JOSEPH H. HUNT
Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section
EREZ REUVENI
Assistant Director
LAUREN C. BINGHAM
Senior Litigation Counsel
FRANCESCA M. GENOVA
Trial Attorney
BRIAN C. WARD
Senior Litigation Counsel
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) 616-9121
Email: brian.c.ward@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

This Court should deny Plaintiffs' extraordinary and irresponsible request to halt all immigration-court functions nationwide.

The federal government has taken swift, substantial, and tailored action to respond to the effects and challenges created by the global coronavirus pandemic on the Nation's immigration courts. These courts carry out a vital role across the country of adjudicating the admissibility to or removability from this country of hundreds of thousands of aliens and their claims for relief from removal, conducting bond hearings for detained aliens, ruling on urgent motions to stay removal and for other relief, and upholding the immigration laws—functions that necessarily entail exercises of sovereignty consistent with the statutory structure created by Congress.

As with court systems throughout the United States, the pandemic has created challenges for the immigration courts and for those who appear in those courts. The Executive Office for Immigration Review (EOIR), the office within the Department of Justice that oversees the Nation's 69 immigration courts, has responded to those challenges by, among other things, postponing all hearings in immigration courts through May 1, 2020, for aliens who are not detained; limiting in-person appearances in courts where possible; and, reminding immigration judges—who are administrative judges who retain independence—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 to COVID-19. *See* Ex. 1, Declaration of EOIR Director James McHenry, at ¶¶ 43-54, 68-70. Like most court systems in the country, EOIR has not shut down all operations, and continues to perform essential functions, including holding bond hearings for detained aliens that may lead to an alien's release from custody, accepting and deciding urgent motions, and carrying out other duties that immigration judges are required by statute or court order to complete on specific, short timelines. *See* McHenry Decl. ¶¶ 31-36, 57-67.

Against this effort, the Plaintiffs in this case—all of whom are legal-services organizations rather than aliens who have cases in immigration courts—move for an extraordinary temporary restraining order that would effectively shut down all immigration-court operations everywhere, including those courts' essential functions. Although Plaintiffs do not raise any claims related to COVID-19 in their complaint, and do not identify a single individual alien they purport to represent who faces imminent court proceedings that he or she alleges will place her in danger of contracting COIVD-19, they ask this Court to enjoin nationwide the operation of the immigration courts, preempting those courts from addressing the crisis and from carrying on their critical work. And although Defendants raised significant, threshold defenses to Plaintiffs' ability to bring any of their actual claims in this case, Plaintiffs ask the Court to grant this extraordinary relief without even attempting to argue that they have Article III standing or that the Court has jurisdiction to hear any of their claims, without pointing to any basis for this Court to issue such sweeping, systematic, universal relief in a case with no individual plaintiffs or class claims, and without grappling with the separation-of-powers damage raised by their request that this Court take over operational decision-making and oversight of an entire administrative court system that Congress directed the Executive Branch to administer. The Court should reject this unprecedented and manifestly inappropriate request for multiple reasons.

First, this Court cannot grant the relief that Plaintiffs request because that relief falls well outside the scope of this case. Injunctive relief is permissible only where there is "a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint." *Pac. Radiation Oncology, LLC v. Queen's Medical Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015). Plaintiffs' request fails that requirement. Plaintiffs' complaint challenges case-completion goals and performance metrics for immigration judges that they allege impact decisions on asylum claims. *See* ECF No. 1, Compl. ¶¶ 197, 204, 213-14, 221, 230. The complaint

makes no allegations based on the COVID-19 pandemic. Yet Plaintiffs' TRO motion asks this Court to enjoin operations of the Nation's 69 immigration courts under the All Writs Act, 28 U.S.C. § 1651(a), to respond to the COVID-19 pandemic. *See* ECF No. 28 (Pls' Mot.). That requested relief does not relate to any of the claims pleaded in the complaint. This Court cannot grant injunctive relief based on a claim that Plaintiffs did not raise.

Second, and for similar reasons, Plaintiffs have no basis for invoking the All Writs Act, yet that is the statute on which they rest their claim for relief. *See* Pls.' Mot. 2. That Act allows courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions," 28 U.S.C. § 1651(a), and permits a court to issue orders that are "necessary to protect its own jurisdiction," *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). The All Writs Act does not permit the relief that Plaintiffs seek, which does not relate to—and thus could not affect the Court's jurisdiction over—the claims pleaded in the complaint. And even if Plaintiffs' TRO motion related to the claims in the complaint, Defendants have moved to dismiss Plaintiffs' claims, laying out a host of significant threshold jurisdictional problems with each claim and request for relief that was pleaded. *See* ECF No. 24, at 6-22. The All Writs Act does not enlarge a district court's jurisdiction; it only permits a court to protect jurisdiction that was properly obtained on some other basis. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). A court cannot grant relief to protect its jurisdiction where there was no jurisdiction to begin with. Plaintiffs have failed to establish the jurisdictional prerequisites for seeking relief under the All Writs Act.

Third, and as noted, this Court cannot grant the relief that Plaintiffs seek because this Court lacks jurisdiction over any of Plaintiffs' claims. The INA limits both how challenges to the operation of immigration courts are brought and who may bring such challenges, and forecloses the availability of the All Writs Act as a remedial mechanism in immigration cases. As explained in the government's pending motion to dismiss, 8 U.S.C. § 1252(b)(9) limits "[j]udicial review of

all questions of law and fact" "arising from any action taken or proceeding brought to remove an alien," to claims brought by an *individual alien* in the court of appeals after the conclusion of proceedings before the agency. Congress has eliminated jurisdiction in district court over challenges related to removal proceedings, including decisions to "adjudicate cases," the procedures used to adjudicate cases, and challenges brought by organizations, notwithstanding other statutory provisions, including the All Writs Act, 28 U.S.C. § 1651. *See* 8 U.S.C. § 1252(b)(9) (providing "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). Relatedly, because organizations have no legally cognizable or protected interest in the conduct of removal proceedings, Plaintiffs have no standing to raise challenges related to those proceedings.

