail to identify any uniform policy they disagree with that applies to all facilities, any reason why the agency is not entitled to deference in developing varied and targeted policies that leave room for individual facilities to adapt to local needs or challenges, or any reason why this Court—as opposed to the courts in the relevant districts—should oversee the operations of those facilities, some of which are already subject to ongoing litigation before courts in those districts. *See, e.g.* McHenry Decl. ¶ 67; *Las Americas*, 2020 WL 1671584.

Accordingly, Plaintiffs cannot meet their burden to show a likelihood of success on their

APA claim, and this Court should deny their motion for a TRO.

2. EOIR’s and ICE’s Policies Do Not Violate Plaintiffs’ Constitutional or Statutory Rights to Counsel or Procedural Due Process.

Plaintiffs assert that “Defendants have violated [Plaintiffs’] constitutional and statutory rights to counsel and to due process,” Mot. 30, “by impairing (1) their ability to retain counsel, (2) their ability to communicate confidentially with their counsel, and (3) their counsel’s ability to competently represent them in immigration court,” Mot. 36; *see also id.* at 34–37. They claim that “ICE’s failure to act to increase detained persons’ access to robust communication and EOIR’s failure to suspend in-person hearings and grant continuances as a matter of course together deprive detained persons of their right of access to counsel.” Mot. 37. They are wrong. Plaintiffs fail to explain how EOIR’s decision not to suspend all in-person immigration hearings nationwide or ICE’s disease-prevention or attorney-access protocols “effectively deny” the Individual Plaintiffs’ access to counsel in violation of the INA or the Due Process Clause.

It is well-established that “there is in a civil case no constitutional right to counsel.” *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1052 (D.C. Cir. 1984), *vacated on other grounds sub nom. Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”). Congress, however, has provided aliens a limited right to counsel in civil removal proceedings:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned 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.

8 U.S.C. § 1362. This statutory right that Congress has afforded aliens in removal proceedings exceeds the minimum due-process requirement that an alien receive “some form of meaningful or fair hearing.” *Maldonado-Perez v. INS*, 865 F.2d 328, 32 (D.C. Cir. 1989); *Dia v. Ashcroft*, 353

F.3d 228, 243 (3d Cir. 2003) (en banc) (“[a]liens only have those statutory rights granted by Congress”). Plaintiffs’ procedural-due-process claim is thus subsumed by their statutory right-to-counsel claim: “[A]n immigration hearing that satisfies the statutory requirements of [the INA] also satisfies the requirements of the due process clause.” *Skorusa v. Gonzales*, 482 F.3d 939, 943 n.1 (7th Cir. 2007).

Courts have held that the statutory right to counsel in immigration proceedings is violated only where conditions are “tantamount to denial of counsel.” *Biwot*, 403 F.3d at 1098. Whether a denial occurred requires a backward-looking inquiry into “the actual substance of the hearing,” *Lara-Torres*, 383 F.3d at 973, to determine whether the proceedings were “so fundamentally unfair that [the alien] was prevented from reasonably presenting his case,” *Gonzalez v. INS*, 82 F.3d 903, 908 (9th Cir. 1996). And, a violation of the statute alone may not violate due process absent a showing of prejudice. *See Castro-O’Ryan v. U.S. Dep’t of Immigration and Naturalization*, 847 F.2d 1307, 1312–13 (9th Cir. 1987).

Here, Plaintiffs allege that Defendants’ COVID-19 response “impedes” the Individual Plaintiffs’ ability to retain or consult with counsel. Mot. 26. But they fall far short of showing that they were effectively denied access to counsel during immigration proceedings. Against ICE, for example, Plaintiffs allege that “videoconferencing is not always made available” to immigration detainees, Mot. 22, and that detainees “common[ly]” miss telephone calls, must pay for calls, have their scheduled call times canceled, wait in line to make calls, have their calls “monitored or overheard by others,” have time limits on calls, or experience poor connection quality. Mot. 22–23. And against EOIR, Plaintiffs complain that the lack of a blanket order permitting telephonic appearances as a matter of course at all immigration courts and the denial of some motions for continuances or for telephonic appearances make it more difficult to obtain or consult with counsel.

See Mot. 25–26. But these allegations are of a different kind and categorically less severe than the effective denial of counsel and forced self-representation that courts have recognized as a denial of the statutory right to counsel. See, e.g., *Biwot*, 403 F.3d at 1096 (finding a violation of the statutory right to counsel when an immigration judge allowed an alien, “who was incarcerated and diligently seeking representation, only five working days to obtain counsel”); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1089–90 (9th Cir. 2012) (violation where, after learning at a hearing that an alien’s counsel had been suspended from the bar, immigration judge refused to grant the alien a continuance to secure new counsel and then denied the alien’s claims for relief). And it is impossible to know now whether Plaintiffs’ allegations will have any effect on their rights, let alone result in “substantial prejudice,” before their immigration hearings have been held. *Lara-Torres*, 383 F.3d at 973 (quotation marks omitted). Such a determination can be made only by scrutinizing “the actual substance of the hearing” after the fact. See *id.*

Plaintiffs’ and their declarants’ actual allegations also fall far short of specifying why they believe Defendants are responsible for the issues of which they complain. For example, Plaintiff Napoles Vaillant states merely: “I am concerned that I do not have an attorney to represent me at this hearing. ... The Florence Immigrant & Refugee Rights Project was trying to obtain pro bono representation for me and my husband, Ernesto, but it had to suspend those efforts in light of COVID-19 and the government’s response to COVID-19.” Pls.’ Ex. 21, Napoles Vaillant Decl. ¶¶ 7–8 (ECF No. 7-22). He offers no explanation why he believes that “the government’s response to COVID-19” is the cause of his inability to find an attorney, nor does he say that the immigration judge has denied a request for a continuance. See *id.* Attorney Michelle Edstrom states that she filed a motion to continue a hearing scheduled for April 2, 2020, in the Dallas immigration court, but states only that she “remain[s] apprehensive that the motion will not be granted.” Pls.’ Ex. 28,

Edstrom Decl. ¶¶ 7–8 (ECF No. 7-29). There is no evidence in Plaintiffs’ TRO Motion papers filed on April 8 that the request was in fact denied (despite the fact that such evidence would have been available by the time Plaintiffs filed this Motion and could have been submitted if it existed). Likewise, although Plaintiff Rodriguez Cedenó states that his motion for a continuance of his April 2 hearing was denied, *see* Pls.’ Ex. 5, Rodriguez Cedenó Decl. ¶ 6, Plaintiffs fail to mention that Rodriguez Cedenó’s hearing was later continued until August 5 and so did not occur on April 2, meaning that he was not denied any right to counsel. Burgus Decl. ¶ 3; *see, e.g., Perez v. Sessions*, 690 F. App’x 360, 365 (6th Cir. 2017) (no violation of § 1362 where immigration judge provided alien five additional weeks to obtain counsel); *Benjamin v. U.S. Attorney General*, 682 F. App’x 725, 729 n.1 (11th Cir. 2017) (no violation where immigration judge provided two continuances to allow alien to obtain counsel). Plaintiffs fail to establish that they are likely to succeed on their right-to-counsel claims. And because that right exceeds the constitutional minimum required by the Due Process Clause, they also fail on their procedural-due-process claim.

Plaintiffs also cannot succeed on their argument (made in footnotes) that this Court can grant preliminary relief based on the APA’s right-to-counsel provision, which states that “[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.” 5 U.S.C. § 555(b); *see* Mot. 35 n.64 & 37 n.66. “Congress intended the provisions of the [INA] to supplant the APA in immigration proceedings,” *Ardestani v. INS*, 502 U.S. 129, 133 (1991), so the only right-to-counsel statute that applies here is the INA’s (8 U.S.C. § 1362), not the APA’s (5 U.S.C. § 555(b)). As discussed above, Defendants have not violated that statute.

Plaintiffs cannot succeed on their access-to-counsel or procedural-due-process claims.

B. Considerations of Harm and the Equities Weigh Strongly Against a TRO.

It is well-settled that the public interest in enforcement of United States immigration laws

is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976); *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (“The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant.”); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs seek injunctive relief altering Defendants’ response to COVID-19, but the disruptive effect of ordering the relief Plaintiffs seek based on these temporary circumstances would long survive the COVID-19 pandemic, and the precedent would serve to allow organizations and individuals to rewrite the immigration statutes and change federal policy anytime they disagree with the government’s response to a crisis. Granting such far-flung relief based on temporary circumstances is not in the public interest. The public interest is instead best served by allowing the orderly processes and protocols designed to safeguard the essential functions of the immigration system, and implemented by government professionals, to proceed. *See Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982) (urging judicial deference and finding presumption of validity for decisions of medical professionals concerning conditions of confinement). The burden and attendant harm caused by the relief Plaintiffs seek, and its impact on EOIR and ICE operations nationwide, is not justified at this preliminary stage.

Against these weighty considerations, Plaintiffs fail to show that they will suffer irreparable injury absent a TRO. Plaintiffs must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22 (emphasis in original). The D.C. Circuit thus “has set a high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Plaintiffs claim that “Defendants’ failures to implement uniform, reasonable policies that protect Plaintiffs’ constitutional and statutory rights to counsel and that conform with public health requirements have already injured Plaintiffs (and the public) and will continue to do so absent immediate relief.” Mot. 37; *see also* Mot. 37–41. They are wrong.

First, for the reasons explained above, Defendants EOIR and ICE have implemented policies that protect aliens' rights and safeguard the agencies' essential functions, with an eye towards maintaining public health. *See supra* at pp. 4–12.

Second, Plaintiffs' allegations of certain and irreparable harm fail on their face. Plaintiffs themselves admit that they seek a TRO only to prevent "the *possibility* of [attending] in-person hearings in 58 of the nation's 69 immigration courts." Mot. 1 (emphasis added). And the alleged irreparable harm that they would suffer from this *possibility* (which they can avoid by requesting telephonic or VTC hearings, or continuances) is the speculative harm of exposure to COVID-19 or the potential for inadequate assistance of counsel caused by EOIR's and ICE's policies. Plaintiffs' claim of future injury is hypothetical—and unlikely, given the precautions that EOIR and ICE have put into place and the guidance it has issued to its immigration judges allowing for telephonic or VTC hearings, *see* McHenry Decl. ¶¶ 44–100; EOIR Mem. 1–4; ICE Pandemic Response 7–16; Hott Decl. ¶¶ 19–30; Ciliberti Decl. ¶¶ 8–24; Benoit Decl. ¶¶ 13–42; Beckhelm Decl. ¶¶ 10–26; Bretz Decl. ¶¶ 9–23; Simao Decl. ¶¶ 6–15; LaBier Decl. ¶¶ 9–26; Allen Decl. ¶¶ 7–22—and Plaintiffs are not entitled to an immediate shutdown of the immigration court system based on a conjectural injury they have not suffered and may never suffer. *See Clapper*, 568 U.S. at 416 (finding standing based on fear, even one that is reasonable, "improperly waters down the fundamental requirements of Article III."); *see also Las Americas*, 2020 WL 1671584, at *2. Courts considering TRO motions from aliens in immigration detention where there is an absence of specific facts showing that the particular facility had any confirmed cases or was taking inadequate precautions have thus declined to release aliens based on pure speculation about COVID-19. *See Dawson*, 2020 WL 1304557, at *3 ("The 'possibility' of harm is insufficient to warrant the extraordinary relief of a TRO.").

Because Plaintiffs’ asserted injuries are highly speculative, they have failed to make the requisite clear showing of “certain and great” irreparable harm necessary to warrant a TRO. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (1985); *Winter*, 555 U.S. at 22.

C. Even if This Court Were to Grant a TRO, It Must Be Sharply Limited.

As noted above, this Court is barred from awarding the Organizational Plaintiffs any injunctive relief under section 1252(f)(1).⁴ Thus, even if some preliminary relief were warranted here, the indiscriminate nationwide relief that Plaintiffs seek is far too broad. Any TRO that the Court issues must be limited to the Individual Plaintiffs identified in the Complaint. This is especially true where, as here, Plaintiffs’ requested relief would cause harm to at least some non-parties by delaying bond hearings and merits hearings for aliens who want those hearings to go forward because they may lead to their release. *See* Mot. 2; McHenry Decl. ¶ 31.

First, Plaintiffs seek relief that conflicts with Article III, which requires that a “remedy must be tailored to redress the plaintiff’s particular injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Allowing a party to challenge policies “apart from any concrete application that threatens imminent harm to [their] interests” would “fly in the face of Article III’s injury-in-fact requirement.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). That rule is especially important where plaintiffs do “not represent a class, so they [can] not seek to enjoin [an agency regulation] on the ground that it might cause harm to other parties.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010).

Second, injunctions that go beyond Plaintiffs’ own injuries exceed the power of a court sitting in equity, which must limit injunctions to “be no more burdensome to the defendant than

⁴ Notably, the Organizational Plaintiffs only move for relief on Claim I because they are not party to the claims brought in Claims II and III of the Complaint. Therefore, it is even clearer that should this Court find that any relief is appropriate on either of those Counts, it must be limited to the actual individual Plaintiffs who bring those Counts. *See* Compl. ¶¶ 73–82.

necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). It is well established that the scope of a court’s statutory authority to enter injunctive relief is circumscribed by the type of relief that was “traditionally accorded by courts of equity.” *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). But the tradition of equity inherited from English law was premised on “providing equitable relief only to parties” because the fundamental role of a court was to “adjudicate the rights of ‘individual[s].’” *Trump v. Hawaii*, 138 S. Ct. 2392, 2427–28 (2018) (Thomas, J., concurring) (quoting *The Federalist* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). This Court should tailor any relief to the actual Plaintiffs’ injuries.

Third, although Plaintiffs attempt to rely (in a footnote) on the All Writs Act for the basis of their injunction, *see* Mot. 29 n.57, their claims are rooted in the APA, and the APA does not authorize universal injunctive relief. The APA provides only that a court may “hold unlawful and set aside agency action.” 5 U.S.C. § 706(2). Nothing in § 706(2)’s text specifies whether challenged agency action, if found invalid, should be set aside on its *face* or *as applied* to the individuals. In the absence of a clear statement in the APA that it displaces traditional rules of equity, the court should adopt the narrower reading. *See Virginia Soc’y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (“Nothing in the language of the APA, however, requires us to exercise such far-reaching power.”). The absence of nationwide injunctions prior to Congress’ enactment of the APA in 1946 (and for over fifteen years thereafter) further suggests that the APA was not originally understood to authorize such broad relief. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 438 & n.121 (2017).

Furthermore, nationwide injunctive relief creates other legal and practical problems—problems which would be acute here, given the variety of different factual circumstances

surrounding each of the 69 immigration courts and the various ICE detention facilities. Plaintiffs want a one-size-fits-all remedy, disregarding the fact that immigration courts and detention centers across the country have responded appropriately, taking local conditions into account and considering the operations of their individual dockets. McHenry Decl. ¶ 46. A nationwide injunction would freeze immigration-court operations everywhere and limit EOIR's and ICE's flexibility to respond to local conditions or issues. Such an injunction circumvents the procedural rules governing class actions, which permit relief to absent parties only if rigorous safeguards are satisfied. *See* Fed. R. Civ. P. 23. Plaintiffs—who do not raise class claims in their complaint and have not moved to certify a class under Rule 23—have made no effort to explain why they should be entitled to such sweeping relief. Nationwide relief also enables forum shopping and effectively nullifies the decisions of other district courts nationwide, including courts who have considered similar requests to the one here. *See DHS v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); *see also Las Americas*, 2020 WL 1671584 (denying similar relief to that requested here). Nationwide relief would also deprive the judicial system of the benefits that accrue when numerous courts grapple with complex legal questions in a common-law-like fashion.

These principles apply with greater force to TROs and preliminary injunctions, which are equitable tools designed to “preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). “[T]he purpose of” preliminary equitable relief “is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward.” *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). Courts thus “need not grant the total relief sought by the applicant but may mold [their] decree to meet the exigencies of the particular case.” *Id.*; *U.S. Ass’n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 126, 129 (D.D.C. 2015), *aff’d sub nom. U.S. Ass’n of Reptile Keepers, Inc. v. Zinke*,

852 F.3d 1131 (D.C. Cir. 2017) (“the Court has not finally determined that the [action] is unlawful,” so “the need for narrow tailoring ... is particularly important,” and any “injunction should be limited in scope to protect only” parties); *Neb. Dep’t of Health & Human Servs. v. Dep’t of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (“district court should not have enjoined agency from applying challenged regulation to any party when an injunction covering plaintiff alone adequately protects it”); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018).

Finally, even if a TRO were appropriate, Plaintiffs have not shown that the nationwide relief they seek is warranted based on the harms alleged, as weighed against a TRO that would irreparably harm the United States and the public. It is always in the public interest to enforce its immigration laws—including through immigration courts conducting its essential functions. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Blackie’s House of Beef, Inc.*, 659 F.2d at 1221. Here, the Executive Branch has identified a crisis and is responding appropriately, with due consideration for local circumstances and aliens’ rights. *E.g.*, McHenry Decl. ¶¶ 44–46, 97. In contrast, Plaintiffs’ alleged injuries are speculative, do not account for recent action that ICE and EOIR have taken to respond to the crisis, and do not outweigh the harm that would be caused by “injunctive relief [that] deeply intrudes into the core concerns of the executive branch,” *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978), and would undermine the “efficient administration of the immigration laws,” *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

Under these principles, the proposed nationwide TRO is overbroad and should be rejected. If the Court grants relief, the Court must limit any relief to the Individual Plaintiffs and actual clients of the Organizational Plaintiffs’ members whom they can identify as having imminent immigration-court hearings.

CONCLUSION

This Court should deny Plaintiffs’ motion for a temporary restraining order,

Dated: April 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

NIPNLG v. EOIR, No. 1:20-cv-00852-CJN (D.D.C.)

I certify that on April 13, 2020, I served a copy of the foregoing document and its attachments on all parties of record by causing them to be filed with the Clerk of the Court through the CM/ECF system, which will provide electronic notice to all attorneys of record.

Dated: April 13, 2020

/s/ Alexander J. Halaska
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

DECLARATION OF ALEXANDER J. HALASKA

I, Alexander J. Halaska, declare as follows:

1. I am a trial attorney for the U.S. Department of Justice. I represent the federal government Defendants in their official capacities in the above-captioned matter. I am a member in good standing of the bar of the State of Illinois, and I am authorized to practice in the U.S. District Court for the District of Columbia pursuant to Local Civil Rule 83.2(e). I submit this declaration in support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Restraining Order.

2. Attached hereto as **Exhibit 1** is a true and accurate copy of the declaration of James McHenry, Director of the Executive Office for Immigration Review (Apr. 13, 2020).

3. Attached hereto as **Exhibit 2** is a true and accurate copy of Executive Office for Immigration Review Policy Memorandum 20-10, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak.

4. Attached hereto as **Exhibit 3** is a true and accurate copy of U.S. Immigration and

Customs Enforcement's *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020), except that Exhibit 3 does not include the documents listed as Attachments A–K. The document is available at <https://www.ice.gov/sites/default/files/documents/Document/2020/ero-COVID19responseReqsCleanFacilities.pdf>.

5. Attached hereto as **Exhibit 4** is a true and accurate copy of the declaration of Russell Hott, the Acting Assistant Director for U.S. Immigration and Customs Enforcement's Custody Management Division (Apr. 13, 2020).

6. Attached hereto as **Exhibit 5** is a true and accurate copy of the declaration of Acting Chief Immigration Judge Christopher Santoro (Apr. 13, 2020).

7. Attached hereto as **Exhibit 6** is a true and accurate copy of guidance issued by Peter Berg, U.S. Immigration and Customs Enforcements Assistant Director for Field Operations (Apr. 4, 2020).

8. Attached hereto as **Exhibit 7** is a true and accurate copy of the declaration of Jason Ciliberti (Apr. 13, 2020).

9. Attached hereto as **Exhibit 8** is a true and accurate copy of the declaration of Alcide R. Benoit (Apr. 13, 2020).

10. Attached hereto as **Exhibit 9** is a true and accurate copy of the declaration of Kelley Beckhelm (Apr. 13, 2020).

11. Attached hereto as **Exhibit 10** is a true and accurate copy of the declaration of John Bretz (Apr. 13, 2020).

12. Attached hereto as **Exhibit 11** is a true and accurate copy of the declaration of Jose Simao (Apr. 13, 2020).

13. Attached hereto as **Exhibit 12** is a true and accurate copy of the declaration of

Christopher L. LaBier (Apr. 13, 2020).

14. Attached hereto as **Exhibit 13** is a true and accurate copy of the declaration of Brian Allen (Apr. 13, 2020).

15. Attached hereto as **Exhibit 14** is a true and accurate copy of the declaration of Elizabeth Burgus (Apr. 13, 2020). Plaintiff Rodriguez Cedenos's A number is redacted from the declaration.