Fourth, even if the organizational plaintiffs could establish standing and jurisdiction, Plaintiffs' request would still fail because Congress has barred district courts from awarding injunctive relief that would restrain the operation of the statutory provisions that relate to the operation of immigration courts, including 8 U.S.C. §§ 1229 and 1229a, the provisions that Plaintiffs ask this Court to override to shutter the immigration courts indefinitely. *See* 8 U.S.C. § 1252(f) ("Limit on Injunctive Relief"). As the Ninth Circuit just held, "Congress intended [§ 1252(f)] to prohibit injunctive relief with respect to organizational plaintiffs," raising challenges related to the operation of 8 U.S.C. §§ 1221-1232, and so barred injunctions at the behest of organizations like the one requested here. *Padilla v. ICE*, No. 19-35565, 2020 WL 1482393, at *12 (9th Cir. Mar. 27, 2020). This bar to injunctive relief applies "[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action," 8 U.S.C. § 1252(f)(1), and forecloses the injunctive relief that Plaintiffs seek under the All Writs Act.

Fifth, even if the Court could reach the merits, the motion would still fail. Agencies enjoy well-settled authority—and are entitled to significant deference—on their day-to-day operations

and procedures, particularly in the immigration context. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978); *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004). EOIR is exercising that authority soundly. Plaintiffs provide no basis for enjoining EOIR's authority and ability to adopt policies to respond to the evolving crisis while maintaining essential immigration-court functions.

Finally, even if emergency relief were appropriate, the scope of Plaintiffs' requested relief is vastly overbroad and risks harm to individuals who Plaintiffs purport to help. At a minimum the Court must limit any relief to actual clients that Plaintiffs can identify who have pending proceedings with imminent immigration-court hearings.

The Court should deny Plaintiffs' TRO motion.

II. BACKGROUND

Immigration-Court System. The Executive Office for Immigration Review, which is housed within the Department of Justice, oversees a system of 69 immigration courts located across the country. McHenry Decl. ¶ 9. Generally, when the 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 inadmissible to or 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 or protection from removal. 8 U.S.C. § 1229a(a)(1). Congress has mandated that certain categories of aliens must be detained during removal proceedings. *See, e.g.* 8 U.S.C. § 1226(c). For other categories of aliens, immigration judges may conduct bond hearings and grant release on bond if certain requirements are met. *See* 8 U.S.C. § 1226(a); *see also* McHenry Decl. ¶¶ 8-42 (describing proceedings in immigration court).

Aliens may appeal from the decisions from immigration judges, including decisions on custody and bond, to the Board of Immigration Appeals (BIA), which hears appeals from all immigration courts across the country. 8 C.F.R. § 1003.38. An alien may seek judicial review of a BIA decision through a petition for review filed with the court of appeals for the circuit where the immigration court that initially heard the claim is located. 8 U.S.C. § 1252(a)(5), (b)(2).

The Attorney General ultimately 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). Accordingly, "to assist in the expeditious, fair, and proper resolution of matters" before the immigration courts, there are various regulations that govern the conduct of removal proceedings, including regulations giving immigration judges authority over "scheduling cases," and to make custody determinations, grant continuances "for good cause shown," waive the "presence of the parties" in certain circumstances or permit telephonic or video hearings, limit public access to hearings, "set and extend time limits" for filings, and "establish local operating procedures." 8 C.F.R. §§ 1003.12, 1003.18, 1003.19, 1003.25, 1003.27, 1003.29, 1003.31, 1003.40. The Attorney General also has authority to "issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section." 8 U.S.C. § 1103(g)(2). In immigration court, 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." 8 C.F.R. §§ 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, 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. ¶¶ 43-46.

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. ¶¶ 49, 68. On March 18, the Director of EOIR also 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 Policy Memorandum (McHenry Mem.) 20-10, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak, https://www.justice.gov/eoir/file/1259226/download; McHenry Decl. ¶¶ 46-46.

Among other things, EOIR restricted access to immigration courts for individuals at risk of having COVID-19. McHenry Mem. at 2, Decl. ¶ 46. 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." McHenry Mem. at 2, Decl. ¶ 46. 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." McHenry Mem. at 2-3, Decl. ¶¶ 45-46.

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." McHenry Mem. at 3-4, Decl. ¶¶ 45-47. 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." McHenry Mem. at 3. This guidance "was modeled on similar orders issued by federal district courts." McHenry Decl. ¶ 46.

Although the immigration courts have dramatically 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. For many aliens that fall into these categories, it is not until the hearing takes place that an immigration judge is alerted to the identity of an alien's counsel, and so it would effectively put these hearings on hold if EOIR needed to contact every alien and their counsel and obtain advance consent and could raise additional ethical problems. *Id*. ¶¶ 62-65. The outbreak has also generated demand for EOIR to hold more or more-immediate hearings, including litigation and threatened litigation requesting that immigration courts expedite certain types of hearings. *Id*. ¶ 67. Immigration courts must also remain open to

accept certain urgent filings, including motions to reopen or stay removal. *Id.* ¶ 57. Closing courts to aliens who wish to file such motions would leave them at risk of removal. *Id*. Various other statutes and court orders require immigration judges to take certain actions within certain strict timelines, and closing the immigration courts completely may violate those orders. *Id*. ¶ 66.

Immigration judges have authority to extend deadlines if necessary and to excuse untimely filings caused by the outbreak where appropriate, as courts have done in other emergency situations. McHenry Decl. ¶¶ 21-27. Immigration judges also have authority to issue standing orders and adopt local operating procedures, and many courts "have done so over the past two weeks in response to the COVID-19 and have tailored them to the particular circumstances of their respective dockets." *Id*. ¶ 39. For aliens who receive *in absentia* orders, immigration judges can reopen the proceedings for an alien who shows 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. ¶¶ 71-79. 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*. ¶¶ 55-56.

This Lawsuit. Plaintiffs filed this lawsuit on December 18, 2019, to challenge the performance metrics and case-completion goals for immigration judges who hear asylum claims at immigration courts in other parts of the country. Plaintiffs are six legal advocacy organizations located in various places in the United States. Compl. ¶¶ 17-22. There are no individual plaintiffs and Plaintiffs do not raise any class claims.

Plaintiffs' allegations fall into three categories. *First*, they allege that a number of immigration courts in other parts of the country are so-called "asylum-free zones" with low asylum

grant rates. Compl. ¶ 6. *Second*, Plaintiffs allege that the immigration courts decide cases too slowly, creating a backlog of cases that "undermines fairness." *Id*. ¶¶ 7, 105. *Third*, Plaintiffs allege that the Attorney General has improperly tried to manage the immigration court backlog by setting case-completion goals and performance measures to encourage resolution of more cases. *Id*. ¶¶ 8, 134. Plaintiffs allege that the performance metrics and case-completion goals violate the Take Care Clause of the United States Constitution, the Immigration and Nationality Act (INA) requirement that cases be decided on a case-by-case basis, 8 U.S.C. § 1229a, and the Administrative Procedure Act (APA), 5 U.S.C. § 706. Compl. ¶¶ 52-62.

The government moved to dismiss all of Plaintiffs' claims on March 20, raising significant, threshold jurisdictional defenses. *See* ECF No. 24, at 6-22. Rather than respond, Plaintiffs sought a three-week extension on March 24. After securing that extension, on March 27, Plaintiffs moved for a TRO, invoking the All Writs Act exclusively, and asking for an order requiring the government to: (1) stop all in-person hearings in immigration court and not move forward with any hearing without advance consent of the alien and any counsel; (2) stop issuing *in absentia* orders to aliens that "fail to appear in any immigration court"; (3) vacate all deadlines during the national emergency, while continuing to count this time towards any benefits that might otherwise accrue to an alien; (4) waive any requirement for an original signature or filings that cannot be done electronically; (5) stop deeming petitions for relief abandoned or untimely; and (6) not hold in contempt any attorney who does not appear in immigration court "because of their fear of contagion or because a public health order exists cautioning against congregation or public movement." Pls.' Mot. 32-33. Plaintiffs' complaint, which they have not sought to amend, does not raise any claims related to these issues.

III. LEGAL STANDARD

In deciding whether to grant a TRO, courts generally look to substantially the same factors that apply to a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). A court should enter a preliminary injunction only "upon a clear showing that the [movant] is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the moving party 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. *Id.* at 20.

A TRO "should be restricted to … preserving the status quo and preventing irreparable harm" just until a preliminary injunction hearing may be held, "and no longer." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974). Moreover, Article III demands that a remedy "be limited to the inadequacy that produced the injury in fact that the plaintiff has established," *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (citation omitted); *see Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (per curiam), and bedrock principles of equity similarly require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

IV. ARGUMENT

The Court should deny Plaintiffs' extraordinary TRO request for the following reasons.

A. A court cannot grant an injunction that is not related to the claims raised in the complaint.

Plaintiffs' TRO request should be denied because it rests on claims that Plaintiffs never made in their complaint and that accordingly fall outside the scope of this case.

For injunctive relief to be proper, "there must be a relationship between the injury claimed in the motion for injunctive relief and the *conduct asserted in the underlying complaint*." *Pac. Radiation Oncology, LLC*, 810 F.3d at 636 (emphasis added). If a court never finds that the "conduct asserted in the underlying complaint" is likely to be unlawful, then there is no basis to issue an injunction of conduct not challenged in the complaint. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 219 (1945) (the issuance of preliminary relief "presupposes or assumes ... that a decree may be entered after a trial on the *merits* enjoining and restraining the defendants from certain future conduct") (emphasis added). Indeed, such a ruling would be an abuse of discretion. *See Pac. Radiation Oncology, LLC*, 810 F.3d at 637 (movant "could not prove the likelihood of success requirement of the preliminary injunction analysis because the [] violations alleged in the motion were not contained within the actual complaint"); *accord Colvin v. Caruso*, 605 F.3d 282, 300 (6th Cir. 2010) (plaintiff "had no grounds to seek an injunction pertaining to allegedly impermissible conduct not mentioned in his original complaint").

Plaintiffs' TRO request flunks the requirement for "a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint." *Pac. Radiation Oncology, LLC*, 810 F.3d at 636. Plaintiffs' complaint challenges case-completion goals and performance metrics for immigration judges that they allege impact decisions on asylum claims. *See* ECF No. 1, Compl. ¶¶ 197, 204, 213-14, 221, 230. The complaint makes no allegations based on the COVID-19 pandemic. Yet Plaintiffs' TRO motion asks this Court to enjoin operations of the Nation's 69 immigration courts under the All Writs Act, 28 U.S.C. § 1651(a), to respond to the COVID-19 pandemic. *See* ECF No. 28 (Pls' Mot.). That requested relief does not relate to any of the claims pleaded in the complaint.

In their TRO motion Plaintiffs define their underlying claims as "seeking a full and fair immigration court adjudication system." Pls' Mot. 28. That abstract and generalized description

of their claims is just an attempt to paper over the lack of any meaningful connection between the TRO request and their actual claims. The Court should reject Plaintiffs' effort. Plaintiffs seek an order altering a range of different immigration-court practices based on the COVID-19 epidemic. Their complaint addresses nothing of the sort. The Court should deny a TRO on this ground alone.

B. The All Writs Act does not provide a basis for the relief Plaintiffs seek, which is unrelated to this Court's adjudication of the claims they have brought.

This Court should deny a TRO for the further, independent, threshold reason that the relief they seek is unrelated to securing this Court's jurisdiction over their complaint, and so does not seek a proper use of the All Writs Act.