16. Attached hereto as **Exhibit 15** is a true and accurate copy of the declaration of Elizabeth Burgus (Apr. 13, 2020). Plaintiff Estrada Fernandez's A number is redacted from the declaration.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge. Executed on April 13, 2020, in Washington, D.C.

/s/ Alexander J. Halaska
ALEXANDER J. HALASKA
U.S. Department of Justice

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD,
et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

**DECLARATION OF JAMES MCHENRY, DIRECTOR OF THE 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).
5. As the EOIR Director, I manage EOIR and its employees and am responsible for the supervision of each EOIR component in the execution of its respective duties in accordance with the law.

6. My testimony in this declaration is based upon my experience with and personal knowledge of EOIR's operations, information obtained from records and systems maintained by EOIR, and publicly available statements or announcements.
7. I am testifying in this declaration to the best of my knowledge and understand this declaration is for use in the *National Immigration Project of the National Lawyers Guild (NIPNLG)* case.

Background

8. EOIR contains three components responsible for immigration-related administrative adjudicatory proceedings conducted under the Immigration and Nationality Act (INA) and associated regulations.
9. The Office of the Chief Immigration Judge (OCIJ) oversees the operations of EOIR's immigration courts. OCIJ currently operates 69 immigration courts and immigration adjudication centers (IAC) in 29 states, Puerto Rico, and the Northern Mariana Islands.¹
10. Immigration courts located within a detention center operated or leased by DHS hear exclusively detained cases. A small number of courts located outside a DHS detention facility also hear primarily or exclusively detained cases. A small number of courts hear primarily or exclusively non-detained cases, but may conduct bond hearings as appropriate. The remaining plurality of immigration courts hear primarily non-detained cases but also maintain regularly-scheduled dockets for detained cases. The two IAC hear cases exclusively by video teleconferencing (VTC). All immigration courtrooms are equipped with VTC technology.
11. OCIJ currently employs approximately 460 immigration judges (IJs) authorized to conduct proceedings under the INA and the associated regulations. Over 1200 support staff, including contractors, further support immigration court operations.

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

12. IJs preside over multiple types of proceedings. Among the most common are removal proceedings, custody redetermination proceedings (bond proceedings), and credible fear review proceedings.
13. Removal proceedings are conducted pursuant to section 240 of the INA. As of April 3, 2020, there were 19,518 pending detained cases in removal proceedings and 1,088,785 pending non-detained cases in removal proceedings.
14. All cases in removal proceedings are initiated by DHS, and DHS generally retains prosecutorial discretion in determining whether to place an alien into removal proceedings. For aliens convicted of crimes which render them removable, Congress has directed that DHS “shall begin any removal proceeding as expeditiously as possible after the date of the conviction.”² DHS initiates removal proceedings by serving a charging document, called a Notice to Appear (NTA), on an alleged alien and then filing the NTA with an immigration court. Once the NTA is filed with an immigration court, court personnel will create a record of proceeding (ROP) for the case. The NTA contains various information, including factual allegations and charges of removability based on alleged violations of either section 212 or 237 of the INA.³ In some cases, the NTA provides notification of the time and date of the first hearing in removal proceedings, but if it does not, the immigration court provides notice.
15. In removal proceedings, DHS is represented by an attorney within OPLA. In removal proceedings, an alleged alien has the privilege of being represented by an attorney at no expense to the Government.⁴

² 8 U.S.C. § 1229(d)(1).

³ 8 U.S.C. § 1229(a)(1).

⁴ 8 U.S.C. § 1362.

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

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

decision, though in more complex cases, the immigration judge may reserve a decision and issue a written decision at a later date.

17. During removal proceedings, an IJ will first determine removability. If the IJ determines that the alleged alien is not removable as charged, the IJ will terminate the proceedings. If the IJ determines that the alien is removable as charged, then the IJ will consider whether the alien is eligible for any relief or protection from removal. At the conclusion of removal proceedings, if they have not been terminated, an IJ will issue an order of removal, an order of voluntary departure, or an order granting relief or protection. Some orders may be issued in the alternative. Both DHS and the alien may appeal the IJ's decision to the Board of Immigration Appeals (the Board), another component within EOIR.
18. By statute, an alien who fails to attend a scheduled hearing shall be ordered removed *in absentia* if DHS establishes both the alien's removability and that the alien received proper notice of the hearing.⁶ An *in absentia* order of removal may be rescinded based on a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice or the alien demonstrates that the alien was in state or federal custody.⁷ An *in absentia* order of removal may also be rescinded based on a motion to reopen filed within 180 days if the 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

⁶ 8 U.S.C. § 1229a(b)(5).

⁷ 8 U.S.C. § 1229a(b)(5)(C)(ii).

⁸ 8 U.S.C. § 1229a(b)(5)(C)(i).

⁹ 8 U.S.C. § 1229a(e)

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. In addition to statutes, regulations, and case law, removal proceedings are generally conducted in accordance with the Immigration Court Practice Manual (ICPM),¹⁰ though an IJ may direct that the provisions of the ICPM not rooted in statute or regulation do not apply in particular cases.¹¹ 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 during the hearing.¹² For non-detained cases, the ICPM sets a general filing deadline of 15 days before an individual hearing, excluding impeachment or rebuttal evidence, and objections to the evidence may be made at any time.¹³ For all detained hearings, the ICPM defers to individual immigration judges to specify deadlines.¹⁴ For all hearings, an IJ retains discretion to set his or her own deadline, and IJs vary in the extent to which they follow the ICPM in non-detained cases.¹⁵
21. IJs also have the authority to grant extensions of filing deadlines in advance of the deadline or to excuse untimely filings made after a deadline has passed. Untimely filings are not rejected by immigration court staff, and the IJ retains authority for how to deal with untimely filings.¹⁶
22. Although EOIR does not have experience with delayed filings due to a disease such as COVID-19, it does have significant experience with filings delayed due to comparable situations such as hurricanes or other natural disasters. In those situations, parties should file a motion to accept

¹⁰ <https://www.justice.gov/eoir/page/file/1258536/download>

¹¹ ICPM, ch. 1.1(b) and (c).

¹² ICPM, ch. 3.1(b)(i)(A).

¹³ ICPM, ch. 3.1(b)(ii)(A).

¹⁴ ICPM, ch. 3.1(b)(i)(B) and (b)(ii)(B).

¹⁵ ICPM, ch. 1.1(b) and (c).

¹⁶ ICPM, ch. 3.1(d)(iii) and (iv).

the untimely filing.¹⁷ In my experience, properly filed and supported motions to accept untimely filings due to natural disasters are rarely denied. Similarly, in my experience, properly filed and supported motions to extend a filing deadline due to an impending natural disaster, such as a hurricane, are also rarely denied.

23. In general, in my experience, for untimely filings related to an individual hearing, IJs frequently either excuse the untimeliness of the filing at the hearing or continue the case to another date to allow both the IJ and the opposing party additional time to review the filing.
24. How an IJ addresses an untimely filing will also depend on the specific facts of the case, the nature of the filing, and the extent of its untimeliness. For example, an IJ may not address the timeliness of a filing that is found to be cumulative or irrelevant because such a filing would be excluded from evidence even if it were timely. In my experience, the probative value of the filing, rather than its timeliness, is the most dispositive factor in how an IJ assesses the filing. Based on my experience, as a general—though not universal—proposition, the more probative the filing, the more likely an IJ will overlook its untimely filing.
25. Regulations also provide for the filing of motions for a continuance based upon a showing of good cause, and IJs possess authority to *sua sponte* adjourn cases.¹⁸ Whether good cause exists depends on the specific facts of each case.
26. Deadlines for filing motions to reopen, motions to reconsider, and appeals are generally set by statute or regulation. Although IJs and members of the Board cannot alter those deadlines *per se*, evolving case law has made many of them subject to equitable tolling. Thus, depending on fact-specific circumstances of individual cases and applicable case law, equitable tolling may excuse filings not meeting these deadlines.

¹⁷ ICPM, ch. 3.1(d)(iii) and (iv).

¹⁸ 8 C.F.R. §§ 1003.29 and 1240.6.

27. During a bond proceeding for an adult, an IJ determines whether a detained alien is eligible for release from DHS custody and, if so, under what conditions.¹⁹ IJs also have authority to consider requests to ameliorate the conditions of release from custody if the request is filed within 7 days of release.²⁰ An IJ may consider a request for bond even in cases where DHS has not filed an NTA. Based on evolving case law, an IJ may also have jurisdiction to consider bond requests for aliens whose removal proceedings have concluded but who have not yet been removed. An IJ may not grant bond or redetermine conditions of custody *sua sponte*.²¹
28. Any individual in DHS custody may request a bond hearing prior to the issuance of an administratively final order of removal. The initial request may be in writing or it may be made orally to the IJ during the individual's regularly-scheduled hearing. If requested in writing, the immigration court is supposed to schedule the hearing within three to five days after the request is received.²² If requested orally, an IJ will typically conduct the bond hearing after concluding the scheduled hearing in order to keep the proceedings separate. Either party may appeal the IJ's bond decision to the Board.
29. An ROP for a bond proceeding is maintained separately from an ROP for a removal proceeding.²³ In my experience, at least one party typically files documents in a bond proceeding, and in some proceedings both parties file documents. OPLA frequently files a Form I-213, Record of Deportable/Inadmissible Alien, and the alleged alien often, though not always, files documentation to support a bond request. In cases involving detained aliens with criminal convictions, OPLA almost always files conviction records to assist the IJ in

¹⁹ 8 C.F.R. §§ 1003.19 and 1236.1(d).

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

²¹ *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).

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>

²³ 8 C.F.R. § 1003.19(d).

determining whether the alleged alien is eligible for bond or may be subject to mandatory detention.²⁴

30. Administrative support staff for a court are responsible for creating and maintaining the ROP for a bond proceeding, including placing any paper filings in the ROP. IJs do not typically print out filings, assemble the ROP, or maintain physical custody of it. Bond hearings are not required to be recorded, but some IJs do record the hearings. IJs in certain parts of the country are required to record bond hearings in certain types of cases due to court rulings.²⁵
31. Some adult aliens are not eligible for a bond from an IJ while their removal proceedings are pending due either to their criminal history or their manner of attempted entry into the United States.²⁶ Such aliens may nevertheless be released from DHS custody if an IJ terminates their removal proceedings or grants them relief or protection at the conclusion of an individual hearing in their removal proceeding case. For example, an immigration judge generally lacks jurisdiction to grant bond to a detained “arriving alien,”²⁷ but if the immigration judge grants that alien’s asylum application following an individual merits hearing, then in my experience, there is a strong likelihood DHS will release that alien from custody. Similarly, an immigration judge generally lacks jurisdiction to grant bond to a detained lawful permanent resident (LPR) alien convicted of certain crimes,²⁸ but immigration judges do have authority to cancel the removal of an LPR whose conviction is not an aggravated felony, who meets other criteria, and who warrants a favorable exercise of discretion.²⁹ In my experience, IJs often grant cancellation of removal to LPR who are statutorily eligible following an individual hearing,

²⁴ 8 U.S.C. § 1226(c);

²⁵ *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011).

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

²⁷ 8 C.F.R. § 1003.19(h)(2)(i)(B).

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

²⁹ 8 U.S.C. 1229b(a).

and upon the granting of such relief, there is also a strong likelihood that DHS will release the LPR from custody. Thus, for detained aliens, both bond proceedings and removal proceedings provide a potential mechanism for release from custody, and the blanket postponement of all detained cases would deprive aliens of the opportunity to avail themselves of that mechanism. Between March 17 and April 9, 2020, for example, IJs either terminated proceedings or granted an application for relief or protection from removal for approximately 334 detained aliens, who may now be amenable to release from detention, but who would not necessarily have had that opportunity if their proceedings had been postponed.

32. Pursuant to paragraph 24A of what is known as the Flores Settlement Agreement (FSA), as interpreted by the Ninth Circuit, EOIR is required to hold bond hearings for any unaccompanied alien child (UAC) detained in the custody of the Department of Health and Human Services (HHS) in a secure or staff-secure facility or for any UAC who has affirmatively requested a hearing, including by requesting a hearing directly from the IJ.³⁰ During a bond proceeding for a UAC, an IJ determines whether a UAC is a danger to the community or is a flight risk, though HHS may not release a UAC determined to be neither a flight risk nor a danger to the community until a suitable sponsor is located. Either party may appeal the IJ's bond decision to the Board. Because a UAC may request a bond hearing directly from an IJ during a regularly-scheduled hearing, the blanket postponement of all detained cases would deprive some UAC of the opportunity to request a bond hearing and potentially subject EOIR to liability for violating the FSA and disregarding a district court order.
33. Neither adult nor juvenile aliens are required to file a written motion or request in order to receive an initial bond hearing, and many aliens often request a bond hearing orally during

³⁰ *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017)

their regularly-scheduled hearings. Thus, postponing all regular hearings for detained aliens would necessarily require all such aliens to request a bond hearing in writing which is a requirement not currently imposed by the applicable regulation.³¹

34. Both DHS and HHS have authority to release aliens in their custody separate and apart from the authority of an IJ, though HHS cannot simply release a UAC alone without the availability of a sponsor.³² The blanket postponement of all detained cases in removal proceedings—and, thus, the elimination of the availability of a detained alien to make an oral bond request in front of an IJ and the elimination of any opportunity for an IJ to terminate proceedings or to grant the alien’s application for relief or protection that would make the alien amenable to release—would place extraordinary pressure on both DHS and HHS to release all aliens in their custody to avoid possible constitutional violations or violations of existing federal court orders. The mass release from custody of all detained aliens, including criminal aliens or aliens with national security concerns, in DHS custody and UAC in HHS custody, would have significant, adverse consequences for public safety.

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

³¹ 8 C.F.R. 1003.19(b),

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

36. An alien otherwise subject to expedited removal may avoid removal initially if the alien demonstrates a credible fear of persecution or torture.³³ An alien's claim of a fear of persecution or torture is first reviewed by DHS.³⁴ If DHS determines that the alien does not have a credible fear of persecution or torture, the alien may seek review of that determination by an IJ.³⁵ By statute, that review "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the [DHS] determination."³⁶ If either DHS or an IJ finds that an alien does possess a credible fear of persecution or torture, that alien is placed in removal proceedings for a full consideration of his or her application for asylum.³⁷
37. By statute, most aliens are detained during the credible fear review process, and an IJ does not have jurisdiction to grant an alien bond while that process is ongoing.³⁸ Whether an alien who has been found to have a credible fear and subsequently placed in removal proceedings is eligible for release from custody is the subject of ongoing litigation, and the most recent ruling from the Ninth Circuit on March 27, 2020, affirmed that such aliens who had entered the country illegally are eligible for a bond hearing.³⁹ Even if such aliens are ultimately determined not to be eligible for bond, the granting of such an alien's asylum application by an IJ in removal proceedings would typically cause DHS to release the alien from custody. Consequently, the postponement of credible fear review proceedings would effectively preclude aliens in those proceedings from any opportunity to seek release from custody except

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

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

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

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

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

³⁸ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

³⁹ *Padilla v. ICE*, ---F.3d--- (9th Cir. 2020).

through federal habeas corpus litigation which itself is the subject of a case pending before the Supreme Court.

38. By regulation, “[i]n deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”⁴⁰ No employee at EOIR, except members of the Board acting on an appeal from the decision of an immigration judge, possesses the authority to direct the result of an adjudication assigned to an immigration judge.⁴¹

39. By regulation, as Director, I do not have the authority to adjudicate cases in immigration court or to direct the result of an adjudication assigned to an immigration judge, unless provided for by statute, regulation, or delegation of authority from the Attorney General.⁴² No existing statute, regulation, or delegation of authority from the Attorney General provides me authority to adjudicate cases or to direct the result of an adjudication assigned to an immigration judge. Consequently, I do not have authority to direct immigration judges to deny or grant any motion in individual cases or to direct any result in any case in immigration court. If I were to order immigration judges to deny or grant motions in individual cases, I would be infringing on the independence and discretion accorded to immigration judges and potentially violating the regulations.

⁴⁰ 8 C.F.R. § 1003.10(b).

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

⁴² 8 C.F.R. § 1003.0(c).

40. Immigration judges do have the authority to issue standing orders in certain circumstances.⁴³

Immigration courts may also adopt local operating procedures.⁴⁴ Many courts and IJs hearing detained cases have done so over the past three weeks in response to the COVID-19 outbreak and have tailored them to the particular circumstances of their respective dockets.⁴⁵

41. 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.

42. Like IJs, members of the Board exercise “independent judgment and discretion” in considering the cases that come before them.⁴⁶ No EOIR employee can direct a Board Member to decide a motion or an appeal to obtain a particular result.⁴⁷

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

Court Operations in Response to COVID-19.

44. COVID-19 has presented challenges to EOIR, as it has to almost every court system in the United States, in ensuring that critical functions continue while the agency simultaneously aggressively monitors and works to mitigate risks presented by COVID-19 to those within EOIR space. As with any type of emergency situation, EOIR is continually assessing how to

⁴³ 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>.

⁴⁴ 8 C.F.R. § 1003.40.

⁴⁵ <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁴⁶ 8 C.F.R. § 1003.1(d)(1)(ii).

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

best ensure the safety of employees, respondents, practitioners, and visitors. It continues to closely review and implement guidance from the Department of Justice, the Office of Management and Budget, the Office of Personnel Management, the Centers for Disease Control and Prevention (CDC), and the General Services Administration in responding to issues concerning specific locations or employee situations related to COVID-19. EOIR takes the safety, health, and well-being of its employees respondents, practitioners, and visitors very seriously and will continue to respond to the COVID-19 outbreak accordingly, while also attempting to ensure that its critical and essential judicial functions continue.

45. I have closely observed that many court systems have grappled with the operational challenges posed by the outbreak of COVID-19. I have observed that few courts have closed entirely, but I understand that most federal, state, and administrative courts have scaled back operations to what may be characterized as essential or critical services. I have observed that many courts continue to process filings, including those submitted by mail or electronically. I have observed that many courts continue to adjudicate motions or filings that may be resolved without a hearing. I am aware that many, though not all, courts have also continued to conduct critical hearings of individuals in custody, including detention hearings. I am aware that many, if not most, courts have issued multiple announcements in March and April 2020 regarding their operational statuses and that these announcements are typically posted on the website for each court. I am also aware that the federal courts with social media accounts have also used social media channels to communicate announcements regarding their operational statuses. I am unaware of any legal challenges to the continued operation of other court systems or why the continued operation of those courts on a scaled-down level do not pose the same issues alleged by Plaintiffs regarding EOIR.

46. Because COVID-19 has not affected all communities nationwide in the same manner and because EOIR's dockets vary considerably from court to court, the challenges presented by COVID-19 are not the same for every immigration court. In recognition of these variances and of the fact that local immigration judges and court staff are often in the best position to address challenges tailored to the specifics of their court's practices, EOIR has not adopted a "one size fits all" policy for every immigration court, though it has issued generally-applicable guidance regarding access to EOIR space, the promotion of practices that reduce the need for hearings, and the maximization of the use of telephonic and VTC means through which to hold hearings.
47. Overall, EOIR has followed a path similar to that of other courts. EOIR has implemented a number of measures to maximize social distancing. For example, on March 18, 2020, I issued EOIR Policy Memorandum (PM) 20-10 restricting access to EOIR space for individuals at risk of having COVID-19; reminding practitioners and IJs of well-established law that could help minimize the risk of exposure to COVID-19 such as waiving appearances,⁴⁸ granting continuances,⁴⁹ limiting physical presence in the courtroom,⁵⁰ issuing standing orders,⁵¹ deviating from the ICPM,⁵² and conducting hearings by VTC or by telephone; and, encouraging IJs and the parties to resolve cases through written filings⁵³ and establishing a policy of conducting hearings through VTC or by telephone⁵⁴ to the maximum extent practicable consistent with the law.⁵⁵ PM 20-10 was modeled on similar orders issued by federal district courts.

⁴⁸ 8 C.F.R. § 1003.25(a).

⁴⁹ 8 C.F.R. §§ 1003.29 and 1240.6.

⁵⁰ 8 C.F.R. § 1003.27(a) and (b).

⁵¹ PM 20-09.

⁵² ICPM, ch. 1.1(b) and (c).

⁵³ 8 C.F.R. § 1003.25(b).