The All Writs Act allows courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). It "does not erase *separate* legal requirements for a given type of claim." *Makekau v. Hawaii*, 943 F.3d 1200, 1204 (9th Cir. 2019). The Act only "authorizes a federal court 'to issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has *previously issued* in its exercise of jurisdiction *otherwise obtained*.'" *Syngenta*, 537 U.S. at 32 (quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977)) (emphases added). While the All Writs Act empowers courts "to issu[e] process 'in aid of' its existing" jurisdiction; the Act does not empower courts to "enlarge that jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (citation omitted). As Plaintiffs concede, "[t]he court must already have an independent basis for exercising its jurisdiction" to invoke the All Writs Act. Pls' Mot. at 28 n.50; *see Henson*, 537 U.S. at 33 ("[T]he All Writs Act does not confer jurisdiction on the federal courts."). The All Writs Act "does not authorize" federal courts "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). And a "district court may not evade the traditional requirements of an injunction by purporting to

issue what is, in effect, a preliminary injunction under the All Writs Act." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004).[1]

"The All Writs Act ... serves to protect courts and not parties." *In re Convertible Rowing Exerciser Patent Litig.*, 616 F. Supp. 1134, 1139 (D. Del. 1985). The court's authority under the All Writs Act "is only properly exercised where ... the legal rights at issue are 'indisputably clear.'" *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (quoting *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers)); *see Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (same). And a "court may not rely on the Act to enjoin conduct that is 'not shown to be detrimental to the court's jurisdiction.'" *Peters v. Brants Grocery*, 990 F. Supp. 1337, 1342 (M.D. Ala. 1998) (quoting *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)). Thus, the Ninth Circuit has warned against using the All Writs Act as an "unwarranted intrusion upon the administrative process." *Cal. Energy Comm'n v. Johnson*, 767 F.2d 631, 635 (9th Cir. 1985). Moreover, the "fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the All Writs Act cannot be, a sufficient basis for issuance of the writ." *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991)

[1] Even if Plaintiffs sought an injunction to preserve the Court's jurisdiction, instead of the standard preliminary injunction that they clearly seek, the injunction would still need to comport with the traditional injunction factors in Rule 65. *See In re Jimmy John's Overtime Litig.*, 877 F.3d 756, 769-70 (7th Cir. 2017) (holding that an All Writs Act injunction needs to comport with Rule 65 factors); *Fla. Med. Ass'n, Inc. v. U. S. Dep't of Health*, 601 F.2d 199, 202 (5th Cir. 1979); *Ben David v. Travisono*, 495 F.2d 562, 563 (1st Cir. 1974). While the Second and Eleventh Circuits have held that an injunction *to aid jurisdiction* may not need to follow Rule 65, the Eleventh Circuit emphasized that a "district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004). And the Second Circuit similarly emphasized that the relevant consideration under the All Writs Act is *jurisdiction*, not harm, *see In re Baldwin-United Corp.*, 770 F.2d 328, 338-39 (2d Cir. 1985), so any consideration of harms—the only consideration Plaintiffs raise in their motion—are inappropriate and an improper basis for an injunction here.

(quotation, citation, and alteration omitted); *id.* n.13 ("[s]peculation ... cannot form the legal basis of a remedial order").

Here, the relief that Plaintiffs seek has no bearing on this Court's jurisdiction over the claims in their suit. As detailed in Defendants' Motion to Dismiss, ECF No. 24, and below, this Court lacks jurisdiction over Plaintiffs' claims, brought by organizational plaintiffs challenging decisions on asylum claims and immigration-court procedures unrelated to the procedures that they now seek to enjoin. Moreover, even if this Court could issue a writ to preserve jurisdiction while a motion to dismiss for lack of jurisdiction was pending, the practices that Plaintiffs challenge in their TRO motion in no way affect the Court's jurisdiction over the underlying claims in this case. An All Writs Act injunction is improper where Plaintiffs give the Court no basis to "explain how its jurisdiction was, or could be, threatened by the conduct [they ask the Court to] enjoin[ ]." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1257 (11th Cir. 2006).

Plaintiffs argue that they invoke the All Writs Act to prevent the immigration courts from becoming a "public health hazard," which in turn would "subvert[]" "Plaintiffs' underlying claims seeking a full and fair immigration court adjudication system." Pls.' Mot. 28. But that is just an admission that Plaintiffs are not seeking to avert a threat to this Court's jurisdiction, which means that the All Writs Act—the sole basis for their TRO request—is not available to them. As already explained, the claims made in Plaintiffs' TRO motion bear no connection to the claims in their complaint, and so Plaintiffs cannot plausibly claim that their TRO request would aid this Court's jurisdiction to decide those claims. And Plaintiffs do not credibly allege that any action or non-action on the part of immigration courts threatens this Court's *jurisdiction*, which—again—is the sole authority for invoking the All Writs Act. Rather, they merely assert that "jurisdiction" is understood flexibly, and speculate that the immigration courts will suffer a "COVID-19-related system collapse," rendering their suit "functionally irrelevant." *Id.* at 30. Plaintiffs' speculation

does not comport with the facts of how the immigration courts are addressing the current outbreak, which largely track what Article III courts are doing across the country. *See* McHenry Decl. ¶¶ 43-44. And speculation cannot be used to invoke such an extraordinary remedy when there is a high likelihood that immigration courts, like Article III courts, will remain functioning in various ways throughout the length of this current crisis, and will return to their normal operation when the crisis subsides. Indeed, Plaintiffs cite no case granting a sweeping injunction under the All Writs Act like what they seek.

Plaintiffs' cited cases do not support their claims. *Michaelson v. United States* involves whether Congress may require criminal contempt proceedings to be tried by a jury, and the language that Plaintiffs cite regarding courts' powers "essential to the administration of justice" does not involve the All Writs Act, but rather rejects the argument that Congress' enactment of that Act interferes with courts' inherent authority to deal with contempt. 266 U.S. 42, 66 (1924). *United States v. New York Tel. Co.* addressed a courts' authority to order a company to implement a pen register order. 434 U.S. 159, 173 (1977). And *United States v. Morgan* involves a writ of coram nobis to set aside a conviction, not the authority to fashion equitable relief in a civil case. 346 U.S. 502, 512 (1954). Moreover, Plaintiffs rely on cases addressing the court's authority to enforce *final* judgments. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) (dealing with "the power of the court to issue [an] order requiring compliance or to enforce the judgment"); *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012) (addressing a court's power to "restrain a convicted defendant's property in anticipation of ordering restitution"); *Flores v. Barr*, 207 F. Supp. 3d 909, 929 (C.D. Cal. 2019) (appeal pending) (involving a consent judgment).

The cases involving the All Writs Act in the pre-judgment context emphasize that the writ is a tool for preserving jurisdiction over the claims, not to remedy unrelated alleged wrongs. *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (noting that writ exists "to prevent

impairment of the effective exercise of appellate jurisdiction"); *California v. M&P Investments*, 46 F. App'x 876, 879 (9th Cir. 2002) ("The court was obviously concerned that the AAO would impede its ability to exercise jurisdiction over the issues in the federal suit."). And *In re Baldwin-United Corp.*, which Plaintiffs cite in support of avoiding the requirements of Rule 65, supports Defendants, because it makes clear that injunctions under the All Writs Act are limited to situations where "a federal court has jurisdiction over its case in chief, as did the district court" in that case, and grants only "ancillary jurisdiction to issue writs 'necessary or appropriate in aid of' that jurisdiction." 770 F.2d 328, 335 (2d Cir. 1985). And the Ninth Circuit's stay-panel reading of authority under the Act in *Al Otro Lado v. Wolf* was based on a finding that the challenged action "would interfere with the court's jurisdiction" because it would "extinguish class members' [ ] claims." *Al Otro Lado v. Wolf*, No. 19-56417, 2020 WL 1059682, at *4 n.6 (9th Cir. Mar. 5, 2020).[2] Nothing in Plaintiffs' TRO motion even remotely compares to cases where a court has held that it has jurisdiction over certain claims and the challenged action would undermine that jurisdiction and previously issued orders. The relief Plaintiffs seek here is unrelated to their underlying claims challenging performance metrics and case-completion goals.

Thus, the All Writs Act does not apply and this Court should deny Plaintiffs' motion.

C. The INA bars district courts from hearing challenges to the conduct of proceedings in immigration court, including requests for relief under the All Writs Act and claims raised by organizations.

Even if Plaintiffs' TRO motion related to the claims in the complaint and the All Writs Act otherwise authorized the court to act, this Court does not have jurisdiction over any of those claims, including under the All Writs Act. The INA sharply limits the manner and scope of judicial review

[2] While the government disagrees with this ruling, *see* Appellants' Br., *Al Otro Lado, v. Wolf*, No. 19-56417, ECF 79 (9th Cir. filed Feb. 20, 2020), Plaintiffs fail to meet even the standard set out therein.

of all claims connected to removal proceedings. *See* 8 U.S.C. § 1252. Under Congress's carefully constructed scheme for judicial review of such claims, including challenges to the policies and practices that apply to aliens in immigration court, only an individual affected alien may seek judicial review, and may do so only through a petition for review (PFR) filed with the appropriate court of appeals after removal proceedings conclude and review by the BIA is complete. *Id*. § 1252(a)(5), (b)(9), (g). The INA explicitly precludes relying on the All Writs Act to circumvent these strict jurisdictional limitations by expressly eliminating a court's authority to act under "section[] … 1651 of" "title 28," 8 U.S.C. §§ 1252(b)(9), (g), *i.e.*, the All Writs Act.

The INA provides that a "petition for review filed with an appropriate court of appeals in accordance with this section shall be *the sole and exclusive means* for judicial review" of an order of removal or issues arising in those proceedings. *See id*. § 1252(a)(5) (emphasis added). Under this framework, "[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 ... shall be available only in judicial review of a final order under this section" and no district court "shall have jurisdiction ... to review such an order or such questions of law or fact." *Id*. § 1252(b)(9). 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. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016); *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 (plurality opinion) ("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" (emphasis in original)).

Section 1252(b)(9)'s channeling of all claims related to removal proceedings to the PFR

process is "breathtaking" in scope and "vise-like" in grip, swallowing up "virtually all claims that are tied to removal proceedings." *J.E.F.M.*, 837 F.3d 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.* This jurisdictional bar is not limited to individual challenges, as Congress specifically "crafted language to channel challenges to agency policies through the PFR process," eliminating district-court jurisdiction over "policies-and-practices challenges." *Id.* at 1035. And it applies regardless of whether the challenge is to an actual final order of removal or whether there even is a final order at all. *Id.* at 1032. What matters is whether Plaintiffs' challenges arise from any aspect of the processes or practices that apply to aliens in immigration court. *See Sophia v. Decker*, No. 19-9599, 2020 WL 764279, at *2 (S.D.N.Y. Feb. 14, 2020) (statutory "bar applies to 'question[s] of law' that 'aris[e] from [an] action taken ... to remove an alien,' and is not limited to questions of law that would in fact determine removability" (alterations in original)); *ASAP v. Barr*, 409 F. Supp. 3d 221, 225 (S.D.N.Y. 2019) (§ 1252(b)(9) bars challenges to process for issuing removal orders where relief Plaintiffs seek would indirectly "challenge to the removal orders" issued under that process).

As explained in greater detail in Defendants' Motion to Dismiss, ECF No. 24, at 16-22, all of Plaintiffs claims relate to decisions about how removal proceedings are conducted, including the scheduling of hearings, and the decisions made by immigration judges in those hearings. Plaintiffs' claims in their TRO motion are also related to the conduct of proceedings in immigration court, including requirements for appearances by aliens and counsel in those proceedings (and what happens when they fail to appear), and requirements for filings and deadlines in those proceedings. Pls.' Mot. 32-33. When a claim filed in district court, "however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to

the order of removal, it is prohibited." *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012). Because all of Plaintiffs' claims "arise from" actions and decisions in immigration court and "are bound up in and an inextricable part of the administrative process," the claims fit squarely within § 1252(b)(9)'s bar to district-court review. *J.E.F.M.*, 837 F.3d at 1033.