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

⁵⁵ 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>

48. PM 20-10 also commits EOIR to using alternative hearing mediums—such as hearings by telephone or by VTC—“to the maximum extent practicable in accordance with the law” to further minimize in-person interaction and reduce the risk of the spread of COVID-19. All immigration courts have the equipment to conduct hearings through VTC. When conducting hearings by video or telephone conference, the IJ, the respondent, the DHS attorney, and the witness do not need to be present in the same location.⁵⁶ For example, some courts use VTC to connect to another courtroom from an IJ’s courtroom in the same court. Thus, the detainee is in a separate courtroom. If represented, the attorney could appear by telephone—and in many courts currently, prior approval or the filing of a motion is not required to appear telephonically—or appear in person.
49. Additionally, in master calendar and bond hearings, IJs and immigration courts have curtailed the number of detainees allowed in a courtroom at one time. Courts not located in detention facilities have also used VTC to conduct hearings, and some courts have conducted VTC hearings where the respondent appears in DHS space, rather than in an EOIR courtroom.
50. VTC is commonly used for detained hearings already, and EOIR conducted almost 35,000 hearings by VTC in the first quarter of FY 2020.⁵⁷ Aliens may also consent to have their individual hearings occur by telephone, though VTC is more logistically feasible for aliens who are detained.
51. Between March 18 and March 26, 2020, EOIR conducted approximately 81.5% of credible fear reviews by telephone or by VTC. Excluding removal cases heard by an immigration court physically located inside a DHS detention facility, EOIR conducted approximately 76.4% of removal hearings during that same time period by telephone or by VTC. For cases heard by a

⁵⁶ ICPM ch. 4.7(b).

⁵⁷ <https://www.justice.gov/eoir/page/file/1117301/download>

court physically located inside a DHS detention facility, no policy or law prevents either party from requesting to follow social distancing guidelines within the courtroom or prevents the IJ from following those guidelines *sua sponte*.

52. OCIJ has further taken specific steps at the 58 immigration courts that maintain dockets of detained cases to minimize risk of exposure to COVID-19 to employees, aliens, and practitioners. These steps include consolidating dockets so that fewer IJs are needed to hear cases; establishing standing orders to allow practitioners to appear telephonically; maintaining social distancing in courtrooms; and, furthering the use of VTC and the telephone for hearings, including utilizing empty courtrooms as needed to avoid the need for a detained alien to appear in person before an IJ, and relocating IJs to nearby courts to hear cases by VTC. As of April 10, 2020, OCIJ has maximized its VTC usage for hearings at all but four of the 58 immigration courts hearing detained cases and is actively working on maximizing the use of VTC at the remaining four.⁵⁸

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

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

55. Although EOIR has completely closed particular immigration courts for a limited period of time and on a court-specific basis for issues related to COVID-19, courts that are open are limited to the performance of essential functions, such as those associated with hearing cases

⁵⁸ Two of the four courts are awaiting the installation of VTC capability and recording programming on the IJs' computers to allow them to conduct hearings remotely rather than in court. One court is awaiting testing of VTC equipment. The fourth hears only one detained docket per month and is assessing its technological capability to hear that docket by VTC in May if warranted.

of detained individuals or with the processing of mail and filings. At courts without a regular detained docket, EOIR's staff presence is minimal, as is their interaction with the public. Overall, EOIR's current operating posture is similar, though not completely identical, to the one in which it operates during a lapse in appropriations in which only critical functions continue.

56. The impact of postponements and court closures on any filing deadlines varies considerably from case to case and depends on the nature of the filing, the procedural posture of the specific case, and the IJ's specific order on filings, if any. Because filing deadlines are committed by the ICPM to IJs for all detained cases, the impact of any court closures will depend on any specific order issued by an IJ in a particular case.
57. Unless there is a specific IJ order to the contrary, postponements and court closures would not be expected to raise issues regarding filing deadlines for non-detained cases at the master calendar stage because any deadline imposed by the ICPM only applies to a motion and only applies if the party wishes to receive a ruling on the motion prior to the hearing. "Otherwise filings may be made either in advance of the hearing or in open court during the hearing."⁵⁹
58. Similarly, unless there is a specific IJ order to the contrary, postponements and court closures would also not be expected to raise issues regarding filing deadlines for non-detained cases at the individual calendar stage. If the IJ has ordered that the deadlines in the ICPM are applicable, the postponement of the hearing would necessarily postpone the deadline because the ICPM deadline applies in advance of date of the "hearing" which may change if the hearing is postponed.⁶⁰ If a court is closed when a deadline occurs, the deadline then becomes the next

⁵⁹ ICPM, ch. 3.1(b)(i)(A).

⁶⁰ ICPM, ch. 3.1(b)(ii)(A).

business day the court is open.⁶¹ These rules are longstanding, and in my experience, most, if not all, practitioners are well aware of them.

59. I understand that on March 24, 2020, EOIR announced via social media the reopening of several immigration courts handling primarily, if not exclusively, non-detained cases and noting that filings due to those courts during the time they were closed would be due the next business day. Although this announcement was consistent with the longstanding rule that filings due when a court is closed become due on the next business day the court is open, it nevertheless caused confusion because it did not account for the fact that all non-detained hearings had been postponed through April 10, 2020. Consequently, the earliest possible due date for a filing in a non-detained case following the ICPM would have been 15 days prior to the earliest possible scheduled non-detained hearing, which would not occur until April 13, 2020. Thus, filings for hearings scheduled on April 13, 2020, were not actually due until March 30, 2020.⁶²

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

61. EOIR has not completely closed—meaning closed even to process mail or receive filings—all immigration courts. The complete closure of all immigration courts would preclude IJs from hearing any cases because IJs do not assemble ROPs themselves, they typically do not print

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

⁶² Fifteen days prior to April 13, 2020, fell on Sunday March 29. Thus, any filings would have actually been due on Monday March 30.

out electronic filings themselves, and they would have no way of retrieving any relevant filings from a closed court. The complete closure of all immigration courts would also render aliens subject to removal by DHS without an opportunity to file a motion to reopen or to seek a stay of removal.⁶³ Such an action would be contrary to statutory provisions allowing the filing of a motion to reopen⁶⁴ and would likely be viewed as a violation of due process for aliens whose removal is imminent. Accordingly, EOIR is continuing to receive and process filings at all courts, including motions to reopen.

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

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

64. Preventing a detained alien from receiving a review of a negative credible fear determination for an unknown or indefinite period of time would be contrary to 8 U.S.C. § 1225(b)(1)(B)(iii)(III). It would also prevent that alien from potentially obtaining release from custody.

65. Preventing hearings from occurring would prevent DHS from filing an NTA to initiate proceedings with the time and date of the next hearing. Such an action would not only infringe upon DHS's prosecutorial discretion to bring removal proceedings but would also appear to be

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

⁶⁴ 8 U.S.C. § 1229a(c)(7).

contrary to 8 U.S.C. § 1229(d)(1), which directs DHS to initiate removal proceedings against aliens removable due to criminal convictions “as expeditiously as possible after the date of the conviction.”

66. In my experience, many, if not most, aliens who are detained do not want any additional delay in their proceedings precisely because they are detained. Moreover, many detained aliens actively seek either an order of removal or an order of voluntary departure because they wish to return to their home countries. Thus, postponing all detained hearings would prolong detention for some aliens against their wishes and would force some aliens to remain detained even though the alien and DHS are in agreement that the alien should return to the alien’s home country.

67. EOIR must comply with rulings from multiple federal courts across the country requiring the provision of bond hearings in certain circumstances. For example, based on federal court rulings in some districts or circuits, EOIR is required to hold bond hearings, *inter alia*, for UAC,⁶⁵ for aliens detained more than six months,⁶⁶ for aliens in withholding-only proceedings,⁶⁷ for aliens otherwise subject to the mandatory custody provisions of 8 U.S.C. § 1226(c),⁶⁸ for juvenile aliens re-arrested after being released by HHS,⁶⁹ and for aliens who have been found to have a credible fear of persecution or torture.⁷⁰ The blanket postponement of all detained hearings would place EOIR at serious risk of violating federal court orders or rulings in each of these circumstances because it would prevent EOIR from scheduling and

⁶⁵ *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

⁶⁶ *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).

⁶⁷ *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).

⁶⁸ *Gayle v. Warden, Monmouth Cty. Correctional Inst.*, 2017 WL 5479701 (D.N.J. 2017).

⁶⁹ *Saravia v. Sessions*, 905 F.3d 1137 (9th Cir. 2018).

⁷⁰ *Padilla v. ICE*, ---F.3d--- (9th Cir. 2020).

holding hearings at which an alien could orally request bond pursuant to some of these decisions, would effectively require each alien to file a written motion for bond in excess of the requirements of either the applicable regulation or the holdings of many of the cases, and would prevent EOIR from holding hearings in which an alien could potentially obtain some form of relief or protection from removal that would render the alien amenable to release.

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

69. On April 1, 2020, EOIR postponed all removal hearings involving aliens placed in removal proceedings under the auspices of DHS's MPP program through at least May 1, 2020.

70. EOIR has implemented many suggestions made by its stakeholders in response to the COVID-19 outbreak. For example, it has postponed non-detained hearings and, in practice, differentiated hearings for detained aliens as essential or critical; it has made electronic filing available at every court; it has updated its policies on electronic signatures; and, it has moved further toward a maximized use of VTC and remote methods of hearing cases.

71. On April 7, 2020, EOIR established email boxes for the electronic filing of briefs at the Board similar to the email boxes that were set up to allow for filing by email at every immigration court. Because the Board adjudicates appeals of detained aliens, including appeals of bond decisions by IJs, the same concerns with closing detained courts or postponing detained cases also apply to the Board.

72. On April 9, 2020, EOIR announced that OCAHO will accept new complaints filed by email. OCAHO otherwise continues to receive filings and adjudicate cases, and I am unaware of any complaints or concerns directed at OCAHO's continued operations.

Notifications

73. EOIR has maintained a social media Twitter account since 2011 and a social media Facebook account since 2013. The current version of EOIR's website launched in October 2010.
74. EOIR communicates information regarding immigration court operations by placing information on its website and through postings on social media. For each case that is rescheduled, it also provides a new notice of hearing in that case which is mailed to the last address provided by an alien and the alien's representative, if any.
75. EOIR routinely posts announcements of immigration court closures on social media, in addition to posting that information on its website. For example, between January 28, 2019, and March 1, 2020, EOIR made approximately 150 separate announcements via social media and its website regarding the operational status of immigration courts, including many announcements regarding the closure of courts.
76. Prior to March 2020, I am unaware of any complaints EOIR received or concerns raised to EOIR regarding the manner in which operational announcements were communicated, even for announcements that involved the transfer of hearings and filings to a different immigration court. For example, on August 16, 2019, EOIR announced, through social media and on its website, the indefinite suspension of operations at the immigration court in Louisville, Kentucky, due to building safety conditions and the transfer of cases and filings to the immigration court in Memphis, Tennessee. I am unaware of any complaints that EOIR received

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

77. On March 15, 2020, EOIR established a specific web page, EOIR Operational Status During Coronavirus Pandemic (Operational Status website), which it has updated on almost a daily basis with information regarding hearing status, filings, court operations, and standing orders.⁷¹

78. In addition to making operational announcements through its website and social media and providing written notice of postponement of hearings, EOIR created a listserv on March 26, 2020, for announcements to practitioners, including announcements of the adoption of standing orders.⁷²

79. Multiple stakeholders, including the organizational Plaintiffs, also frequently retweet, forward, or collect and present information that EOIR announces publicly which further amplifies the dissemination of that information.⁷³ I am aware that Plaintiffs have presented declarations and exhibits indicating that many stakeholders disseminate information EOIR has announced through their own listservs.

80. The three organizational Plaintiff are stakeholders and at least two of them maintain a social media presence, including on Twitter.

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

⁷¹ <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁷² <https://www.aila.org/infonet/eoir-sends-message-to-stakeholders-announcing-new>

⁷³ <https://www.aila.org/recent-postings>

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

Filings and Appearances

82. EOIR has no policy requiring the filing of unclassified documents in person. EOIR's current policy is to encourage filings by mail and through electronic means, including through email or through ECAS, where available.
83. EOIR has allowed filing by mail since its inception, and I am unaware of any systemic problem at EOIR regarding filing by the United States Postal Service (USPS) or by a corporate delivery service. The INA's multiple references to service by mail⁷⁴ further indicate that mail is deemed to be a generally reliable vehicle for communications to and from an immigration court. Every court system of which I am aware relies on the mail for filings, and most courts of which I am aware are continuing to receive filings by mail. Although there may be individual instances in which mail is not properly delivered to an immigration court, those are redressable through motion practice or legal argument.
84. EOIR has no policy requiring any attorney to appear in any case in person. The method of an attorney's appearance is subject to the discretion of the IJ.
85. Beginning March 17, 2020, many immigration courts began adopting local operating procedures (LOPs) pursuant to regulation, and many immigration judges began issuing standing orders pursuant to policy. As of April 10, 2020, all immigration judges at 38 immigration courts hearing principally detained cases had adopted LOPs in the form of standing orders. As of the same date, 8 immigration judges hearing principally detained cases had adopted standing orders at courts which have not yet adopted LOPs. Immigration judges

⁷⁴ 8 U.S.C. §§ 1229(a)(2)(A) and (c).

or immigration courts hearing primarily or exclusively non-detained cases have not generally adopted standing orders or LOPs because non-detained cases are currently postponed through May 1, 2020.

86. Most, if not all, of these LOPs and standing orders allow for the appearance of practitioners by telephone without the need to file a motion. Although a few of them require parties appearing by telephone—meaning both DHS and the alien’s representative, if any—to waive objections to a document on the *sole* basis that they could not examine the document in person, none of the LOPs or standing orders requires parties generally to waive any rights to object to evidence.
87. All LOPs and standing orders have been posted by EOIR on the website for the relevant court, in the ICPM, and on its Operational Status website.⁷⁵ Additionally, all LOPs and standing orders have been noted on EOIR’s social media accounts and distributed through its listserv. All of them are designed to protect EOIR employees, aliens, practitioners, and attorneys for DHS while simultaneously maintaining the due process rights for detained aliens.⁷⁶
88. EOIR does not have the authority to direct IJs on how to rule in their cases. Because IJs exercise independence and discretion in deciding individual cases, neither I nor any employee at EOIR—except a member of the Board adjudicating a case appeal—is authorized to require IJs to deny or grant any particular motion. IJs are expected to adhere to the law, and instances in which a party believes an IJ has failed to follow the law may be redressed through an appeal to the Board, including an emergency interlocutory appeal. I am also not aware of IJs or the Board systematically failing to use sound judgment in consideration of motions filed during the current situation related to COVID-19, especially after March 20, 2020.

⁷⁵ <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

⁷⁶ <https://www.justice.gov/eoir/page/file/1259916/download>

89. Because IJs exercise independence and discretion in deciding individual cases, neither I nor any employee at EOIR—except a member of the Board adjudicating a case appeal—is authorized to require IJs to extend or restrict a filing deadline, to excuse or apply the statutory one-year deadline for filing an asylum application, to determine whether an alien has or has not demonstrated extraordinary circumstances warranting the excusal of that deadline, or to require an IJ to excuse or follow any established filing deadline. IJs are expected to adhere to all applicable law and to utilize their discretion appropriately. Instances in which a party believes an IJ has failed to follow the law, including where a party believes an IJ has abused his or her discretion, may be redressed through an appeal to the Board. I am not aware of IJs or the Board systematically failing to use sound judgment in consideration of any of these legal issues during the current situation related to COVID-19, especially after March 20, 2020.

90. EOIR does not control detention facilities maintained, operated, or leased by DHS and, accordingly, has no authority to direct DHS operations regarding who may access, and under what conditions, those facilities. I understand that DHS may have recently imposed additional safeguards on visitors to its facilities and that it may have limited avenues of communications between practitioners and detainees. I am not aware of any motions to continue being filed by Plaintiffs based on these circumstances, nor am I aware of any such motions being denied by IJs due to these circumstances. In general, although neither I nor any EOIR employee possess the authority to direct an IJ how to rule in a particular case, I am not aware of IJs systematically failing to use sound judgment in consideration of motions filed during the current situation related to COVID-19, especially for motions alleging that a practitioner was unable to access a facility where an alien is detained.

91. In response to an inquiry from a stakeholder received on March 19, 2020, EOIR clarified its policy on signatures for filings on March 31, 2020.⁷⁷ EOIR will allow the submission of filings with electronic signatures, though the signature may be subject to authentication as warranted by the facts in a particular case. I issued PM 20-11, *Filings and Signatures*, on April 3, 2020, confirming this updated policy.⁷⁸ EOIR will also continue to accept original documents containing wet signatures. Any type of signature — wet, digital, or electronic — may be subject to a challenge to its authenticity in immigration proceedings, though EOIR expects that any such challenge will be brought only in good faith.
92. The outbreak of COVID-19 has suspended EOIR's rollout of its new electronic adjudication system, the EOIR Courts & Appeals System (ECAS), which includes an electronic filing capability. ECAS has already been deployed to 14 courts, and in courts where ECAS has been deployed, filing may be made electronically through that system. In the other courts, filing by mail remains available and encouraged.
93. Immigration courts and judges may authorize the filing of documents by facsimile or email,⁷⁹ and some LOPs and standing orders are allowing the filing of documents through those means.⁸⁰ Beginning March 31, 2020, EOIR established court-specific email addresses to be used as temporary electronic filing mailboxes. As of April 9, 2020, 3157 email messages with filings had been received using those addresses.
94. I am aware that several state and local jurisdictions have issued executive orders in response to the COVID-19 situation, though not every state or locality in which an immigration court is present has done so. Although these orders carry different labels and vary considerably in their

⁷⁷ ICPM, ch. 3.3(b)(i).

⁷⁸ <https://www.justice.gov/eoir/page/file/1266411/download>

⁷⁹ ICPM, ch. 3.1(a)(vii).

⁸⁰ <https://www.justice.gov/eoir/page/file/1263056/download>

specifics, they generally order individuals to limit public interactions to essential tasks. Although the precise definition of “essential” varies greatly among the orders, I am not aware of any state or local order that purports to limit or close the functioning of federal government entities such as EOIR. I am also not aware of any such order that deems court operations or the provision of legal services as non-essential, and I am aware of many orders that expressly state that such services are essential.⁸¹ I am also not aware of any such order that considers the mail to be non-essential or that purports to close the operations of the USPS. I am aware that many such orders rely on an advisory list of critical infrastructure workers prepared by DHS’s Cybersecurity and Infrastructure Security Agency (CISA) in their assessments of essential work. I am also aware that CISA includes postal, parcel, and courier services, communications and information technology services, and operations of judicial systems among its list of critical infrastructure services.⁸² In short, I am not aware of any state or local order that requires EOIR to cease its operations, especially hearings for detained individuals, or that prohibits legal practitioners from working with clients in conjunction with those operations.

95. The law and any EOIR policies on filing and appearances generally apply equally to both parties in an immigration proceeding. Thus, standards for filing deadlines, filings by mail, and continuances apply equally to both aliens and DHS. I am unaware of any IJ treating these issues differently for DHS than for the aliens in immigration proceedings.

Assessment of Plaintiffs’ Assertions

96. I understand Plaintiffs’ claims related to EOIR to be speculative based primarily on isolated anecdotes related to a small number of EOIR’s 69 immigration courts and adjudication centers.

I understand Plaintiffs to not have even alleged any concerns with the vast majority of

⁸¹ <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf>

⁸² <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

immigration courts hearing detained cases. Although I understand Plaintiffs to have raised various hypothetical scenarios stemming from the COVID-19, I am not aware of any scenario that cannot be addressed by extant law or policy.

97. I am not aware of any IJs or Board members systematically failing to account for the operational challenges posed by the outbreak of COVID-19 in Plaintiffs' cases or in any other cases. To the contrary, I am aware that Plaintiffs have presented declarations and exhibits indicating that immigration court personnel have been accommodating in light of the current environment—*e.g.*, “I would say our court has been very solicitous in granting telephonic hearings and continuances.”⁸³ and “On March 25, 2020, I received a call from the court clerk asking me to email a motion to continue, an extraordinary request since the immigration courts do not allow electronic filings.”⁸⁴

98. I understand Plaintiffs formally to seek only the postponement of all in-person hearings before EOIR, but I understand Plaintiffs to appear to mean, instead, the postponement of all *non-bond* hearings. Thus, I understand Plaintiffs to seek the postponement of all detained hearings—including the postponement of credible fear reviews and merits hearings at which an alien may become eligible for release upon the granting of an application by an IJ—except for bond hearings, which I understand Plaintiffs to seek to be conducted only by VTC or telephone.

99. I also understand Plaintiffs to present declarations and exhibits seeking a variety of remedies different from those sought by Plaintiffs, including the closure of all immigration courts and, thus, the postponement of all hearings. For example, I understand Plaintiffs to seek the postponement of all credible fear reviews for detained aliens, though I am aware that Plaintiffs have presented declarations and exhibits which do not seek such postponements. I also

⁸³ ECF 7-4, ¶ 18.

⁸⁴ ECF 7-5, ¶ 25.

understand Plaintiffs to present declarations and exhibits seeking mutually exclusive actions—*i.e.* closing courts but continuing to hear certain types of cases.