This does not mean that no court will be able to hear claims from individual aliens who seek to challenge decisions by immigration judges that they believe insufficiently account for the current national emergency and affect the outcome of their cases. Congress did not eliminate all judicial review; it eliminated all *district-court* review and channeled judicial review to the courts of appeals. *J.E.F.M.*, 837 F.3d at 1033. By limiting judicial review to the PFR process, Congress ensured that challenges to the conduct of the proceedings in immigration court would occur after those proceedings are complete, limiting the necessity of such review to cases where aliens can show that the conduct of proceedings somehow prejudiced the outcome, and to where such issues cannot adequately be resolved through an administrative appeal to the BIA. The PFR process also ensures that judicial review of all questions related to removal proceedings is consolidated into one proceeding, limited to occasions where such review is necessary, and done only on the basis of concrete facts and a complete record related to an individual alien's claims. Thus, if an alien believes that an immigration judge improperly denied a continuance or other scheduling request and that the scheduling decision effected the result of their case, or takes or refuses to take the other actions Plaintiffs challenge in their TRO motion, the alien may administratively exhaust the matter and then raise it in a petition for review by the court of appeals. *See, e.g. Hui Ran Mu v. Barr*, 936 F.3d 929, 936 (9th Cir. 2019).

Plaintiffs face another jurisdictional barrier to their TRO request: By authorizing jurisdiction "only in judicial review of a final order" of removal in a PFR from an individual alien, *see* 8 U.S.C. § 1252(b)(9), Congress barred organizations from raising claims related to removal

proceedings, and a suit brought solely by organizational plaintiffs such as this does not escape § 1252(b)(9)'s limitations. *See, e.g.*, *ASAP*, 409 F. Supp. 3d at 227 (dismissing "action for declaratory and injunctive relief brought by organizational plaintiffs"); *P.L. v. U.S. Immigration and Customs Enforcemen*t, No. 1:19-CV-01336, 2019 WL 2568648, at *1 (S.D.N.Y. June 21, 2019) (dismissing claims brought by "Organizational Plaintiffs" who "represent" "detained immigrants in removal proceedings"); *see also Block v. Cmty. Nutrition Inst*., 467 U.S. 340, 344-51 (1984) ([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"). District courts have dismissed for lack of jurisdiction claims closely analogous both to the claims Plaintiffs raise in their complaint and to the separate claims they raise in their TRO motion. *See ASAP*, 409 F. Supp. 3d at 223 (dismissing challenges to the adequacy of communications from the immigration court, specifically the adequacy of notices to appear for hearings, and the lawfulness of *in absentia* removal orders for aliens that did not attend those hearings); *P.L.*, 2019 WL 2568648, at *1-2 (holding that § 1252(b)(9) barred challenges to EOIR procedures organizations alleged caused "scheduling challenges," or made it more difficult for aliens to "examine[] evidence against them, retain[] counsel," and communicate with counsel"). Section 1252(b)(9) prevents Plaintiffs from establishing that this Court will be able to hear any of their claims, and precludes any showing of likelihood of success on the merits or entitlement to relief.[3]

[3] For related reasons, and as explained at length in Defendants' Motion to Dismiss, as organizations, Plaintiffs lack standing to raise any of their claims. ECF No. 24, at 6-16. The INA grants rights to individual aliens but confers no rights on organizations, who have "no judicially cognizable interest" in the "enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). As a result, organizations cannot show an "invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that results from decisions related to the operation of the immigration courts. Federal courts have no power to grant relief in

Other provisions of the INA similarly prevent Plaintiffs from establishing jurisdiction over their claims, both as pleaded in the complaint and as asserted in the TRO motion. Section 1252(g) provides that, apart from a PFR to the 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)." 8 U.S.C. § 1252(g). This bar to jurisdiction for claims related to how EOIR "adjudicate[s] cases" includes any claim related to the "initiation or prosecution" of any "of the various stages in the deportation process," and is aimed at preventing the type of piecemeal litigation that Plaintiffs demand here, challenging certain aspects of immigration-court procedures outside the context of their effect on specific cases through individual PFRs. *See 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").

Even absent these provisions strictly limiting jurisdiction and prohibiting reliance on the All Writs Act, Plaintiffs could not establish jurisdiction for this Court to take over the management of the Nation's immigration courts and review decisions on closings, scheduling, or individual discretionary decisions over deadlines: such decisions are committed to agency discretion by law because there is no law to apply to evaluate how an agency dockets cases or manages competing priorities in general, let alone in response to a national emergency. *See, e.g.*, *Ekimian v. I.N.S.*, 303 F.3d 1153, 1158 (9th Cir. 2002) ("Emphasizing that agencies are better equipped than courts to

---

suits such as this one that are based on the "interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973); *see also Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000) (rejecting organizational 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").

prioritize administrative concerns and actions," and "even where Congress has not affirmatively precluded review, review is not to be had" if "no judicially manageable standards are available for judging" the agency's action (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985))); *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118 (9th Cir. 2009) ("absence of a 'meaningful standard' precludes review").

The All Writs Act does not save Plaintiffs' request for emergency relief. First, as explained above, jurisdiction under the All Writs Act is limited to issuing orders that are necessary to preserve jurisdiction otherwise properly obtained, and there is no basis for jurisdiction over Plaintiffs' claims. Second, § 1252's bar to district court review of challenges to the conduct of immigration-court proceedings is comprehensive, and specifically forecloses relief under the All Writs Act, 28 U.S.C. § 1651. Congress provided in § 1252(b)(9) that "no court shall have jurisdiction ... by section ... 1651 [the All Writs Act], or by any other provision of law (statutory or nonstatutory))" over claims arising from actions or proceedings in immigration court. Congress similarly provided that the jurisdictional limits in § 1252(g) apply "notwithstanding any other provision of law (statutory or nonstatutory)" *including* "section[ ] 1651." Thus, whatever scope of authority Congress provided under the All Writs Act, it carved out from that authority any challenges related to the conduct of removal proceedings. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, (1993) (noting use of "notwithstanding" in § 1252 "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section"); *Nino v. Johnson*, No. 16-CV-2876, 2016 WL 6995563, at *7 (N.D. Ill. Nov. 30, 2016) (noting that neither the All Writs Act nor the Declaratory Judgment Act escape § 1252's jurisdictional limits, which apply "notwithstanding these statutes"); *Nyemba v. Prendes*, No. 06-CV-772, 2006 WL 3300448, at *3 n.8 (W.D. Okla. Oct. 24, 2006) (no jurisdiction over challenge to agency procedures related to granting stays or adjudication of motions to reopen under the All

Writs Act, the federal-question statute, the Declaratory Judgment Act, or the APA).

Plaintiffs' TRO request is thus squarely barred by the INA's jurisdictional provisions.

D. The INA bars district courts from granting injunctive relief to organizations challenging aspects of proceedings in immigration court.

Plaintiffs' requested relief also runs afoul of 8 U.S.C. § 1252(f)(1), which bars district courts from awarding injunctive relief to organizational plaintiffs, like those here, enjoining or restraining operation of 8 U.S.C. §§ 1221-1232. 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.)

In a decision issued just last week, the Ninth Circuit held that "Congress intended [§ 1252(f)] to prohibit injunctive relief with respect to organizational plaintiffs." *Padilla*, 2020 WL 1482393, at *12 (9th Cir. Mar. 27, 2020). The court explained that "[t]he statute's legislative history supports our reading" and "Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in [removal] proceedings, brought preemptive challenges to the enforcement of certain immigration statutes." *Id.* To end such "suits brought by organizational plaintiffs and noncitizens not yet facing proceedings under 8 U.S.C. §§ 1221-1232," Congress enacted § 1252(f)(1). *Id*. That ruling dooms Plaintiffs' TRO request. The relief sought by Plaintiffs—who are all organizations—falls squarely within the scope of injunctive relief that § 1252(f)(1) prohibits. Plaintiffs seek to enjoin wholesale the operation of the immigration courts nationwide, which necessarily means enjoining numerous

provisions of § 1229a (which governs how "[a]n immigration judge shall conduct proceedings"), among other provisions of the INA (such as 8 U.S.C. § 1229). Plaintiffs' requested TRO would, *inter alia*, enjoin all immigration courts nationwide from requiring "any respondent or respondent's counsel to appear in person for any reason," and from "requiring that any hearing go forward" without consent, enjoin the immigration courts from issuing *in absentia* orders for aliens who do not appear, and require immigration judges to toll all deadlines, grant continuances, and waive filing requirements. *See* Prayer for Relief. These requirements appear nowhere in § 1229 or § 1229a, and indeed these requirements would halt the operation of those provisions. Plaintiffs' requested relief thus seeks to dramatically rewrite § 1229a 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 § 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) The Court cannot grant such relief to organizational plaintiffs. *See Padilla* at *12.

Plaintiffs' TRO motion also seeks relief restraining the operation of additional sections of the INA that relate to other aspects of the operation of the immigration courts, *see* Pls.' Mot. 32-33—relief that falls squarely within § 1252(f)(1)'s bar. For example, their request would also enjoin the operation of § 1225(b)(1)(B)(iii)(III), which requires immigration judges to undertake "prompt review" of negative credible fear determinations, and that those review hearings—which are *de novo*—"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 determination." *Id*. It would also enjoin § 1226(a), which provides for bond hearings for certain detained aliens.

Congress can curtail the jurisdiction and equitable authority of lower federal courts, and has done so here by enacting § 1252(f). *See Bowles v. Russell*, 551 U.S. 205, 211 (2007) ("[o]nly Congress may determine a lower federal court's subject-matter jurisdiction"). Moreover, 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). Thus, regardless of whether the All Writs Act authorizes a court to issue injunctive relief, the more specific provision at section 1252(f) eliminates that authority no matter the "action or claim." *See Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) ("[w]hen two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones."); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the specific governs the general," and "[t]hat is particularly true where, … Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions."). This clause extends § 1252(f)(1)'s reach to encompass *any* statute or claim, and thus precludes the entry of an injunction, including under the All Writs Act. Thus, Plaintiffs cannot rely on the All Writs Act to evade Congress's clear limitation on injunctive relief.

Furthermore, not only would the relief Plaintiffs seek contravene § 1252(f)(1), enjoining these critical functions would require EOIR to violate various statutory requirements. For example § 1225(b)(1)(B)(iii)(III) requires EOIR to complete review of credible-fear determinations "to the maximum extent practicable within 24 hours, but in no case later than 7 days." The injunction Plaintiffs seek would effectively rewrite this requirement, enjoin the operation of § 1225, potentially result in longer detention for certain aliens, and might require EOIR to violate other federal court orders. *See* McHenry Decl. ¶ 66.

Accordingly, because controlling Ninth Circuit precedent that bars awarding injunctive relief to organizational plaintiffs that would enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232—exactly what the organizational Plaintiffs here seek—Plaintiffs' motion must be denied.

E. If the Court were to reach the merits, Plaintiffs' requests should be denied, because immigration courts have, and have acted within their, broad authority over their court procedures and practices.

Even if this Court were to consider Plaintiffs' TRO motion on the merits, the Court should reject Plaintiffs' extraordinary request that this Court oversee and direct the operational decisions of all the Nation's immigration courts. EOIR and the immigration courts are entitled to deference as a matter of law on choices related to their practices and the conduct of proceedings.

It is "absolutely clear" that "[a]bsent constitutional constraints or extremely compelling circumstances[,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978); *see also Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) ("[A]n administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings."). The Supreme Court has explained that "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, and priorities." *Mobil Oil Exploration & Producing Se. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) (citations omitted); *see also Heckler*, 470 U.S. at 831-32 (noting that an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," and that courts should generally "defer to ... the procedures it adopts"). And 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." *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Indeed, the Executive's power in the immigration context is "inherent in the executive power to control the foreign affairs of the nation." *Id.* at 542.

In the immigration context, the Attorney General's authority is especially broad. *See* 8 U.S.C. § 1103(g)(2) (authority to "establish such regulations, prescribe such forms of bond,

reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out [the INA]." The "extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique." *Henderson v. INS*, 157 F.3d 106, 126 (2d Cir. 1998); *see also Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 279 (4th Cir. 2004); *Matter of D-J-*, 23 I&N Dec. 572, 573-74 & n.3 (A.G. 2003). Moreover, "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation and citation omitted); *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) ("administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission traditionally has been free from judicial supervision" and "tradition of agency discretion over internal procedures is particularly strong" in immigration matters). This "tradition of deference is rooted in the separation of powers, and the respect of the judiciary for the functions of a coordinate branch of government." *Ngure*, 367 F.3d at 983.