100. EOIR has already adopted a policy of maximizing the use of VTC or a telephone for conducting hearings, especially detained hearings, and it has adopted many of the suggestions put forth in the declarations and exhibits submitted by Plaintiffs. It has declined, however, to cease all hearings for detained aliens. Plaintiffs' claims, if accepted, would require EOIR to postpone credible fear reviews and other hearings for detained aliens at which the aliens may either orally request bond from an IJ or receive a favorable adjudication on an application from an IJ that would warrant their release from custody. I am not aware of any other court system in the United States completely ceasing to hear cases of detained individuals, nor am I aware of any other lawsuit seeking such cessation from any court system in the United States at the current time. Stopping all detained hearings for an unknown or indefinite amount of time would place EOIR at serious risk of failing to comply with district court orders and circuit court decisions related to hearings for detained aliens, would effectively invalidate various statutory provisions, and would eviscerate the independence and discretion of immigration judges and Board members in their consideration of the individual circumstances of each case. Such a shutdown would further place significant pressure on DHS and HHS to release all aliens in their custody in order to avoid constitutional issues associated with potentially indefinite detention without recourse to a hearing, which would raise additional issues of public safety. Such a shutdown would also cause significant harm to aliens in detention who may utilize their hearings to become amenable to release from detention and to aliens seeking to file motions to reopen or to stay removal.

Executed on April 13, 2020.

**JAMES
MCHENRY**

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James McHenry

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 2



OOD
PM 20-10

Effective: March 18, 2020

To: All of EOIR
From: James R. McHenry III, Director *JRM*
Date: March 18, 2020

**IMMIGRATION COURT PRACTICES DURING THE DECLARED NATIONAL
EMERGENCY CONCERNING THE COVID-19 OUTBREAK**

PURPOSE:	Memorialize Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	None

To promote the safety of immigration court personnel, representatives, aliens, attorneys for the Department of Homeland Security, and the general public during the ongoing national emergency related to the COVID-19 outbreak¹, EOIR is issuing a Policy Memorandum (PM) adopting the following guidance for all immigration court cases² effective immediately and until further notice.

¹ The President issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak on March 13, 2020. COVID-19 refers to a novel coronavirus first identified in 2019 in Wuhan, Hubei Province, People's Republic of China that has subsequently spread globally. It is also abbreviated SARS-CoV-2 to distinguish it from a previously-identified coronavirus SARS-CoV that causes severe acute respiratory syndrome, or SARS. Severe acute respiratory syndromes are considered communicable diseases of public health significance for purposes of 8 U.S.C. § 1182(a)(1)(A)(i). *See* 42 C.F.R. § 34.2(b)(1) (a communicable disease of public health significance under 8 U.S.C. § 1182(a)(1)(A)(i) includes "[c]ommunicable diseases as listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act [42 U.S.C. § 264(b)]"); Executive Order 13674, *Revised List of Quarantinable Communicable Diseases* (July 31, 2014) (amending Executive Order 13295 to specify that "[s]evere acute respiratory syndromes, which are diseases that are associated with fever and signs and symptoms of pneumonia or other respiratory illness, are capable of being transmitted from person to person, and that either are causing, or have the potential to cause, a pandemic, or, upon infection, are highly likely to cause mortality or serious morbidity if not properly controlled" are communicable disease for purposes of Section 361(b) of the Public Health Service Act).

² Effective March 18, 2020, EOIR has deferred hearings for all non-detained cases in immigration court scheduled to occur between that date and April 10, 2020. Nevertheless, some non-detained cases may be adjudicated without a hearing during that time consistent with this PM. This PM will continue to apply upon the resumption of hearings in non-detained cases.

I. All individuals having business in person before an immigration court, to include respondents, representatives, and members of the general public, shall notify the security officer³ at any security screening checkpoint if any of the following apply:

- Within the last 14 days, the individual has been in a country with a Level 3 Public Health Notice (signifying widespread, ongoing transmission) or a country subject to a Level 3 or Level 4 Travel Advisory based on COVID-19. As of the date of this Policy Memorandum, those countries include: China, Iran, South Korea, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Monaco, San Marino, Vatican City, and Malaysia.

The current list of countries with a Level 3 Public Health Notice may be found at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>.

Travel advisories the Department of State has issued may be found at: <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/>.

- The individual has been asked to self-quarantine by local health authorities or a medical provider.
- The individual, or someone with whom the individual has had contact, has been diagnosed with COVID-19 within the past 14 days.

No individual described in one of the above categories should be allowed into EOIR court space. If EOIR receives information that a respondent or representative is described in one of these categories, the adjudication of the relevant case shall be deferred to another date.

II. EOIR does not typically provide general guidance or reminders about established law or immigration court procedures because immigration judges and practitioners are already well-versed in the law applicable to immigration proceedings. Nevertheless, under the current conditions related to the COVID-19 outbreak, EOIR has determined that it may be helpful to remind immigration judges and practitioners of the following well-established authorities which may be utilized for preventative purposes to minimize contact among individuals involved in immigration proceedings. Immigration judges may consider applicable public health guidance in exercising these authorities.

- Immigration judges may waive the presence of represented aliens. 8 C.F.R. § 1003.25(a). An alien's representative and the attorney for the Department of Homeland

³ As of the date of this PM, EOIR is holding hearings only for cases of detained aliens, and all visitors to detention facilities are typically subject to a security screening. EOIR does not control entry into any detention facility in which hearings may be conducted, and individuals seeking to attend hearings in such a facility may be subject to additional restrictions imposed by the facility operator that are not addressed in this PM.

Security (DHS) may also agree to hold a hearing without the presence of the alien. 8 U.S.C. § 1229a(b)(2)(A)(ii).

- Immigration judges may grant a motion for a continuance upon a showing of good cause. 8 C.F.R. § 1003.29.
- Depending upon physical facilities, immigration judges may place reasonable limitations upon the number in attendance at a hearing at any one time with priority being given to the press over the general public. For the purpose of protecting witnesses, parties, or the public interest, immigration judges may limit attendance at a hearing or hold a closed hearing. 8 C.F.R. §§ 1003.27(a) and (b).
- Immigration judges control their courtrooms and may exclude persons on a case-by-case basis, including persons exhibiting signs or symptoms of a potentially communicable condition.
- Immigration judges may issue standing orders, including orders regarding telephonic appearances by representatives, consistent with Policy Memorandum 20-09, *The Immigration Court Practice Manual And Orders* (Feb. 13, 2020).
- Immigration judges may direct that provisions of the Immigration Court Practice Manual (ICPM) are not applicable in particular cases. ICPM, sec. 1.1(b) (“The requirements set forth in this manual are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case.”).
- Immigration judges may conduct any hearing by video teleconferencing (VTC) where operationally feasible. Immigration judges may conduct individual merits hearings by telephone in removal proceedings if the alien consents after being advised of the right to proceed in person or through VTC. 8 U.S.C. § 1229a(b)(2).

III. EOIR further memorializes the following policies in order to encourage immigration judges to resolve as many cases as practicable without the need for a hearing and, thus, to minimize contact among individuals involved in immigration proceedings.

- Parties are encouraged to resolve cases through written pleadings, stipulations, and joint motions. Such actions may resolve some types of cases without the parties needing to appear physically in court, though the ultimate disposition of any particular case remains committed to the immigration judge in accordance with the law. Joint or stipulated requests for the disposition of a pending case—*e.g.* requests for a stipulated order of removal, a stipulated order of voluntary departure, or a stipulated order granting protection or relief from removal or joint motions to terminate or dismiss proceedings—shall be adjudicated expeditiously by an immigration judge.

- Scheduling and holding a master calendar hearing solely for the filing of an application by a represented alien and the scheduling of an individual merits hearing on a future date is a disfavored practice. For cases involving represented respondents for whom removability has already been determined, the case is not on a status docket, and the case is not yet scheduled for an individual merits hearing, immigration judges are encouraged to issue a pre-hearing scheduling order establishing a deadline for the filing of any applications for protection or relief from removal in lieu of scheduling a master calendar hearing solely for the purpose of filing that application and scheduling a future individual merits hearing. If an application is not filed within the time set by the immigration judge, the opportunity to file that application or document shall be deemed waived. 8 C.F.R. § 1003.31(c). Upon expiration of the filing deadline, the immigration judge shall either schedule the case for an individual merits hearing or issue an appropriate order (*e.g.* for removal, voluntary departure, or withdrawal of application for admission).
- Scheduling and holding a hearing for a represented respondent on a contested issue of removability which involves solely a pure legal question (*e.g.* whether a respondent's criminal conviction constitutes a conviction for a particular category of aggravated felony) is a disfavored practice. Immigration judges are encouraged to resolve such issues based on briefing from the parties.
- Holding a hearing following the timely filing of a motion to dismiss or a motion to pretermitt to which the opposing party has had an opportunity to respond in a case in which the ruling on the motion is dispositive of the outcome of the case is also a disfavored practice. Immigration judges should adjudicate motions in an expeditious manner and are encouraged to resolve cases based on the filings of the parties to the maximum extent practicable in accordance with the law.
- Hearings amenable to being conducted by telephone or VTC, especially for cases involving detained aliens, should be conducted through those mediums to the maximum extent practicable in accordance with the law.⁴ In particular, reviews of negative credible fear determinations made by DHS may be heard by telephone or by VTC. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case.

Please contact your supervisor if you have any questions.

⁴ EOIR has used VTC for hearings for nearly three decades, and it has been shown to be a "proven success." *Jurisdiction and Venue in Removal Proceedings*, 72 Fed. Reg. 14494 (Mar. 28, 2007).

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 3



ERO

U.S. Immigration and Customs Enforcement Enforcement and Removal Operations

COVID-19 Pandemic Response Requirements



**U.S. Immigration
and Customs
Enforcement**

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PURPOSE AND SCOPE

The U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) Coronavirus Disease 2019 (COVID-19) Pandemic Response Requirements (PRR) sets forth expectations and assists ICE detention facility operators to sustain detention operations, while mitigating risk to the safety and well-being of detainees, staff, contractors, visitors, and stakeholders due to COVID-19. Consistent with ICE's overall adjustments to its immigration enforcement posture,¹ the ERO PRR builds upon previously issued guidance and sets forth specific mandatory requirements expected to be adopted by all detention facilities housing ICE detainees, as well as best practices for such facilities, to ensure that detainees are appropriately housed and that available mitigation measures are implemented during this unprecedented public health crisis. The ERO PRR has been developed in consultation with the Centers for Disease Control and Prevention (CDC) and is a dynamic document that will be updated as additional/revised information and best practices become available.

INTRODUCTION

As the CDC has explained:

COVID-19 is a communicable disease caused by a novel (new) coronavirus, SARS-CoV-2, that was first identified as the cause of an outbreak of respiratory illness that began in Wuhan Hubei Province, People's Republic of China (China).

COVID-19 appears to spread easily and sustainably within communities. The virus is thought to transfer primarily by person-to-person contact through respiratory droplets produced when an infected person coughs or sneezes; it may transfer through contact with surfaces or objects contaminated with these droplets. There is also evidence of asymptomatic transmission, in which an individual infected with COVID-19 is capable of spreading the virus to others before exhibiting symptoms. The ease of transmission presents a risk of a surge in hospitalizations for COVID-19, which would reduce available hospital capacity. Such a surge has been identified as a likely contributing factor to the high mortality rate for COVID-19 cases in Italy and China.

Symptoms include fever, cough, and shortness of breath, and typically appear 2-14 days after exposure. Manifestations of severe disease include severe pneumonia, acute respiratory distress syndrome (ARDS), septic shock, and multi-organ failure. According to the [World Health Organization], approximately 3.4% of reported COVID-19 cases have resulted in death globally. This mortality rate is higher among older adults or those with compromised immune systems. Older adults and people who have severe chronic medical conditions like heart, lung or kidney disease are also at higher risk for more serious COVID-19 illness. Early data suggest older people are twice as likely to have serious COVID-19 illness.

¹ See, e.g., Attachment A, U.S. Immigration and Customs Enforcement, *Updated ICE statement on COVID-19* (Mar. 18, 2020), <https://www.ice.gov/news/releases/updated-ice-statement-covid-19>.

Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020) (internal citations omitted).

Given the seriousness and pervasiveness of COVID-19, ICE is taking necessary and prompt measures in response. ICE is providing guidance on the minimum measures required for facilities housing ICE detainees to implement to ensure consistent practices throughout its detention operations and the provision of medical care across the full spectrum of detention facilities to mitigate the spread of COVID-19. The ICE detention standards applicable to all facilities used to house ICE detainees have long required that each such facility have written plans that address the management of infectious and communicable diseases, including, but not limited to, testing, isolation, prevention, treatment, and education. Those requirements include reporting and collaboration with local or state health departments in accordance with state and local laws and recommendations.² The measures set forth in the PRR, allow ICE personnel and detention providers to properly discharge their obligations under those standards in light of the unique challenges posed by COVID-19.

OBJECTIVES

The ERO PRR is designed to establish consistency across ICE detention facilities by establishing mandatory requirements and best practices all detention facilities housing ICE detainees are expected to follow during the COVID-19 pandemic. Consistent with ICE detention standards, all facilities housing ICE detainees are required to have a COVID-19 mitigation plan that meets the following four objectives:

- To protect employees, contractors, detainees, visitors to the facility, and stakeholders from exposure to the virus;
- To maintain essential functions and services at the facility throughout the pendency of the pandemic;
- To reduce movement and limit interaction of detainees with others outside their assigned housing units, as well as staff and others, and to promote social distancing within housing units; and
- To establish means to monitor, cohort, quarantine, and isolate the sick from the well.³

² See, e.g., Attachment B, ICE National Detention Standards 2019, Standard 4.3, Medical Care, at II.D.2 (p. 114), https://www.ice.gov/doclib/detention-standards/2019/4_3.pdf; Attachment C, 2011 ICE Performance-Based National Detention Standards (PBNDS), Revised 2016, Standard 4.3, Part V.C.1 (p. 261), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf>; Attachment D, 2008 ICE PBNDS, Standard 4-22, Medical Care, V.C.1 (pp. 5-6), https://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf.

³ A *cohort* is a group of persons with a similar condition grouped or housed together for observation over a period of time. Isolation and quarantine are public health practices used to protect the public from exposure to individuals who have or may have a contagious disease. For purposes of this document, and as defined by the CDC, *quarantine* as the separation of a person or group of people reasonably believed to have been exposed to a communicable disease but not yet symptomatic, from others who have not been

CONCEPT OF OPERATIONS

The ERO PRR is intended for use across ICE's entire detention network, applying to all facilities housing ICE detainees, including ICE-owned Service Processing Centers, facilities operated by private vendors, and facilities operated by local government agencies that have mixed populations of which ICE detainees comprise only a small fraction.

DEDICATED ICE DETENTION FACILITIES

All ICE dedicated detention facilities⁴ must:

- Comply with the provisions of their relevant ICE contract or service agreement.
- Comply with the ICE national detention standards applicable to the facility, generally the [Performance-Based National Detention Standards 2011](#) (PBND 2011).
- Comply with the CDC's [Interim Guidance on Management of Coronavirus Disease 2019 \(COVID-19\) in Correctional and Detention Facilities \(Attachment E\)](#).
- Follow ICE's March 27, 2020 Memorandum to Detention Wardens and Superintendents on COVID-19 Action Plan Revision 1, and subsequent updates (Attachment F).
- Report all confirmed and suspected COVID-19 cases to the local ERO Field Office Director (or designee), Field Medical Coordinator, and local health department immediately.
- Notify both the local ERO Field Office Director (or designee) and the Field Medical Coordinator as soon as practicable, but in no case more than 12 hours after identifying any detainee who meets the CDC's identified populations potentially being at higher-risk for serious illness from COVID-19, including:
 - People aged 65 and older
 - People of all ages with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma
 - People who have serious heart conditions
 - People who are immunocompromised

exposed, to prevent the possible spread of the communicable disease. For purposes of this document, and as defined by the CDC, *isolation* as the separation of a person or group of people known or reasonably believed to be infected with a communicable disease and potentially infectious from others to prevent the spread of the communicable disease.

⁴ Dedicated detention facilities are facilities that house only ICE detainees. Dedicated facilities may be ICE-owned Service Processing Centers, privately owned Contract Detention Facilities, or facilities operated by state or local governments that hold no other detention populations except ICE detainees.

- Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- People with severe obesity (body mass index [BMI] of 40 or higher)
- People with diabetes
- People with chronic kidney disease undergoing dialysis
- People with liver disease

Notification shall be made via e-mail from the facility's Health Services Administrator (HSA) (or equivalent) and contain the following subject line for ease of identification: "Notification of COVID-19 High Risk Detainee (A-Number)." At a minimum the HSA will provide the following information:

- Detainee name
- Detention location
- Current medical issues as well as medications currently prescribed
- Facility medical Point of Contact (POC) and phone number

NON-DEDICATED ICE DETENTION FACILITIES

All non-dedicated detention facilities and local jails housing ICE detainees must:

- Comply with the provisions of their relevant ICE contract or service agreement.
- Comply with the ICE national detention standards applicable to the facility, generally [PBNDS 2011](#).
- Comply with the [CDC Interim Guidance on Management of Coronavirus Disease 2019 \(COVID-19\) in Correctional and Detention Facilities](#).
- Report all confirmed and suspected COVID-19 cases to the local ERO Field Office Director (or designee), Field Medical Coordinator, and local health department immediately.
- Notify both the ERO Field Office Director (or designee) and Field Medical Coordinator as soon as practicable, but in no case more than 12 hours after identifying any detainee who meets the CDC's identified populations potentially being at higher-risk for serious illness from COVID-19, including:
 - People aged 65 and older
 - People of all ages with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma
 - People who have serious heart conditions
 - People who are immunocompromised

- Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- People with severe obesity (body mass index [BMI] of 40 or higher)
- People with diabetes
- People with chronic kidney disease undergoing dialysis
- People with liver disease

Notification should be made via e-mail from the facility's HSA (or equivalent) and should contain the following subject line for ease of identification: "Notification of COVID-19 High Risk Detainee (A-Number)." Other standardized means of communicating this information to ICE are acceptable. At a minimum the HSA will provide the following information:

- Detainee name
- Detention location
- Current medical issues as well as medications currently prescribed
- Facility medical POC and phone number

ALL FACILITIES HOUSING ICE DETAINEES

In addition to the specific measures listed above, all detention facilities housing ICE detainees must also comply with the following:

PREPAREDNESS

Administrators can plan and prepare for COVID-19 by ensuring that all persons in the facility know the symptoms of COVID-19 and how to respond if they develop symptoms. Other essential actions include developing contingency plans for reduced workforces due to absences, coordinating with public health and correctional partners, and communicating clearly with staff and detainees about these preparations and how they may temporarily alter daily life.

➤ Develop information-sharing systems with partners.

- Identify points of contact in relevant state, local, tribal, and/or territorial public health department before cases develop.
- Communicate with other correctional and detention facilities in the same geographic area to share information including disease surveillance and absenteeism patterns among staff.

➤ Review existing pandemic, influenza, all-hazards, and disaster plans, and revise for COVID-19, and ensure that they meet the requirements of ICE's detention standards.

➤ **Offer the seasonal influenza vaccine to all detained persons (existing populations and new intakes) and staff throughout the influenza season, where possible.**

➤ **Staffing**

- Review sick leave policies to ensure that staff can stay home when sick and determine which officials will have the authority to send symptomatic staff home. Staff who report for work with symptoms of COVID-19 must be sent home and advised to follow CDC-recommended steps for persons exhibiting COVID-19 symptoms.
- Staff who test positive for COVID-19 must inform their workplace and personal contacts immediately. If a staff member has a confirmed COVID-19 infection, the relevant employers will inform other staff of their possible exposure to COVID-19 in the workplace consistent with any legal limitations on the sharing of such information. Exposed employees must then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).
- Identify staff whose duties would allow them to work from home and allow them to work from home in order to promote social distancing and further reduce the risk of COVID-19 transmission.
- Determine minimum levels of staff in all categories required for the facility to function safely.
- Follow the Public Health Recommendations for Community-Related Exposure.⁵

➤ **Supplies**

- Ensure that sufficient stocks of hygiene supplies (soap, hand sanitizer, tissues), personal protective equipment (PPE) (to include facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls), and medical supplies (consistent with the healthcare capabilities of the facility) are on hand, and have a plan in place to restock as needed if COVID-19 transmission occurs within the facility.
- Note that shortages of N95 respirators are anticipated during the COVID-19 response. Based on local and regional situational analysis of PPE supplies, face masks should be used when the supply chain of N95 respirators cannot meet the demand.
- Follow COVID-19: Strategies for Optimizing the Supply of PPE.⁶
- Soiled PPE items should be disposed in leak-proof plastic bags that are tied at the top and not re-opened. Bags can be disposed of in the regular solid waste stream.

⁵ Attachment G, Centers of Disease Control and Prevention, *Public Health Recommendations for Community-Related Exposure*, <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html> (last visited Apr. 9, 2020).

⁶ Attachment H, Centers for Disease Control and Prevention, *Strategies to Optimize the Supply of PPE and Equipment*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/> (last visited Apr. 9, 2020).

- Cloth face coverings should be worn by detainees and staff (when PPE supply is limited) to help slow the spread of COVID-19. Cloth face masks should:
 - fit snugly but comfortably against the side of the face
 - be secured with ties or ear loops where possible or securely tied
 - include multiple layers of fabric
 - allow for breathing without restriction
 - be able to be laundered and machine dried without damage or change to shape.

➤ **Hygiene**

- Reinforce healthy hygiene practices and provide and restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms, common areas, medical, and staff-restricted areas (e.g., break rooms).
- Require all persons within the facility to cover their mouth and nose with their elbow (or ideally with a tissue) rather than with their hand when they cough or sneeze, and to throw all tissues in the trash immediately after use. Provide detainees and staff no-cost access to tissues and no-touch receptacles for disposal.
- Require all persons within the facility to maintain good hand hygiene by regularly washing their hands with soap and water for at least 20 seconds, especially after coughing, sneezing, or blowing their nose; after using the bathroom; before eating or preparing food; before taking medication; and after touching garbage.
- Provide detainees and staff no-cost, unlimited access to supplies for hand cleansing, including liquid soap, running water, hand drying machines or disposable paper towels, and no-touch trash receptacles.
- Provide alcohol-based hand sanitizer with at least 60% alcohol where permissible based on security restrictions.
- Require all persons within the facility to avoid touching their eyes, nose, or mouth without cleaning their hands first.
- Post signage throughout the facility reminding detained persons and staff to practice good hand hygiene and cough etiquette (printable materials for community-based settings can be found on the [CDC website](#)). Signage must be in English and Spanish, as well as any other common languages for the detainee population at the facility.
- Prohibit sharing of eating utensils, dishes, and cups.
- Prohibit non-essential personal contact such as handshakes, hugs, and high-fives.

➤ **Cleaning/Disinfecting Practices**

- Adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response.⁷
- Several times a day using household cleaners and Environmental Protection Agency-registered disinfectants, clean and disinfect surfaces and objects that are frequently touched, especially in common areas (e.g., doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment). The Environmental Protection Agency's (EPA) list of certified cleaning products is located [here](#).
- Staff should clean shared equipment several times per day and on a conclusion of use basis (e.g., radios, service weapons, keys, handcuffs).
- Ensure that transport vehicles are thoroughly cleaned after carrying a confirmed or suspected COVID-19 case.
- Facility leadership will ensure that there is adequate oversight and supervision of all individuals responsible for cleaning and disinfecting these areas.

CDC Recommended Cleaning Tips

Hard (Non-porous) Surfaces

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
- For disinfection, most common EPA-registered household disinfectants should be effective.
 - A list of products that are EPA-approved for use against the virus that causes COVID-19 is available [here](#). Follow the manufacturer's instructions for all cleaning and disinfection products for concentration, application method and contact time, etc.
 - Additionally, diluted household bleach solutions (at least 1000ppm sodium hypochlorite) can be used if appropriate for the surface. Follow manufacturer's instructions for application, ensuring a contact time of at least 1 minute, and allowing proper ventilation during and after application. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
 - Prepare a bleach solution by mixing:
 - 5 tablespoons (1/3 cup) bleach per gallon of water or
 - 4 teaspoons bleach per quart of water

Soft (Porous) Surfaces

⁷ Attachment I, Centers for Disease Control and Prevention, *Cleaning and Disinfection for Community Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html> (last visited Apr. 9, 2020).

- For soft (porous) surfaces such as carpeted floor, rugs, and drapes, remove visible contamination if present and clean with appropriate cleaners indicated for use on these surfaces. After cleaning:
 - If the items can be laundered, launder items in accordance with the manufacturer's instructions using the warmest appropriate water setting for the items and then dry items completely.
 - Otherwise, use products that are EPA-approved for use against the virus that causes COVID-19 and that are suitable for porous surfaces.⁸

Electronics

- For electronics such as tablets, touch screens, keyboards, remote controls, and ATM machines, remove visible contamination if present.
 - Follow the manufacturer's instructions for all cleaning and disinfection products.
 - Consider use of wipeable covers for electronics.
 - If no manufacturer guidance is available, consider the use of alcohol-based wipes or sprays containing at least 70% alcohol to disinfect touch screens. Dry surfaces thoroughly to avoid pooling of liquids.

Linens, Clothing, and Other Items That Go in the Laundry

- In order to minimize the possibility of dispersing virus through the air, do not shake dirty laundry.
- Wash items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely. Dirty laundry that has been in contact with an ill person can be washed with other people's items.
- Clean and disinfect hampers or other carts for transporting laundry according to guidance above for hard or soft surfaces.

PREVENTION

Detention facilities can prevent introduction of COVID-19 from the community and reduce transmission if it is already inside by reinforcing good hygiene practices among incarcerated/detained persons, staff, and visitors (including increasing access to soap and paper towels), intensifying cleaning/disinfection practices, and implementing social distancing strategies.

Because many individuals infected with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified. Both good hygiene practices and social distancing are critical in preventing further transmission.

⁸ Attachment J, U.S. Environmental Protection Agency, *List N: Disinfectants for Use Against SARS-CoV-2*, <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> (last visited Apr. 9, 2020).

➤ **Perform pre-intake screening for all staff and new entrants for symptoms of COVID-19.**

Screening should take place before staff and new intakes enter the facility or just inside the facility, where practicable. For new admissions, this should occur before beginning the intake process, in order to identify and immediately isolate any detainee with symptoms before the individual comes in contact with others or is placed in the general population. This should include temperature screening of all staff and new entrants, as well as a verbal symptoms check.

- Verbal screening for symptoms of COVID-19 and contact with COVID-19 cases should include the following questions based on [Interim Guidance: Managing COVID-19 in Correctional/Detention Facilities](#):
 - Today or in the past 24 hours, have you had any of the following symptoms?
 - Fever, felt feverish, or had chills?
 - Cough?
 - Difficulty breathing?
 - In the past 14 days, have you had contact with a person known to be infected with COVID-19 where you were not wearing the recommended proper PPE?
- If staff have symptoms of COVID-19 (fever, cough, shortness of breath): they must be denied access to the facility.
- If any new intake has symptoms of COVID-19:
 - Require the individual to wear a face mask.
 - Ensure that staff interacting with the symptomatic individual wears recommended PPE.
 - Isolate the individual and refer to healthcare staff for further evaluation.
 - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective isolation and necessary medical care.
- If an individual is a close contact of a known COVID-19 case or has traveled to an affected area (but has no COVID-19 symptoms), quarantine the individual and monitor for symptoms two times per day for 14 days.

➤ **Visitation**

- During suspended (social) or modified (legal) visitation programs, provide access to virtual visitation options where available. When not possible, verbally screen all visitors on entry for symptoms of COVID-19 and perform temperature checks, when possible. ICE continues to explore opportunities to enhance attorney access while legal visits are being impacted. For facilities at which immigration hearings are conducted or where detainees are otherwise held who have cases pending immigration proceedings, this may include:

- Adding all immigration attorneys of record to the Talton Pro-bono platform.
 - Requiring facilities to establish a process for detainees/immigration attorneys to schedule appointments and facilitate the calls.
 - Leveraging technology (e.g., tablets, smartphones) to facilitate attorney/client communication.
 - Working with the various detention contractors and telephone service providers to ensure that all detainees receive some number of free calls per week.
 - Communicate with the public about any changes to facility operations, including visitation programs. Facilities are encouraged to prohibit or, at a minimum, significantly adopt restricted visitation programs, and to suspend all volunteer work assignments for detainees assigned to food service, and other assignments where applicable.
- **Where possible, restrict transfers of detained non-ICE populations to and from other jurisdictions and facilities unless necessary for medical evaluation, isolation/quarantine, clinical care, or extenuating security concerns.**
- **Consider suspending work release programs for inmates at shared facilities to reduce overall risk of introduction and transmission of COVID-19 into the facility.**
- **When feasible and consistent with security priorities, encourage staff to maintain a distance greater than six feet from an individual that appears feverish or ill and/or with respiratory symptoms while interviewing, escorting, or interacting in other ways, unless wearing PPE.**
- **Additional Measures to Facilitate Social Distancing**
- Although strict social distancing may not be possible in congregate settings such as detention facilities, all facilities housing ICE detainees should implement the following measures to the extent practicable:
 - Efforts should be made to reduce the population to approximately 75% of capacity.
 - Where detainee populations are such that such cells are available, to the extent possible, house detainees in individual rooms.
 - Recommend that detainees sharing sleeping quarters sleep “head-to-foot.”
 - Extend recreation, law library, and meal hours and stagger detainee access to the same in order to limit the number of interactions between detainees from other housing units.
 - Staff and detainees should be directed to avoid congregating in groups of 10 or more, employing social distancing strategies at all times.

- Whenever possible, all staff and detainees should maintain a distance of six feet from one another.
- If practicable, beds in housing units should be rearranged to allow for sufficient separation during sleeping hours.

MANAGEMENT

If there has been a suspected COVID-19 case inside the facility (among incarcerated/detained persons, staff, or visitors who have recently been inside), begin implementing Management strategies while test results are pending. Essential Management strategies include placing cases and individuals with symptoms under medical isolation, quarantining their close contacts, and facilitating necessary medical care, while observing relevant infection control and environmental disinfection protocols and wearing recommended PPE.

ICE Custody Review for Potentially High-Risk Detainees

Upon being informed of a detainee who may potentially be at higher risk for serious illness from exposure to COVID-19, ERO will review the case to determine whether continued detention is appropriate.⁹ ICE will make such custody determinations on a case-by-case basis, pursuant to the applicable legal standards, with due consideration of the public health considerations implicated.

- **Considerable effort should be made to quarantine all new entrants for 14 days before they enter the general population.**
 - To do this, facilities should consider cohorting daily intakes; two days of new intakes, or multiple days on new intakes, in designated areas prior to placement into the general population. Given the significant variance in facility attributes and characteristics, cohorting options and capabilities will differ across the various detention facilities housing ICE detainees. ICE encourages all facilities to adopt the most effective cohorting methods practicable based on the individual facility characteristics taking into account the number new intakes anticipated per day.
- **For suspected or confirmed COVID-19 cases:**
 - Isolate the individual immediately in a separate environment from other individuals. Facilities should make every possible effort to isolate persons individually. Each isolated individual should be assigned his or her own housing space and bathroom where possible. Cohorting should only be practiced if there are no other available options. Only individuals who are laboratory-confirmed COVID-19 cases should be isolated as a cohort. Do not cohort confirmed cases with suspected cases or case contacts.
 - Ensure that the individual is always wearing a face mask (if it does not restrict breathing) when outside of the isolation space, and whenever another individual

⁹ Attachment K, Assistant Director Peter Berg, Enforcement and Removal Operations, *Updated Guidance: COVID-19 Detained Docket Review* (Apr. 4, 2020).

enters the isolation room. Masks should be changed at least daily, and when visibly soiled or wet.

- If the number of confirmed cases exceeds the number of individual isolation spaces available in the facility, then ICE must be promptly notified so that transfer to other facilities, transfers to hospitals, or release can be coordinated immediately. Until such time as transfer or release is arranged, the facility must be especially mindful of cases that are at higher risk of severe illness from COVID-19. Ideally, ill detainees should not be cohorted with other infected individuals. If cohorting of ill detainees is unavoidable, make all possible accommodations until transfer occurs to prevent transmission of other infectious diseases to the higher-risk individual (For example, allocate more space for a higher-risk individual within a shared isolation room).
- Review the CDC's preferred method of medically isolating COVID-19 cases here depending on the space available in a particular facility. In order of preference, individuals under medical isolation should be housed:
 - Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully.
 - Separately, in single cells with solid walls but without solid doors.
 - As a cohort, in a large, well-ventilated cell with solid walls and a solid door that closes fully. Employ social distancing strategies related to housing in the Prevention section above.
 - As a cohort, in a large, well-ventilated cell with solid walls but without a solid door. Employ social distancing strategies related to housing in the Prevention section above.
 - As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
 - As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section above.
- Maintain isolation until all the CDC criteria have been met:
 - The individual has been free from fever for 72 hours without the use of fever-reducing medications.
 - The individual's other symptoms have improved (e.g., cough, shortness of breath).
 - The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart.

- At least 7 days have passed since the date of the individual's first positive COVID-19 test and he or she has had no subsequent illness.
- Meals should be provided to COVID-19 cases in their isolation rooms. Isolated cases should throw disposable food service items in the trash in their isolation room. Non-disposable food service items should be handled with gloves and washed with hot water or in a dishwasher. Individuals handling used food service items must clean their hands after removing gloves.
- Laundry from a COVID-19 case can be washed with other individuals' laundry.
 - Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard gloves after each use, and clean their hands after handling.
 - Do not shake dirty laundry. This will minimize the possibility of dispersing the virus through the air.
 - Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.
 - Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.

ATTACHMENTS

ATTACHMENT LETTER	DOCUMENT NAME AND CITATION
A	U.S. Immigration and Customs Enforcement, <i>Updated ICE statement on COVID-19</i> (Mar. 18, 2020), https://www.ice.gov/news/releases/updated-ice-statement-covid-19 .
B	ICE National Detention Standards 2019, Standard 4.3, Medical Care, https://www.ice.gov/doclib/detention-standards/2019/4_3.pdf .
C	2011 ICE Performance-Based National Detention Standards, Revised 2016, Standard 4.3, https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf .
D	2008 ICE Performance-Based National Detention Standards, Standard 4-22, Medical Care, https://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf .
E	Centers of Disease Control and Prevention, <i>Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities</i> (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf .
F	Memorandum from Executive Associate Director Enrique Lucero, Enforcement and Removal Operations, <i>Memorandum on Coronavirus 2019 (COVID-19) Action Plan, Revision 1</i> (Mar. 27, 2020).
G	Centers of Disease Control and Prevention, <i>Public Health Recommendations for Community-Related Exposure</i> , https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html (last visited Apr. 9, 2020).
H	Centers for Disease Control and Prevention, <i>Strategies to Optimize the Supply of PPE and Equipment</i> , https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/ (last visited Apr. 9, 2020).
I	Centers for Disease Control and Prevention, <i>Cleaning and Disinfection for Community Facilities</i> , https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html (last visited Apr. 9, 2020).

J	U.S. Environmental Protection Agency, <i>List N: Disinfectants for Use Against SARS-CoV-2</i> , https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2 (last visited Apr. 9, 2020).
K	Assistant Director Peter Berg, Enforcement and Removal Operations, <i>Updated Guidance: COVID-19 Detained Docket Review</i> (Apr. 4, 2020).

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL IMMIGRATION PROJECT OF THE

NATIONAL LAWYERS GUILD, et al.

Case No. 1:20-cv-00852

on their own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, et
al.

Respondents-Defendants.

DECLARATION OF RUSSELL HOTT

I, Russell Hott, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Assistant Director for the Custody Management Division (CMD). I have held this position since February 2020. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of three divisions led by three Deputy Assistant Directors under my direct supervision: (1) the Alternatives to Detention Division; (2) the Detention Management Division; and (3) the Custody Programs Division.

2. As the Acting Assistant Director, I am responsible for the effective and proficient performance of these three Divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 40,000 detainees daily and roughly 500,000 detainees annually, at approximately 250 facilities nationwide, including three family residential shelters located in Texas and Pennsylvania.

3. From May 2017 to February 2020, I served as the Field Office Director for the Washington, DC ERO Field Office, responsible for the District of Colombia and Virginia. In my role as Field Office Director, I provided operational and policy oversight for ERO's interior enforcement efforts within the local area of responsibility, spanning 43,000 square miles, three district courts, a cadre of nearly 200 employees, and 1,400 detention beds.

4. I began my career with the U.S. Government as a detention enforcement officer with the former Immigration and Naturalization Service in New York, NY. I advanced through a variety of positions including Immigration Enforcement Agent, Deportation Officer, Instructor at the Federal Law Enforcement Training Center, Supervisory Detention and Deportation Officer, acting Assistant Field Office Director, National Program Manager, Unit Chief, Acting Deputy Chief of Staff for ERO, Chief of Staff for the ICE Deputy Director, Deputy Field Office Director for both the Boston and Washington field offices, Field Office Director, and Acting Deputy Assistant Director.

II. Overview of ICE ERO

5. ICE is charged with the enforcement of more than 400 federal statutes, and its mission is to protect the United States from the cross-border crime and illegal immigration that threaten national security and public safety through enforcement of the federal laws governing border control, customs, trade, and immigration. To carry out this mission, ICE focuses on enforcing federal immigration laws, preventing terrorism, and combating transnational criminal threats. As an operational program of ICE, ERO is responsible for the planning, management, and direction of broad programs relating to the supervision, detention, and removal of aliens who are removable from the United States under the U.S. immigration laws.

6. ERO's mission is to identify, arrest, and remove aliens who present a danger to national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts. CMD is one of six headquarters Divisions. The other five are: Enforcement, Removal, Field Operations, the ICE Health Service Corps (IHSC), and Operations Support.

7. CMD provides policy and oversight for the administrative custody of one of the most highly transient and diverse populations of any correctional or detention system in the world. CMD manages ICE detention operations efficiently and effectively to provide for the safety, security, and care of aliens detained in ICE custody.

8. As a part of my official duties, I am familiar with a complaint filed in *National Immigration Project of the National Lawyers Guild. v. Executive Office of Immigration Review*, No. 1:20-cv-00852 (D.D.C. filed Mar. 30, 2020),¹ in which Plaintiffs seek an order suspending

¹ The correct name of the first named Defendant agency is the "Executive Office *for* Immigration Review." See www.justice.gov/eoir (accessed April 10, 2020) (emphasis added).

in-person immigration hearings for detained individuals for the duration of the COVID-19² pandemic, providing “robust access alternatives for detained individuals who wish to proceed with their hearings,” guaranteeing “secure and reliable remote communication” between detainees and counsel, and requiring, if personal protective equipment (PPE) is mandated to be worn by detainees and visitors, that the government provide such equipment. I understand that Plaintiffs are also arguing for temporary release from custody in the alternative, should detainees have “inadequate access to alternative means of remote communication” with counsel. I submit this declaration to explain the extensive and continuing actions ICE is already taking to protect detainees in response to this unprecedented pandemic. The information in this declaration is based upon my personal knowledge and experience as a law enforcement officer and on information provided to me in my official capacity. Due to the constantly evolving nature of this crisis, operational realities are fluid with new decisions being required on a regular basis. The information in this declaration is current and accurate as of the time I signed below.

III. ICE Detention Facilities and Practices Nationwide

9. As an operational program of ICE, ERO is responsible for the planning, management, and direction of broad programs relating to the supervision, detention, and removal of aliens from the United States under the U.S. immigration laws. ERO’s statutory responsibilities include detention of aliens during the pendency of proceedings to determine whether they will be removed from the United States, as well as aliens subject to an administratively final removal order, pending their removal from the United States. The

² According to the Centers for Disease Control and Prevention (CDC), on February 11, 2020 the World Health Organization announced an official name for the disease that is causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China. The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’ for disease. Formerly, this disease was referred to as “2019 novel coronavirus” or “2019-nCoV”. See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics> (accessed April 10, 2020).

immigration laws also mandate detention of certain categories of aliens, including “arriving aliens” and certain categories of criminal and terrorist aliens.

10. The length of an individual alien’s detention depends on a number of factors, including whether the alien is subject to mandatory detention under the U.S. immigration laws, the duration of any removal proceedings before the Department of Justice’s Executive Office for Immigration Review (EOIR), appeals before the federal courts of appeals, and issues regarding execution of a final removal order. ERO also transfers aliens in its custody for a number of legal and operational purposes such as attendance at immigration court hearings, to facilitate removal, provide for appropriate medical care, and transfers between facilities for other reasons. In Fiscal Year 2019, ICE housed an average daily population of 50,165 aliens nationwide. In Fiscal Year 2020, through April 4, 2020, ICE housed an average daily population of 42,738 nationwide.

11. ICE coordinates the acquisition of detention bed space for removable adult aliens through: (1) Service Processing Centers (SPCs); (2) Contract Detention Facilities (CDFs); and (3) Intergovernmental Service Agreement (IGSA) facilities (collectively, “immigration detention facilities”). SPCs are owned by ICE and staffed by a combination of federal and contract employees. CDFs are owned by private companies that contract directly with the government and are predominantly staffed by contract employees. Dedicated IGSA facilities can be public facilities or privately owned and can be operated by local governments or private companies operating under contracts with local governments.

12. Many IGSA facilities house a very small ICE population compared to the local inmate population, while others are almost exclusively committed to housing ICE detainees. Other facilities used by ICE under various contractual arrangements include: facilities used by ICE through a contract awarded by the U.S. Marshals Service (USMS), facilities operated by the

Federal Bureau of Prisons (BOP), staging facilities for transportation, holding facilities for temporary detention, and hospitals for emergency care, among other types of facilities.

13. ICE used about 30 dedicated (or largely dedicated) immigration detention facilities throughout the United States in Fiscal Year 2019. Of these facilities, 13 were privately operated CDFs that are typically privately owned, housing an average daily population of 9,387 alien detainees; five were SPCs owned by the federal government and privately operated through contractors, housing an average daily population of 3,799 alien detainees; and 14 were dedicated (or largely dedicated) IGSAAs, housing an average daily population of 12,635 alien detainees.³

14. All immigration detention facilities are bound by strict detention standards to ensure that detainees in ICE custody reside in safe, secure and humane environments and under appropriate conditions of confinement. The first of these standards, the National Detention Standards (NDS), was issued in September 2000, to facilitate consistent conditions of confinement, access to legal representation and safe and secure operations across the detention system. In particular, NDS required facilities to allow detainees to meet privately with current or prospective legal representatives and their assistants, as well as with consular representatives.⁴ The standards established consistency of program operations and management expectations, accountability for compliance and a culture of professionalism.

15. In 2008, ICE revised NDS to more clearly delineate the results or outcomes to be accomplished by adherence to their requirements. The Performance-Based National Detention Standards (PBNDS 2008), developed in coordination with agency stakeholders, prescribe both the expected outcomes of each detention standard and the expected practices required to achieve

³ The remaining average daily population (approximately 24,344 alien detainees) was housed in other facilities that are not entirely dedicated to immigration detention, namely: 143 non-dedicated IGSA facilities, 121 facilities under intergovernmental agreements with other federal agencies, and 20 other facilities, such as BOP facilities.

⁴ <https://www.ice.gov/doclib/dro/detention-standards/pdf/visit.pdf> (accessed April 10, 2020).

them. PBNDS 2008 was also designed to improve safety, security and conditions of confinement for detainees. Regarding visitation, PBNDS 2008 maintained and expanded on the provisions in NDS, requiring each facility to permit legal visitation 7 days a week, including holidays, for a minimum of eight hours per day on weekdays and a minimum of four hours per day on weekends and holidays.⁵ In addition to legal representatives and assistants, interpreters and messengers are also permitted. PBNDS 2008 also expanded and clarified confidentiality provisions, added a requirement for private meeting rooms and confidential exchange of documents, and provides for group legal meetings.

16. The PBNDS was revised in 2011, reflecting ICE's ongoing effort to tailor the conditions of immigration detention to its unique purpose while maintaining a safe and secure detention environment for staff and detainees. In developing the revised standards, ICE incorporated the input of many agency employees and stakeholders, including the perspectives of nongovernmental organizations and ICE field offices. PBNDS 2011 is crafted to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, and increase recreation and visitation. PBNDS 2011 was revised in 2016 to ensure consistency with federal legal and regulatory requirements as well as prior ICE policies and policy statements. PBNDS 2011 contains the same visitation policies as PBNDS 2008.⁶

17. In 2019, ICE issued new National Detention Standards (NDS 2019) for non-dedicated facilities which supersede the NDS. These updated, modernized standards focus on ICE's essential requirements, encourage greater communication between facilities and their local

⁵ <https://www.ice.gov/doclib/dro/detention-standards/pdf/visitation.pdf> (accessed April 10, 2020).

⁶ <https://www.ice.gov/doclib/detention-standards/2011/5-7.pdf> (accessed April 10, 2020).

ICE field offices, and provide a comprehensive list of circumstances in which such communication is required. Based on ICE's experience with its state and local law enforcement partners, and the understanding that local practice appropriately covers many requirements that were explicitly enumerated in NDS, NDS 2019 streamlines several prior standards. NDS 2019 also incorporates substantive additions, addressing topics such as medical care, segregation, disability access, sexual assault and abuse prevention and intervention, and language access. NDS 2019 will apply to the approximately 45 IGSA facilities currently operating under the NDS, approximately 35 USMS facilities used by ICE and which ICE inspects against the NDS, as well as approximately 60 facilities (both IGSA and USMS) which do not reach the threshold for ICE annual inspections – generally those with an Average Daily Population of less than 10. These are facilities across the country where ICE's state and local law enforcement partners successfully manage their own populations under federal, state, and local regulations, and assist ICE with housing immigration detainees to enforce immigration laws and improve national safety and security. Importantly, with this superseding NDS, the visitation requirements applicable to facilities covered by PBNDS 2008 and PBNDS 2011 are now applicable to all facilities.⁷

18. In addition to adult-only immigration detention facilities, ICE also utilizes three Family Residential Centers (FRCs) located in Texas and Pennsylvania. Visitation standards applicable to these facilities are substantively similar to those referenced above for adult immigration detention facilities.⁸

IV. NATIONWIDE ICE EFFORTS IN RESPONSE TO COVID-19

19. The health, welfare and safety of ICE detainees is one of the agency's highest priorities. Since the initial reports of COVID-19, ICE epidemiologists have been tracking the

⁷ https://www.ice.gov/doclib/detention-standards/2019/5_5.pdf (accessed April 10, 2020).

⁸ https://www.ice.gov/doclib/dro/family-residential/pdf/rs_visitation.pdf (accessed April 10, 2020).

outbreak, regularly updating infection prevention and control protocols, and issuing guidance to staff for the screening and management of potential exposure among detainees.

20. ICE continues to adapt and, through daily monitoring of the Centers for Disease Control and Prevention (CDC) website,⁹ incorporate in its procedures any updates to the CDC's COVID-19 guidance, which is built upon well-established infectious disease monitoring and management protocols already in use by the agency.

21. On March 13, 2020, social visitation at all immigration detention facilities was suspended indefinitely in order to mitigate the potential transmission of COVID-19. However, legal visitation was permitted to continue, subject to facility-specific determinations that such visitation poses a threat to the safety and security of any given facility. Due to the highly contagious nature of COVID-19, ICE has been encouraging the use of communication services such as teleconferencing, video visitation (e.g. Skype, FaceTime), email, and/or the use of tablets, where possible, in lieu of in-person visitation. Recognizing that the unique nature of some legal consultations requires in-person communication, ICE recommends non-contact visitation to the maximum extent possible. Where requested, and where local conditions allow, contact visitation has been permitted if requested.

22. On March 20, 2020, as the COVID-19 situation continued to evolve, ICE revised the temporary limitation on visitation to add a requirement that all visitors provide and wear PPE when entering any facility, for the protection of detainees, staff, and visitors alike. ICE further announced that legal representatives seeking to enter any immigration detention facility may be subject to additional, enhanced screening procedures. Specific measures taken to prevent the

⁹ Specifically, ICE closely follows the CDC's *Interim Guidance on Management of Coronavirus 2019 (COVID-19) in Correctional and Detention Facilities* at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>, and its general public guidance at <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

spread of COVID-19 to residents, staff, and/or visitors may differ from facility to facility, based on varying local conditions and contractual requirements.

23. The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) requires employers to provide PPE to employees who could be exposed to infectious individuals or materials. An ICE-wide acquisition plan is underway to obtain bulk purchases of PPE and coordinate distribution of equipment to agency staff and, as inventory allows, assist medical units in ICE detention facilities that are experiencing a critical reduction in supply. ICE does not have a requirement or expectation to source PPE to the public, including private attorneys or other visitors who have been retained to provide legal services to detainees. While the use of alternate supply chains is being continually explored to obtain PPE, at this time, ICE does not have on hand enough inventory to offer PPE to the public. Due to the global shortage of PPE caused by the crisis,¹⁰ ICE must be judicious in utilizing this limited resource. As noted by the CDC, PPE are “critical supplies that must continue to be reserved for healthcare workers and other medical first responders, as recommended by current CDC guidance.”¹¹

24. ICE has been, and will continue to be, committed to ensuring that detainees are always able to communicate with legal representatives. Facilities have been instructed that, should it become necessary to suspend in-person legal visitation, they must ensure detainee communication with legal representatives continues unimpeded by leveraging all available forms of video technology, email, and messaging. ICE will also take steps to facilitate such

¹⁰ See <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide> (accessed April 13, 2020); <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/faqs-shortages-surgical-masks-and-gowns> (accessed April 13, 2020).

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (accessed April 13, 2020).

communication, in the absence of visitation, through extended access to telephones and other reasonable means.

25. At the onset of COVID-19, ICE consulted with telecommunications service providers to expand access to electronic and phone services during diminished contact visitation. The service providers agreed to provide increased access to telecommunications equipment, free phone and video services, and extended hours where possible. Further, the service providers agreed to provide indigent aliens with regular, unfettered phone access. ERO expounded on the commitments of the service providers and agreed to double the amount of free access to all detainees and purchase additional telecommunications equipment such as mobile tablets enabled with videoconferencing and texting services, where available.

26. Since March 2020, ICE has participated in discussions with service providers and pro bono attorneys to identify possible solutions to increase attorney accessibility through other communication methods. ICE has experienced an outpouring of support from service providers to further expand and build upon existing capabilities. Existing ICE practices, consistent with most other detention and corrections systems, incorporate time limitations to ensure equal access. Beginning on March 27, the ICE detainee telephone system (DTS), provided by Talton Communications at certain dedicated facilities, committed to expanding system capabilities and access, including some free international capabilities that were previously unavailable. This includes providing detainees with a free 15-minute video call or two free 5-minute calls per week. To further enhance accessibility, ICE committed additional funds to double this access, so that detainees have up to two free 15-minute video calls and four free 5-minute voice calls per week. Although specific rules vary by facility, in general if no other detainees are waiting to utilize the equipment (i.e. phone, tablet, or kiosk), the detainee may be permitted to participate in

a cumulative call. Detainees at facilities with DTS may opt to use free calls to speak with their attorneys privately, without monitoring. They may also call families and friends free of charge. Additionally, as of the week of April 12, ICE began providing free 30-minute calls through the DTS to detainees with pending court actions. This access is in addition to the existing pro bono platform. Furthermore, ICE has been working with Talton Communications to install an additional 200 tablets across facilities by April 30, with the possibility of adding another 350 tablets shortly thereafter, to further facilitate all forms of electronic communication. For other facilities, such as non-dedicated IGSAAs that have other phone contractors or operations, ICE has been working with those other service providers to provide the same or similar services as those made available on the DTS platform.

27. ICE continues to explore opportunities to enhance attorney access while legal visits are being impacted. For facilities at which immigration hearings are conducted or where detainees are otherwise held who have immigration proceedings pending, this may include options such as adding immigration attorneys to the pro bono communications platform, requiring facilities to establish a process for detainees and/or attorneys to schedule appointments and facilitate the calls, further leveraging the use of technology, and working with the various detention contractors and communications service providers to ensure that all detainees receive a number of free calls per week.

28. With respect to immigration court hearings, on March 18, 2020, ICE requested that EOIR suspend the in-person requirements for detainee appearance before immigration judges in removal proceedings. EOIR committed to considering individual, case-by-case motions for telephonic appearances. As of April 7, 2020, most immigration judges nationwide have standing orders permitting telephonic appearance of the parties, while a few others continue

to consider requests on a case-by-case basis. Additionally, EOIR has made electronic filing available for parties before the immigration courts.¹²

29. On April 10, 2020, ERO issued *COVID-19 Pandemic Response Requirements* (PRR), developed in consultation with the CDC, which sets forth expectations and assists ICE detention facility operators to sustain detention operations, while mitigating risk to the safety and well-being of detainees, staff, contractors, visitors, and stakeholders due to COVID-19.¹³ The PRR builds upon previously-issued guidance and sets forth specific mandatory requirements and best practices on a number of issues, including visitation, for all immigration detention facilities.

30. The continually-evolving nature of the COVID-19 emergency requires ongoing review and frequent adaptation of agency policy. ICE continues to explore all available options to ensure the health and safety of its diverse detained population while also safeguarding important detainee legal rights.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 13th day of April 2020.



Russell Hott
Acting Assistant Director
Custody Management Division
ICE Enforcement and Removal Operations

¹² <https://www.justice.gov/eoir/filing-email> (accessed April 10, 2020).

¹³ <https://www.ice.gov/sites/default/files/documents/Document/2020/eroCOVID19responseReqsCleanFacilities.pdf> (accessed April 13, 2020).

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD,
et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

**DECLARATION OF ACTING CHIEF IMMIGRATION JUDGE CHRISTOPHER A.
SANTORO, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

I, Acting Chief Immigration Judge Christopher A. Santoro, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am the Acting Chief Immigration Judge for the Office of the Chief Immigration Judge (OCIJ), a component within the Executive Office for Immigration Review (EOIR).
2. I have held this position since June of 2019.
3. Prior to this position, I was appointed as the principal deputy chief immigration judge for EOIR in May 2018. From February 2018 to May 2018, I served as acting assistant director for Policy at EOIR. From June 2017 through February 2018 I served as EOIR chief of staff. From July 2015 through January 2016, I served as deputy chief immigration judge (acting). From March 2012 through July 2015 I was an assistant chief immigration judge and oversaw operations in 11 immigration courts, new immigration judge training, and intergovernmental and external affairs.
4. As the Acting Chief Immigration Judge for OCIJ, I oversee the management of 67 immigration courts and two adjudication centers across the nation.
5. My testimony in this declaration is based upon my experience serving as the Acting Chief Immigration Judge.
6. EOIR is taking a range of steps to minimize in-person interaction and reduce the risk of spreading COVID-19 to employees, aliens, and practitioners. OCIJ is striving to maximize the use of video-teleconferencing (VTC) and social distancing practices within the immigration courts that continue to conduct in-person hearings and has developed a VTC and social-distancing plan for each of these courts. These plans are tailored to each court's staffing levels, building space, and local conditions, among other factors. EOIR is continuing to revise and update these plans as circumstances develop and change.

7. All immigration courts have the equipment to conduct hearings through VTC. VTC was already commonly used for detained hearings before the COVID-19 pandemic. EOIR conducted almost 35,000 hearings by VTC in the first quarter of FY 2020.¹ When conducting hearings by VTC, the immigration judge (IJ), the alien, the Department of Homeland Security (DHS) attorney, the interpreter, and any witness(es) do not need to be present in the same location.²
8. In an effort to maximize social distancing, EOIR has limited hearings to its detained dockets and has expanded its use of VTC. In some detained courts, IJs have relocated to non-detained courts to conduct hearings remotely into the detained court by VTC. Some courts use VTC to connect the IJ in one courtroom to a detainee in a separate courtroom within the same immigration court. And some courts have conducted VTC hearings where the alien appears in DHS space, rather than in an EOIR courtroom.
9. If an alien is represented, the attorney may also appear by telephone if he or she is not in a location with access to VTC, and can do so even if the alien is appearing by VTC. In many courts, prior approval or the filing of a motion for a telephonic appearance is no longer required. Additionally, IJs are not materially limited in the number of phone connections used during a hearing, which also allows for all parties to appear telephonically if necessary. Using a service called OpenVoice, IJs may conference call attorneys, the alien, witnesses, and interpreters from the bench simultaneously. Like with a VTC hearing, none of the individuals need to be in the same location, The technology also allows for the recording of all participants on the court's digital audio recording system.

¹ <https://www.justice.gov/eoir/page/file/1117301/download>

² Immigration Court Practice Manual ch. 4.7(b).

10. Furthermore, when the alien and counsel appear separately by VTC or telephone, the IJ has the discretion to allow the alien and counsel to confer confidentially in the courtroom. In these cases, the IJ and DHS attorney may leave the courtroom, VTC, or telephone line. However, if a detainee has appeared in the courtroom with a DHS Enforcement and Removal Operations officer, the officer may need to remain with the detainee pursuant to DHS's procedures.

Executed on April 13, 2020.

**CHRISTOPHER
SANTORO**

Digitally signed by CHRISTOPHER
SANTORO
Date: 2020.04.13 20:31:12 -04'00'

Christopher A. Santoro
Acting Chief Immigration Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 6

From: [Berg, Peter B](#)

To:

Cc:

Subject: Updated Guidance: COVID-19 Detained Docket Review-- Effective Immediately

Date: Saturday, April 4, 2020 5:17:40 PM

UPDATE: Please see the updated guidance below. The previous version of this guidance is rescinded.

This message is sent from Peter B. Berg, (a)Assistant Director, Field Operations

To: Field Office Directors and Deputy Field Office Directors

Subject: COVID-19 Detained Docket Review

Background:

U.S. Immigration and Customs Enforcement (ICE) has taken a number of significant and proactive measures in response to the Coronavirus Disease 2019 (COVID-19) pandemic, in order to mitigate the spread of COVID-19 to aliens detained in its custody, its workforce, and stakeholders at its detention facilities. As more becomes known about the virus, ERO will continue to update its practices and guidance in this regard. General ICE COVID-19 guidance is available [here](#) and will be updated and supplemented on an ongoing basis.

On March 18, 2020, you were directed to review the cases of aliens detained in your area of responsibility who were over the age of 70 or pregnant to determine whether continued detention was appropriate. The Centers for Disease Control and Prevention (CDC) has developed a [list](#) of categories of individuals identified as potentially being at higher-risk for serious illness from COVID-19. Expanding on that list, ERO has identified the following categories of cases that should be reviewed to re-assess custody:

- Pregnant detainees or those having delivered in the last two weeks
- Detainees over 60 years old
- Detainees of any age having chronic illnesses which would make them immune-compromised, including but not limited to:
 - Blood Disorders
 - Chronic Kidney Disease
 - Compromised immune system (e.g., ongoing treatment such as chemotherapy or radiation, received an organ or bone marrow transplant, taking high doses of corticosteroids or other immunosuppressant medications)
 - Endocrine disorders

- Metabolic disorders
- Heart disease
- Lung disease
- Neurological and neurologic and neurodevelopment conditions

As part of your ongoing application of the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (available [here](#)), please identify all cases within your AOR that meet any of the criteria above and validate that list with assistance from IHSC or your Field Medical Coordinator to ensure the conditions listed are still present and do result in the detainee potentially having a higher risk for serious illness from COVID-19. After identifying a case as meeting any of the above criteria, you should review the case to determine whether continued detention remains appropriate in light of the COVID-19 pandemic.

The presence of one of the factors listed above should be considered a significant discretionary factor weighing in favor of release. To be clear, however, it may not always be determinative. Field offices must remain cognizant of the requirements of mandatory detention. Section 236(c) of the Immigration and Nationality Act (INA) mandates the detention of certain categories of criminal and terrorist aliens during the pendency of removal proceedings. Such aliens may not be released in the exercise of discretion during the pendency of removal proceedings even if potentially higher-risk for serious illness from COVID-19. INA § 236(c); 8 C.F.R. § 236.1(c)(1)(i). Such aliens may only be released following a final order issued by an immigration judge, the Board of Immigration Appeals, or a federal court granting the alien relief, dismissing proceedings, or terminating proceedings. Similarly, pursuant to section 241(a)(2), certain criminal and terrorist aliens subject to a final order of removal may not be released during the 90-day removal period even if potentially higher-risk for serious illness from COVID-19. INA § 241(a)(2). For alien's subject to discretionary detention under section 236(a), please remember that release is prohibited, even if the alien is potentially higher-risk for serious illness from COVID-19, if such release would pose a danger to property or persons. 8 C.F.R. § 236.1(c)(8).

When reviewing cases of alien's subject to discretionary detention under 236(a), the following must be completed:

- **Cases involving any arrests or convictions for any crimes that involve risk to the public regardless of the date of arrest or conviction must be reviewed and approved by a Deputy Field Office Director (DFOD) or higher before a determination is made to release.**
 - Examples of crimes that involve a risk to the public include any crime that: involves any form of violence, driving while intoxicated, threatening behaviors, terroristic threats, stalking, domestic violence, harm to a child, or any form of assault or battery. This list is not intended to be

comprehensive. If there is any doubt whether a crime involves risk to the public, consult with your Office of the Principal Legal Advisor (OPLA) field location and your respective Deputy Assistant Director for Domestic Operations before a custody redetermination is completed.

- You may consider the age of an arrest or conviction as a mitigating or an aggravating factor, but the age of an arrest or a conviction does not automatically outweigh public safety concerns.

With regard to arriving aliens and certain other aliens eligible for consideration of parole from custody, under current circumstances and absent significant adverse factors, the fact that an alien is potentially higher-risk for serious illness from COVID-19, may form the basis for a determination that “continued detention is not in the public interest,” justify release under 8 C.F.R. § 212.5(b) (5).

For other aliens for whom there is discretion to release, field offices remain responsible for articulating individualized custody determinations, taking into consideration the totality of the circumstances presented in the case. The fact that an alien is potentially higher-risk for serious illness from COVID-19 should be considered a factor weighing in favor of release. You may also consider alternatives to detention consistent with ICE ATD policies, if ATD is determined to sufficiently mitigate the risk of flight.

Any releases attributed to reviews of COVID-19 susceptibility shall be documented in the ENFORCE Alien Removal Module (EARM) under Special Class - COVID-19 Chronic Care Release. As previously communicated, these individuals should be placed on ATD if possible.

Please contact your local OPLA field location should you have any questions or concerns regarding your authority to release in any individual case.

For any questions on this guidance, please contact your respective Deputy Assistant Director for Domestic Operations.

Limitation on the Applicability of this Guidance. This message is intended to provide internal guidance to the operational components of U.S. Immigration and Customs Enforcement. It does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 7

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.
on their own behalf and on behalf of others similarly situated,

Case No. 1:20-cv-00852

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

DECLARATION OF OFFICER IN CHARGE JASON CILIBERTI

I, Jason Ciliberti, Officer in Charge (OIC), make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and currently serve as the OIC for the La Palma Correctional Center (LPCC) and Eloy Detention Center (EDC). I was previously the Assistant Field Office Director for the LPCC starting in 2018 until I was promoted to the position of OIC in 2020.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information made known to me in my current position.
3. In my current position, I work closely with the Field Medical Coordinator (FMC), who reports to the Medical Case Management Unit. The FMCs serve as medical consultants to the ICE field offices and oversee clinical services at Inter-Governmental Service Agreement (IGSA) facilities that house ICE detainees, including the LPCC.
4. ICE Health Service Corps (IHSC) provides direct medical, dental, and mental health patient care to approximately 15,300 detainees housed at 20 IHSC-staffed facilities throughout the nation, including EDC.
5. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract including LPCC. The FMCs do not provide hands-on care or direct the care within the IGSA facilities but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.

6. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals. The LPCC, as an IGSA facility, employs a multidisciplinary medical workforce that consists of Registered Nurses, Physician assistants, Physicians, medical assistants, Dental Hygienists, Dentists, Psychologists, Psychiatrists, and Nurse Practitioners.
7. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
8. In testing for COVID-19, medical staff at the LPCC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
9. Each detainee is screened for disabilities upon admission by a Registered Nurse. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
10. For both EDC and LPCC medical staff are screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health. Detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks. All new arrival detainees are then placed in isolation from the general population and closely observed for 14 days, regardless of their travel or health history.
11. For both EDC and LPCC, those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
12. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.

13. LPCC has the following medical capabilities: A clinic staff which manages male detainees and provides daily access to sick calls in a clinical setting, as well as mental health services and the ability to admit patients at the local hospital for medical and mental health care. EDC has the same medical capabilities with the clinic staff managing both male and female detainees.
14. As of 8:00 a.m. on April 13, 2020, LPCC medical staff provided the following information:
 - a. There are currently no laboratory confirmed cases of COVID-19 in the LPCC.
 - b. Two ICE detainees with prior laboratory confirmed cases of COVID-19 in the LPCC, no longer test positive. There are 98 detainees who are currently cohorted and under daily observation due to exposure to the first confirmed case of COVID-19.
 - c. There was previously one confirmed case of COVID-19 in the LPCC, who was a new intake. Thanks to ICE's intake process, he was successfully identified and quarantined at intake and separated from the general population. He was subsequently hospitalized for an unrelated injury/illness and then released from ICE custody.
 - d. The entire LPCC facility is cohorted until at least April 14, 2020. All detainees are cohorted in their respective housing units with meals being provided in the housing units and no inter-housing unit contact between detainees.
 - e. The LPCC is not accepting further detainee intakes into the facility until at least April 14, 2020.
15. As of 8:00 a.m. on April 13, 2020, the EDC FMC provided the following information:
 - a. There are zero suspected cases of COVID-19 in the Eloy Detention Center.
 - b. There are zero confirmed cases of COVID-19 in the Eloy Detention Center.
16. Both EDC and LPCC have populations within its approved capacity and is not overcrowded. EDC has the capacity to house 1,540 detainees and is currently at approximately 65% capacity. LPCC has the capacity to house 3,240 detainees and is currently at approximately 53% capacity.
17. Both facilities have put in place measures to ensure social distancing wherever possible by: blocking off seats at tables so detainees are not sitting next to each other, satellite

feeding¹ so the detainees do not congregate in the dining facility, removing sports equipment to discourage group games, and adjusting recreation times so the housing units are not in contact with each other.

18. Both EDC and the LPCC have increased sanitation frequency and provide sanitation supplies as follows: Both facilities provide disinfectant spray, soap, and hot water in every housing unit at the detention center. The administration is encouraging both staff and the detention center general population to use these tools often and liberally.
 - o Both facilities provide disinfectants to staff and cleaning crews and CDC recommended cleaning and disinfection above and beyond normal activity have been implemented.
 - o Both facilities clean and disinfect each housing unit between shifts and entire cell blocks on a rotational schedule.
19. The Department of Homeland Security has suspended in person social visitation and facility tours at both facilities. The Department has required that all attorneys, consular officers and legally mandated Congressional visitors wear personal protective equipment (PPE) to include mask, gloves and eye protection. No visitors are permitted to enter without the PPE. ICE does not provide PPE to visitors.
20. The LPCC is utilizing security staff medically trained to conduct temperature screening and health history questionnaires of all staff, visitors and vendors when they enter the facilities including body temperatures.
21. The LPCC medical staff provide education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.
22. The LPCC medical staff has identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection which would be addressed as set forth in paragraphs 9, 10 and 11, *supra*.
23. In addition to routine custody reviews, ICE has reviewed its detained “at risk population” as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee’s health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.
24. Attorney visits and communications are generally governed by the PBNDS.

¹ Satellite feeding occurs when the food is prepared at a central location then brought to the detainees in their housing units.

25. As described in paragraph 18, both facilities permit in person attorney visits. EDC in person visitation times are 8:00 a.m. to 5:00 p.m. daily, or at any time outside those hours with coordination with ICE and CoreCivic, with the exception of before and after lights out. LPCC permits in person visitation from 8 a.m. to 5 p.m. Monday through Friday, and 8 a.m. to 12 p.m. Saturdays and Sundays, with flexibility upon request of counsel.
26. All parties involved in the legal visit must have PPE, fill out or respond orally to the "Visitor Screening-COVID-19 Questionnaire" and pass through screening, including temperature scanning, to be allowed to enter the facility.
27. Since the onset of COVID-19 ICE has, and continues, to develop and implement additional mechanisms to provide detainee access to counsel. ICE has collaborated with the local American Immigration Lawyers Association (AILA) chapter to set up email boxes at the facilities for attorneys to get messages to the detainees as follows:
 - a. LPCC provided email boxes for attorneys to leave a message with CoreCivic to be delivered to the detainee to return the attorney's call from the telephones in the housing units. These arrangements were communicated to both AILA and the Florence Immigrant Refugee Rights Project (FIRRP).
 - b. EDC provided email boxes for attorneys to leave a message for their clients with instructions to call the attorney. These arrangements were communicated to both FIRRP and AILA.
28. Generally, detainees making calls out of the housing units of the facilities can do so collect, or by purchasing and using a phone card. Detainees can have anyone load money onto their account, which is accessed by the detainee's PIN. In collaboration with AILA and FIRRP, ICE has facilitated additional detainee access to phone calls with counsel as follows:
 - a. At LPCC detainees can schedule a free call with a legal representative from the telephone in visitation. There is an officer present throughout visitation hours who can assist the detainee in making calls. Visitation hours are Monday through Friday 8:00 a.m. to 4:00 p.m. and Saturday and Sunday 8:00 a.m. to 12:00 p.m. There is no limitation placed on the length of the call. This arrangement was communicated to both AILA and FIIRP.
 - b. Beginning March 18, 2020, EDC instituted an appointment system that allows attorneys the ability to schedule 30-minute telephone calls with their clients on a space available basis from 4:00 p.m. to 6:00 p.m. Monday to Friday in the five private telephone booths used during regular business hours for telephonic asylum interviews. This accommodation provides an additional 20 30-minute slots each afternoon. Attorneys are permitted to block out multiple 30-minute slots on the same night or during the week as needed, pending availability.

29. The telephones in the housing units at both facilities can be accessed at any time, except during counts and lights out.
- a. At LPCC available phones for detainees use include:
 - i. Six phones available for use in each of the 24-120 bed pods.
 - ii. Three phones available for use in each of the 12-60 bed pods..
 - iii. One telephone in visitation.
 - b. At EDC there are:
 - iv. Five phones for use in each of the 50 bed pods.
 - v. Five phones for use in (Bravo 500 restricted housing).
 - vi. Five phones in 44 (Bravo 600).
 - vii. Five phones in 48 (Echo 600)
 - viii. Seven phones in 44 (Echo 100 restricted housing -five phones on the wall, two rolling phones).
 - ix. Five Asylum Pre-Screening Officer (APSO) phone in North Visit.²
30. Facility records indicate:
- o At 9:11 a.m. on April 6, 2020, Plaintiff Reynaldo Guerrero-Cornejo was given a message to call his attorney with phone number provided.
 - o Since January 3, 2020 Plaintiff Ernesto Rodriguez Cedeno has had 19 official attorney visits, with the four most recent occurring on March 4, March 9, March 11 and March 12, 2020.
 - o Since January 3, 2020, Plaintiff Enrique Napoles Vaillant has had 18 official attorney visits, with the four most recent occurring on March 4, March 9, March 11, and March 12, 2020.
31. No phone calls on the ICE/CoreCivic provided telephones at either facility are monitored or recorded. Phone calls in the housing units in both facilities are normally recorded, except calls with attorneys per PBNDS standards. All detainees are provided instructions on how to complete an unmonitored call to a legal representative, per PBNDS standards.
32. ICE has also collaborated with the FIRRP and posted flyers in the housing units of both facilities prepared by FIRRP advising detainees of FIRRP's free legal hotline, which the detainees can access as described above. Detainees can call the legal hotline from the phones in the housing units and are one of the free speed dial numbers programmed into the system.
33. There is no video teleconference (VTC) communication option available outside of court for detainees to communicate with attorneys at this time.
34. No removal hearings are presently being conducted at LPCC. Removal hearings are being conducted via VTC at EDC.

² Although there are 11 APSO phones located in the LPCC facility, they are not being utilized to make calls because of the difficulty of scheduling calls with multiple housing units that cannot have contact with each other due to the positive COVID-19 cases at LPCC.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 13, 2020

JASON A CILIBERTI

Digitally signed by JASON A

CILIBERTI

Date: 2020.04.13 08:30:45 -07'00'

Jason Ciliberti, Officer in Charge
La Palma Correctional Center
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 8

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.
on their own behalf and on behalf of others similarly situated,

Case No. 1:20-cv-00852

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

DECLARATION OF ALCIDE R. BENOIT

I, Alcide R. Benoit, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) and currently serve as the Acting Assistant Field Office Director (AFOD), New Orleans Field Office. I have held this position since December 21, 2019. I have been employed by ICE since July 11, 2004. As Acting AFOD, I provide oversight over a number of detention facilities within the New Orleans Field Office, including the Pine Prairie ICE Processing Center (PPIPC), Pine Prairie, Louisiana.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.
3. PPIPC is a private detention center operated by The GEO Group, Inc. (GEO). GEO is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the detainees at PPIPC, who are exclusively ICE detainees.
4. Conditions of detention at the PPIPC are governed by the ICE Performance-Based National Detention Standards 2011, revised 2016 (PBNDS). The PBNDS reflects ICE's

ongoing effort to tailor the conditions of civil immigration detention to its unique purpose while maintaining a safe and secure detention environment for detainees and staff.

5. ERO New Orleans (Oakdale) is responsible for managing the immigration cases of detained individuals. In addition, ERO is responsible for observing, identifying, and notifying GEO of any perceived deficiencies in its adherence to the PBNDS in its management and operation of the PPIPC.
6. As an AFOD, I manage the detained docket for the aliens who are detained at the PPIPC, including supervising Supervisory Detention and Deportation Officers and other detention and deportation staff who are responsible for the review and tracking of aliens' removal proceedings and detention placements. My primary responsibilities include immigration case management for those detained at the PPIPC and general oversight at the PPIPC, including monitoring of adherence to the PBNDS.
7. In my current position, I work with an assigned IHSC Field Medical Coordinator (FMC) to conduct medical oversight at PPIPC. FMCs serve as medical consultants to the ICE field offices and oversee clinical services at Inter-Governmental Service Agreement (IGSA) facilities and monitor clinical services at some Contract Detention facilities (CDF) that house ICE detainees, including the PPIPC.
8. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.
9. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets ICE's detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSA facilities but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.
10. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.
11. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
12. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
13. Each detainee is screened for disabilities upon admission by a medical professional at PPIPC. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
14. At the PPIPC, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with

laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.

15. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
16. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.
17. PPIPC has the following medical capabilities:
 - a. PPIPC, which manages males only, provides daily access to sick calls in a clinical setting, four negative pressure observation rooms, and a medical clinic.
 - b. Specialty and hospital care are provided through an off-sight provider as needed.
18. As of 10:45 a.m. on April 13, 2020, IHSC has the following information:
 - a. There are two confirmed cases of COVID-19 among the detainees at PPIPC. Both individuals are receiving treatment by medical personnel at PPIPC consistent with CDC guidelines. Both are in isolation in negative pressure rooms.
 - b. Other than the two known positive cases, there are no other suspected cases of COVID-19 at PPIPC
19. PPIPC has a detainee population within its approved capacities and is not overcrowded. PPIPC houses only ICE detainees and has a capacity of 730. At present, there are 488 detainees at PPIPC.
20. PPIPC has increased sanitation frequency and provide sanitation supplies as follows:

- a. PPIPC provides disinfectant sprays and wipes, hand sanitizer, soap, masks, gloves to staff and detainees. Appropriate personal protective equipment (PPE), such as gowns, gloves, masks, face shields, are provided for use in isolation as medically indicated. The administration is encouraging both staff and the jail general population to use these tools often and liberally.
 - b. PPIPC has increased the frequency of sanitation through the frequent disinfection of high touch surfaces; the cafeteria, and recreation yard are sanitized after each pod moves through; and there are increased number of sanitation workers across the facility.
21. PPIPC has limited professional visits to noncontact, and has suspended in-person social visitation and facility tours.
22. PPIPC is screening all staff and vendors when they enter the facilities including body temperatures.
23. PPIPC is screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health.
24. PPIPC provides education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.
25. PPIPC has identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 13, 14, and 15, *supra*.
26. ICE has reviewed and continues to review its detained "at risk population" as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.
27. Attorney visits and communications are generally governed by the PBNDS.
28. Attorney phone or video teleconference (VTC) calls, through Skype, with a detainee are scheduled by the attorney sending an email to ppipcnofity@geogroup with the following information:
 - a. Date and time that they wish to have an attorney/client conference;
 - b. Detainee name and A number;
 - c. Copy of attorney bar card;

- d. Copy of attorney identification, and identification for any translator and other legal representatives who will be involved in the attorney/client conference;
 - e. Skype name; and
 - f. Phone number where attorney can be reached in the event of a connection error.
- 29. Attorney phone and Skype calls are allowed Monday through Friday from 8:00 a.m. to 7:00 p.m., and Saturday, Sundays, and Holidays from 8:00 a.m. to 2:00 p.m. PPIPC must receive the attorney or legal representative request by 3:00 p.m. the previous day.
- 30. Detainees may submit a request to call their attorney. If the detainee submits a request, a Case Manager contacts the attorney by the phone number the detainee provides to set up a date and time for the call with the attorney.
- 31. Attorney visits are scheduled by the attorney sending an email to ppipcatv@geogroup.com with the following information:
 - a. Date and time that they wish to have an in-person legal visit;
 - b. Detainee name and A number;
 - c. Copy of attorney bar card; and
 - d. Copy of attorney identification, and identification for any translator and other legal representatives who will be involved in the in-person visit.
- 32. Attorney visits are allowed Monday through Friday from 8:00 a.m. to 7:00 p.m., and Saturday, Sundays, and Holidays from 8:00 a.m. to 2:00 p.m.
- 33. All parties involved in the legal visit must fill out the "Visitor Screening-COVID-19 Questionnaire" and pass through screening to be allowed to enter facility.
- 34. All parties involved in the in-person visit must provide their own and wear PPE equipment.
- 35. Legal visits are conducted in an open space in the visitation area.
- 36. Legal representatives and the detainee are seated six feet apart with a table in between them.
- 37. Sanitation is conducted between each detainee for attorney/client Skype meeting, phone call, and in-person visit. This consists of an officer wiping down the table, chairs, phone, and door handles with HDQ Neutral (one-step disinfectant) and a paper towel, or hard surface disinfecting wipes.

38. At this time, there are no restrictions on attorney/client visits due to Covid-19. Most attorney/client Skype conferences, phone calls, and in-person visits are scheduled for 30 minutes. When the attorney asked for additional time, it is generally accommodated.
39. All immigration hearings at PPIPC are conducted via VTC with an immigration judge in Oakdale, Louisiana and the detainee in a separate VTC room in PPIPC. DHS counsel are either present in the Oakdale courtroom or at a separate location on the telephone. Attorneys representing detainees are able to call in from a separate location.
40. If during the hearing the attorney wants to consult with the detainee, the judge steps out of his or her courtroom in Oakdale, the DHS attorney is disconnected from the call, and the officers at PPIPC step out of the VTC room to allow the attorney and detainee to talk privately.
41. Sanitation is conducted in the VTC room at PPIPC between each detainee hearing. This consists of an officer wiping down the table, chairs, phone, and door handles with HDQ Neutral (one-step disinfectant) and a paper towel, or hard surface disinfecting wipes.
42. According to PPIPC records, on March 6, 2020, Roberto Fausto Velasquez Quiala had a VTC conference with his attorney. PPIPC has no records of any meetings since then.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 13, 2020



Alcide R. Benoit
Acting Assistant Field Office Director, New Orleans
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 9

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.
on their own behalf and on behalf of others similarly situated,

Case No. 1:20-cv-00852

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

DECLARATION OF KELLEY BECKHELM, ASSISTANT OFFICER IN CHARGE

I, Kelley Beckhelm, Assistant Officer in Charge (AOIC) make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). I currently serve as the Assistant Officer in Charge (AOIC) for the ICE ERO San Diego Field Office at the Otay Mesa Detention Center (OMDC) in Otay Mesa, California.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.
3. As AOIC at OMDC I work closely with ICE Health Services Corps (IHSC) and CoreCivic personnel at OMDC.
4. CoreCivic manages the overall OMDC facility operations, security and transportation under contract with ICE.
5. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.
6. OMDC is an IHSC-staffed facility providing both medical and dental care to the detainees.
7. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.

8. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
9. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
10. Each detainee is screened for disabilities upon admission by an IHSC medical provider. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
11. At the OMDC Medical Facility, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.
12. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
13. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.
14. The OMDC Medical Facility has the following medical capabilities:
 - The IHSC Medical Staff which manages both males and females, provides daily access to sick calls in a clinical setting and has an onsite medical infirmary and access to specialty services and hospital care.
15. As of 9:00am PST on April 13, 2020 IHSC has the following information:
 - a. There are 22 confirmed cases of COVID-19 at OMDC, of which 15 are ICE detainees and 7 are U.S. Marshall detainees. There are 26 suspected cases

currently being monitored. The confirmed cases are isolated and receiving medical treatment consistent with CDC guidelines.

16. OMDC has a population within approved capacity and is not overcrowded.
17. The OMDC has increased sanitation frequency and provides sanitation supplies as follows:
 - CoreCivic – provides disinfectant spray and soap in every housing unit at the jail. The administration is encouraging both staff and the jail general population to use these tools often and liberally.
 - CoreCivic – provides disinfectants to staff and cleaning crews and CDC recommended cleaning and disinfection above and beyond normal activity have been implemented.
 - CoreCivic – provides hand sanitizer to staff and cleans and disinfects each housing unit between shifts and entire cell blocks on a rotational schedule.
18. OMDC has limited professional visits to noncontact visits and suspended in person social visitation and facility tours.
19. The OMDC custody staff is screening all staff and vendors when they enter the facilities including body temperatures. At this time OMDC has ceased intake of new cases.
20. The IHSC medical staff are screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health.
21. The IHSC medical staff provide education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.
22. The IHSC medical staff working with CoreCivic staff have identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 8, 9 and 10, *supra*.
23. ICE has reviewed its detained "at risk population" as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.

24. OMDC permits attorney visits via telephone or video teleconference (VTC). The facility has 26 VTC units available in the lobby for attorneys to use to meet with their clients. Detainees in cohort pods can meet with their attorneys via VTC to the lobby but some cohort pods are temporarily limited to telephonic meetings.
25. Detainees at OMDC have access to telephones to call their counsel. The telephones in the housing units can be accessed at any time, except during counts and lights out. The approximate available times for phone use are 5:00am – 7:45am, 9:00am- 3:15pm, 4:30pm- 9:45pm. There are 13 detainee phones in the 128-bed units and 6 detainee phones in each 64-bed unit. Detainees are not limited in how many times they can call their attorney.
26. Attorneys can call CoreCivic to facilitate telephonic or VTC meetings with their client. Attorneys can also contact ERO at OMDC via phone or email if they need assistance in contacting their client.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and based on information obtained from other individuals employed by ICE.

DATED: April 13, 2020


Kelley Beckhelm
Assistant Officer in Charge
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 10

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.
on their own behalf and on behalf of others similarly situated,

Case No. 1:20-cv-00852

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

DECLARATION OF OFFICER IN CHARGE JOHN BRETZ

I, John Bretz, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), and currently serve as the Officer in Charge, at the Stewart Detention Center. I have held this position since 2019.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.
3. In my current position, I am the Officer in Charge at the Stewart Detention Center, at the Atlanta Field Office, employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). In this capacity, I manage ERO personnel and provide oversight over ERO's operations at the Stewart Detention Center. I have been employed by the former Immigration and Naturalization Service (INS) and ICE since 1995.
4. ICE Health Service Corps (IHSC) provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.

5. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSA's but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.
6. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.
7. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
8. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
9. Each detainee is screened for disabilities upon admission by a qualified healthcare professional. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
10. At the facility, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.
11. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
12. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.

13. Stewart Detention Center has the following medical capabilities:

- o The facility, which manages males only, provides daily access to sick calls in a clinical setting, and infirmary and access to specialty services and hospital care.

14. As of 3:20 p.m. on April 13, 2020, IHSC has the following information:

- a. There are 42 ICE detainee suspected cases of COVID-19 in the facility who are in cohort on medical observation per CDC guidelines.
- b. There are 7 confirmed cases of COVID-19 among ICE detainees in the facility. The 7 confirmed cases are isolated and receiving medical treatment consistent with CDC guidelines. There are 14 confirmed cases of COVID-19 among facility staff. Detainees who may have been exposed through contact with these staff members are in cohort and being monitored per CDC guidelines.

15. The facility has populations within their approved capacities and are not overcrowded. on April 9, 2020, the facility was operating at approximately 55% of that capacity, with only 1,248 ICE detainees present at the facility. Where detainees are housed in a dormitory-style unit, rather than individual two-person cells, detainees are being spread out, particularly those detainees who are in a protective cohort.

16. The facility has increased sanitation frequency and provides sanitation supplies as follows:

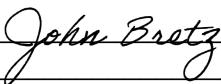
- Hand sanitizer units have been installed in all units and throughout the facility.
- Sanitary wipes have been made available in all units and throughout the facility and are available to detainees. During town hall meetings, detainees have been instructed how to safely sanitize common area surfaces they may come into contact with during the day—such as detainee telephones and kiosks—before and after use.
- Detainees are permitted access to facility-approved chemicals, soap, and hand sanitizer for personal hygiene and to clean their immediate living areas. Such access is available 24-hours a day, seven days a week.
- Pump dispensers for HDQ Neutral, a multi-purpose disinfecting antibiotic and antiviral cleaning solution, have been installed in SDC areas for use by individual detainees as well as Voluntary Work Program participants.

17. The facility has suspended in person social visitation and facility tours. In-person attorney visits at the facility occur in secure visitation areas, with a secure divider between the detainee and attorney visitor. Social distancing practices are followed with any in-person attorney visitor. Visitation staff sanitizes legal visitation areas before and after each legal visit. This includes, but is not limited to, wiping down chairs, tables, phones, and other surfaces and equipment using HDQ Neutral disinfectant. In-person attorney visitors must provide their own personal protective equipment (PPE) and submits to screening, including temperature checks and travel/contact history, prior to entering the facility. PPE includes disposable vinyl gloves, N-95 or surgical masks, and eye protection.

18. During the past two weeks, the number attorneys requesting in-person attorney visits with clients detained at SDC has declined substantially. If attorneys do not wish to visit in person, they may have confidential communications with detainees either through the detainee telephone system or through the Video Teleconference (VTC) System. The facility has begun providing expanded hours for VTC appointments, and further has placed additional VTC equipment in the facility, significantly expanding the number of available VTC appointments. These VTC units are also available for use in lieu of detainee physical appearances in immigration court. Detainees can receive messages from attorneys to call them. Detainees can make phone calls to attorneys, collect, with a calling card or to free hotlines. Three-way calling is available upon initiation by the attorney.
19. The facility is screening all staff and vendors when they enter the facilities including body temperatures.
20. The facility is screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health.
21. The facility provides education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.
22. The facility has identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 9, 10 and 11, *supra*.
23. ICE has reviewed, and continues to review, its detained "at risk population" as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and based on information obtained from other individuals employed by ICE.

DATED: April 13, 2020

_____

Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 11

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.

Case No. 1:20-cv-00852

on their own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET AL.

Respondents-Defendants.

DECLARATION OF JOSE SIMAO

I, Jose Simao, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) and currently serve as the Assistant Field Office Director (AFOD), Newark Field Office. I have held this position since December 9, 2007. I have been employed by ICE and the former Immigration and Naturalization Service (INS) since May 17, 1993. As AFOD, I provide oversight over the Elizabeth Contract Detention Facility (ECDF) in the Newark Field Office. I have been assigned to ECDF since October 1, 2017.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.
3. ECDF is a private detention center operated by Core Civic (CC). CC is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the detainees at ECDF, comprised exclusively of ICE detainees.
4. ERO Newark is responsible for managing the immigration cases of detained individuals. In addition, ERO is responsible for observing, identifying, and notifying CC of any perceived deficiencies in its adherence to the Performance Based National Detention Standards (PBNDS) in its management and operation of the ECDF.
5. As an AFOD, I manage the detained docket for the aliens who are detained at the ECDF, including supervising Supervisory Detention and Deportation Officers and other

detention and deportation staff, who are responsible for the review and tracking of aliens' removal proceedings and detention placements. My primary responsibilities include immigration case management for those detained at the ECDF and general oversight at the ECDF, including monitoring of adherence to the PBNDS.

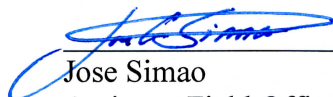
6. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), CC at ECDF has been adhering to the Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, put out by the U.S. Centers for Disease and Prevention (CDC) to safeguard those in its custody and care.
7. As of March 20, 2020, ECDF has suspended in-person social visitation, in-person legal visits and facility tours in response to the COVID-19 pandemic.
8. As of March 20, 2020, legal visits are conducted through telephone conference calls. Attorney teleconference calls are scheduled by the requesting attorney contacting CC in person at the CC front desk or calling the CC front desk line. A notice of this action, with instructions, is posted in the CC front lobby. An email notification has also been provided to the American Immigration Lawyers Association (AILA) and local area Non-Governmental Organization groups that frequent ECDF.
9. Attorney telephone conference calls with their clients can be scheduled Monday through Friday from 8:00 a.m. to 5:00 p.m., by the attorney contacting CC at the front desk line or in person at the front desk window. Saturday and Sunday appointments can be considered if there is an urgent or emergency need. ECDF should receive the legal representative's request by 4:00 p.m. to be able to schedule the visit the next day; but there may be circumstances when CC can schedule such visit on the day it was requested if slots are available.
10. Detainees may also submit a request to call their attorneys through CC or ICE ERO, and provide the attorney's phone number. When a detainee submits a request, a Case Manager contacts the detainee's attorney and sets up a date and time for the telephone conference call with the attorney.
11. CC can schedule nine one-hour legal visits in three separate private telephone conference rooms per day. This schedule offers the largest number of available time slots to ensure detainees can communicate with their legal representatives. The conference rooms are equipped with private telephone lines and all three rooms available daily, offering up to a maximum of twenty-seven time slots. An attorney may request an additional time slot if after their appointment they require more time with their client and other time slots are available. The attorney may also schedule time slots on different days.
12. CC escorts the detainee to one of the scheduled telephone conference rooms and dials out the telephone number provided by the attorney. Once the line is connected, the detainee proceeds with their teleconference with their legal representative, in private. Neither CC nor ICE provides interpreters for legal visitation or telephone conferences. After the completion of each telephonic conference, CC cleans and sanitizes the conference room

in accordance with CDC guidelines with approved disinfectants and cleaners. This includes a CC staff member wiping down the table, chairs, phone, and door handles.

13. Currently, there is no video teleconference (VTC) communication option available outside of court for detainees to communicate with attorneys.
14. Attorneys are encouraged to mail any legal mail correspondence to their clients at ECDF. Priority mail delivery items can be received at ECDF at the front desk.
15. Attorneys at the Office of the Principal Legal Advisor at the Elizabeth Detention Facility can be contacted through the Duty Attorney mail box at OPLA-Elizabeth-DutyAttorney@ice.dhs.gov

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and based on information obtained from other individuals employed by ICE.

DATED: April 13, 2020



Jose Simao
Assistant Field Office Director, Newark
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 12

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.
on their own behalf and on behalf of others similarly situated,

Case No. 1:20-cv-00852

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

DECLARATION OF CHRISTOPHER L. LaBIER

I, Christopher L. LaBier, make the following statements under oath and subject to the penalty of perjury:

1. I am an Assistant Field Office Director with the Detroit Field Office of Enforcement and Removal Operations (ERO), U.S. Department of Homeland Security (DHS) in Columbus, Ohio. I have been employed with ICE, ERO since May 2009, and in my current position since June 2019. In my current position, my duties include oversight of ICE detention facility matters within southern Ohio for the Detroit Field Office area of responsibility.
2. The subject matter of this declaration involves my official duties as an Assistant Field Office Director. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.
3. In my current position, I work with our ICE Health Service Corps (IHSC), Field Medical Coordinator (FMC) regarding detained chronic care cases and detained cases requiring greater medical care management. The FMCs serve as medical consultants to the ICE field offices and oversee clinical services at Inter-Governmental Service Agreement (IGSA) facilities that house ICE detainees, including the Butler County Jail in Hamilton, Ohio.
4. The Butler County Jail is a state and local law enforcement partner that successfully manages its own populations under federal, state, and local regulations, and assists ICE with housing immigration detainees to enforce immigration laws and improve national

safety and security. Conditions of ICE detention at the Butler County Jail are governed by ICE's 2019 National Detention Standards for Non-Dedicated Facilities.

5. In preparing this declaration, I have consulted with the IHSC, FMC serving the Detroit Field Office's area of responsibility throughout Ohio, as well as the Health Services Administrator and the Warden at the Butler County Jail.
6. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.
7. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSA's but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.
8. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.
9. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
10. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
11. At the Butler County Jail, each detainee is screened for disabilities upon admission by a paramedic and, if necessary, a licensed Registered Nurse and/or mental health worker. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
12. At the Butler County Jail, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks. The Butler County Jail also has procedures to continue monitoring the population's health.
13. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
14. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are

monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.

15. The Butler County Jail, which manages both males and females, provides daily access to sick calls in a clinical setting, has an onsite medical infirmary, and access to specialty services and hospital care through outside vendors. Emergency medical assistance is requested in person to the Corrections Officer on duty.
16. Inmate and detainee housing at the Butler County Jail consists of 10 PODs, each identified by a letter A through K. ICE detainees are primarily housed in C and J PODs. Each POD has separate cells that share a common dayroom and bathroom/shower facilities. Meals are brought into the PODs and now are served in the cells to allow for social distancing.
17. In the event of suspected or confirmed cases of COVID-19, the Butler County Jail cleared a section of H POD, capable of housing 16 inmates, for purposes of quarantine in single cells with approval by the mental health team. Additional sections or PODs can be cleared for quarantine if it becomes necessary.
18. As of 4:30 p.m. on Monday, April 13, 2020, I have been informed that there are zero suspected or confirmed cases of COVID-19 amongst ICE detainees at the Butler County Jail. Amongst the inmate population, however, there is currently one confirmed case of COVID-19; one inmate who was cohorted with the confirmed case during intake (currently asymptomatic, awaiting test results); and 8 additional inmates who have been quarantined in single cells since intake due to their responses to the screening questionnaire and/or the presence of symptoms (including a temperature of 100.4°F) compatible with COVID-19. None of these 10 inmates has had any contact with ICE detainees.
19. The Butler County Jail has a population within its approved capacities and is not overcrowded. The Butler County Jail has a capacity of 848. At present, there are 747 inmates and detainees at the Butler County Jail. Appropriate social distancing is being implemented per CDC guidelines.
20. The Butler County Jail has increased sanitation frequency and provide sanitation supplies as follows:
 - o The PODs, individual cells, and common areas are currently being disinfected nine times per day with an approved disinfectant.

- o Staff is provided with N-95 masks, gowns, Tyvek suits, gloves, hand sanitizer, disinfectants, soap, and water.
- o Porters of the PODs, (inmates who are selected and detainees who volunteer to clean common areas), are provided with disinfectant solutions, cleaning disinfectants, gloves, surgical masks, and eye protection.
- o Detainees are provided 24-hour access to water, personal soap and hygiene items, and cleaning products and disinfectants to clean their respective living areas. Surgical masks and gloves are also available if requested.
- o Jail staff and the general population have been encouraged and directed to use these sanitation supplies often and liberally.

21. The Butler County Jail has suspended all in-person social visitation and facility tours.

22. Attorney visits and communications are generally governed by the 2019 National Detention Standards for Non-Dedicated Facilities. The Butler County Jail currently allows professional visits with ICE detainees as follows:

- o Attorneys/legal representatives who bring personal protective equipment (“PPE”), to include surgical or cloth masks, gloves, and protective eyewear, for use during the visit may enter the secure area of the Butler County Jail, after screening, and meet with their client in a private interview room. The Butler County Jail provides surgical masks to the detainees for use during the visit.
- o Attorneys/legal representatives who do not bring PPE are limited to noncontact visits via internal closed circuit audio/video equipment which is available for use in the outer lobby.
- o Visitation by attorneys/legal representatives is accommodated daily outside meal times (5:00-7:00 a.m., 11:00 a.m.-1:00 p.m., 5:00-7:00 p.m.).

Records reflect that attorneys have continued to visit ICE detainees since these measures have been implemented.

23. ICE detainees may also call attorneys/legal representatives from telephones in the dayroom with a pre-paid phone card, collect, or to free hotlines noted on the List of Pro Bono Legal Service Providers issued by the Cleveland Immigration Court. The timeframe for using the telephones in the dayroom varies depending on the housing unit, but is generally permitted between 7:15-11:00 a.m., 1:00-4:45 p.m., 7:15-11:00 p.m., 12:00-3:15 a.m. daily.

24. The Butler County Jail is screening all staff, vendors, and attorneys/legal representatives, including body temperatures, before they are permitted to enter the secure area of the facility.

25. The Butler County Jail provides education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. CDC posters have also been placed throughout the facility in both English and Spanish.

26. ICE has reviewed its detained “at risk population” as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee’s health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 13, 2020

Christopher LaBier

Digitally signed by Christopher LaBier
Date: 2020.04.13 18:07:26 -04'00'
Christopher L. LaBier
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 13

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYER GUILD, ET AL.

Case No. 1:20-cv-00852

on their own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ET
AL.

Respondents-Defendants.

**DECLARATION OF ACTING ASSISTANT FIELD OFFICE DIRECTOR BRIAN
ALLEN**

I, Brian Allen, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), and currently serve as the Acting Assistant Field Office Director, Atlanta Field Office. I have held this position since February 11, 2020.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained made known to me in the course of my official duties.
3. In my current position, I am an Acting Assistant Field Office Director, Atlanta Field Office, employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). In this capacity, I manage ERO personnel and provide oversight over many of ERO's operations the Atlanta Field Office. I also provide oversight over Folkston ICE Processing Center (FIPC) within the Atlanta Field Office. I have been employed by the former Immigration and Naturalization Service (INS) and ICE since August 08, 1995.
4. ICE Health Services Corps (IHSC) provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.
5. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets ICE's detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the

IGSAs but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.

6. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.
7. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.
8. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.
9. Each detainee is screened for disabilities upon admission by a medical professional. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.
10. At the facility, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.
11. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.
12. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.
13. Folkston Processing Center has the following medical capabilities:

- The facility, which manages males only, provides daily access to sick calls in a clinical setting, medical observation rooms, 3 negative pressure rooms, x-rays, labs, 24-hour medical care and access to specialty services and hospital care.

14. As of 11:00 a.m. on April 13, 2020, IHSC has the following information:

- There are zero suspected cases of COVID-19 at the facility.
- There are zero confirmed cases of COVID-19 among ICE detainees. There is one confirmed case of COVID-19 by a GEO transport officer. The officer's last contact with detainees was on April 2, 2020. The officer was in full PPE while transporting detainees between facilities.

15. The facility has populations within their approved capacities and are not overcrowded.

16. The facility has increased sanitation frequency and provide sanitation supplies as follows:

- The facility provides disinfectant, towels, soap, and gloves to the housing units daily.
- Housing units and common areas are sanitized every 2 hours each day.
- VTC equipment, telephones, tablets and Skype equipment are wiped down with disinfectant wipes after each use and every two hours when not in use

17. The facility has limited professional visits to noncontact visits and suspended in person social visitation and facility tours. Detainees can receive email messages from attorneys to call. All detainees have access to telephones, mail and to Skype devices. There is no time limitation on collect calls made by detainees to their attorneys. Three-way calling is available for interpreters if initiated by the detainee's attorney. Together, Talton Communications and ICE have provided all detainees with two 10-minute phone calls per week at no charge to the detainees. In addition, the facility has provided the detainees with free minutes on their calling cards, allowed longer access to the tablets and to the Skype device. All visitors to the facility are required to provide personal protective equipment (PPE) prior to entering the facility. This includes disposable vinyl gloves, N-95 or surgical masks, and eye protection.

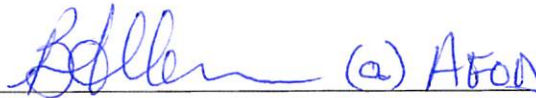
18. The facility is screening all staff and vendors when they enter the facilities including body temperatures. The facility checks all staff and detainees prior to entering the facility. All detainees have their temperature taken whenever they depart or arrive at the facility. All GEO staff have their temperature taken upon entry into the facility and complete a COVID-19 Risk questionnaire.

19. The facility is screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health.

20. The facility provides education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.
21. The facility has identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 9, 10 and 11, *supra*.
22. ICE has reviewed, and continues to review, its detained "at risk population" as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 13, 2020



Atlanta Field Office

Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 14

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

DECLARATION OF PARALEGAL SPECIALIST

I, **ELIZABETH BURGUS**, do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I hold the position of Paralegal Specialist in the Office of the General Counsel (“OGC”) for the Executive Office for Immigration Review (“EOIR”). My duties include, among other things, reviewing records of proceedings (“ROP”) and EOIR electronic database records for purposes of confirming case procedural history. I make this declaration in my official capacity.

2. I have performed a query of the EOIR electronic database records related to the proceedings for ERNEST RODRIGUEZ CEDENO, [REDACTED]. I have reviewed the results of this query and am familiar with the procedural history of Mr. Rodriguez Cedeno’s proceedings, which occurred in Tuscon, Arizona, as reflected in the EOIR electronic database records.

3. On April 2, 2020, Mr. Rodriguez Cedeno was scheduled to appear for a master calendar hearing before an immigration judge. That hearing was adjourned to August 5, 2020, due to leave of the immigration judge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 2020

**ELIZABETH
BURGUS**

 Digitally signed by ELIZABETH
BURGUS
Date: 2020.04.13 10:13:46 -04'00'

Elizabeth Burgus
Paralegal Specialist, OGC
Executive Office for Immigration Review

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

EXHIBIT 15

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

DECLARATION OF PARALEGAL SPECIALIST

I, **ELIZABETH BURGUS**, do hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I hold the position of Paralegal Specialist in the Office of the General Counsel (“OGC”) for the Executive Office for Immigration Review (“EOIR”). My duties include, among other things, reviewing records of proceedings (“ROP”) and EOIR electronic database records for purposes of confirming case procedural history. I make this declaration in my official capacity.

2. I have performed a query of the EOIR electronic database records related to the proceedings for ISRAEL ESTRADA FERNANDEZ, [REDACTED]. I have reviewed the results of this query and am familiar with the procedural history of Mr. Estrada Fernandez’s proceedings, which occurred in Eloy, Arizona, as reflected in the EOIR electronic database records.

3. On April 2, 2020, Mr. Estrada Fernandez was scheduled to appear for a master calendar hearing before an immigration judge. That hearing was adjourned to April 20, 2020, due to closure of the immigration court.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 2020

**ELIZABETH
BURGUS**

 Digitally signed by ELIZABETH
BURGUS
Date: 2020.04.13 10:12:13
-04'00'

Elizabeth Burgus
Paralegal Specialist, OGC
Executive Office for Immigration Review

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD, *et al.*,

Plaintiffs,

v.

EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW, *et al.*,

Defendants.

Civil Action No. 1:20-cv-00852-CJN

[PROPOSED] ORDER

Upon consideration of the parties' arguments, as well as the entire record herein, it is hereby ORDERED that Plaintiffs' Motion for Temporary Restraining Order (ECF No. 7) is DENIED.

SO ORDERED.

DATED: _____

Hon. Carl J. Nichols
United States District Judge