The Ninth Circuit and other Circuits have applied these principles to provide deference to EOIR's procedures. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (upholding the streamlining of decisions); *Zhang v. U.S. Dep't of Justice*, 362 F.3d 155 (2d Cir. 2004) (same); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (holding that the Attorney General's "balancing [of] the need for adequate protections ... against a backlog ... is the type of decision that agencies are the most informed to make, and enjoy the discretion to resolve"); *Albathani v. I.N.S.*, 318 F.3d 365, 377 (1st Cir. 2003) (same); *Soadjede v. Ashcroft*, 324 F.3d 830, 832 (5th Cir. 2003) (similar); *Lonyem v. U.S. Atty. Gen.*, 352 F.3d 1338, 1342 (11th Cir. 2003) (same). Again, "[t]his basic tenet of administrative law has even more force in the immigration

context where [courts'] deference is especially great." *Dia v. Ashcroft*, 353 F.3d 228, 238 (3d Cir. 2003) (quotation and citation omitted); *see Yuk v. Ashcroft*, 355 F.3d 1222 (10th Cir. 2004) (same).

Under these principles of agency authority and deference, this Court should deny the relief that Plaintiffs seek. Plaintiffs ask this Court to second guess the agency's expertise and limit its flexibility to respond to a complex and evolving situation while balancing the safety of judges, lawyers, and aliens with the need to continue to provide due process to aliens who are already in removal proceedings—including aliens who are detained and whose detention may be prolonged by suspending certain aspects of immigration-court operations. McHenry Decl. ¶¶ 30, 32, 36, 45. EOIR has taken reasonable steps, similar to other U.S. courts, to mitigate exposure and permit flexibility while still following the statutory and court-ordered strictures by which it is bound; to promote due process for the aliens who are being processed through the system and ensure that they continue to receive what they are entitled to by statute and orders of other courts; to accord deference to immigration judges to manage their own dockets; and, to process cases for detained aliens and provide bond hearings to respond to the surge in requests for bond hearings in light of the COVID-19 outbreak. McHenry Decl. ¶¶ 43, 45, 94-95. Deference to agency choices such as these is especially necessary in times of crisis. *See Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980) ("A rule of law that would inhibit the flexibility of the political branches should be adopted with only the greatest caution."); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) (noting the "significant ... national concerns that have led our immigration law to place primary decisionmaking authority about" immigration-related problems "squarely into the hands of the political branches").

EOIR has also taken steps to delay certain categories of hearings that can reasonably be postponed and to restrict access to immigration courts for individuals at risk of having COVID-19. McHenry Decl. ¶¶ 43-50. And EOIR has 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, and conducting hearings telephonically or by video-teleconference. *Id*. 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. *Id.*

This approach aligns with how the Administrative Office of the U.S. Courts has dealt with similar issues and challenges by providing similar jurisdiction-by-jurisdiction and case-by-case approaches to the judiciary. *See* Administrative Office of the United States Courts, *Judiciary Preparedness for Coronavirus (COVID-19)* (last updated March 27, 2020), https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19. These similar approaches by other courts support the reasonableness of EOIR's actions here. *See, e.g.*, *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 Plaintiff organizations believe that additional COVID-19-related changes are needed to immigration-court procedures in particularly cases pending before an immigration judge, they can raise those requests with the individual immigration judges before whom they appear. Defendants are not aware of any reasonable requests for continuances, extensions, or waivers of appearances being denied, *see* McHenry Decl. ¶¶ 86-87, 89, 91, 94, and this is a critical flaw with Plaintiffs' demand for a sweeping TRO: the needs of an individual alien with respect to the proceedings and any request related to COVID-19 must be judged based on the alien's individual circumstances. Plaintiffs cannot plausibly argue that every alien will be affected 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. Thus, on the merits, Plaintiffs' requests should be denied.

F. Plaintiffs requested relief is vastly overbroad.

Even if a TRO were warranted here, Plaintiffs' requested relief that is far too broad. Plaintiffs have no basis to request nationwide relief benefiting non-parties, especially where it would, at least in some cases, cause harm to some of those non-parties. McHenry Decl. ¶¶ 29, 35-36. Any TRO should be limited to individuals that Plaintiffs represent who they can identify to the Court.

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. 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." *See 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 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 on the All Writs Act here, their underlying claims stem from 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, such as the relief requested, creates other legal and practical problems—problems which would be especially acute here, given the variety of different factual circumstances surrounding each of the 69 immigration courts. 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. *See DHS v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). As noted in Defendants' Motion

to Dismiss, Plaintiffs complaint raises allegations related entirely to immigration courts outside this District, ECF No. 24, at 32-35, and their TRO motion expands on their improper attempt to have this Court rule on the operations of immigration courts nationwide by asking this Court to now grant relief related to *every* immigration court anywhere in the United States. Plaintiffs want a one-size-fits-all remedy, disregarding the fact that immigration courts across the country have responded appropriately, taking local conditions into account. McHenry Decl. ¶ 45. A nationwide injunction would freeze immigration-court operations everywhere and limit courts' flexibility to respond to local conditions or issues. 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 even greater force to TROs and other preliminary relief, which are equitable tools designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. 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*; *accord California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (narrowing a nationwide preliminary injunction to apply "only to the plaintiff[s]" as that would "provide complete relief to them"); *accord 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 to the case); *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").

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). Here, the Executive Branch has identified a crisis and is responding appropriately, with due consideration for local circumstances and aliens' rights. McHenry Decl. ¶¶ 45, 94-95. In contrast, Plaintiffs' alleged injuries are speculative, do not account for recent action that EOIR has 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 undermines 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 vastly overbroad and should be rejected. If the Court grants relief, it should be limited to clients that Plaintiffs actually represent, who they can identify as having ongoing immigration proceedings with an imminent court appearance.

V. CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a TRO.

DATED: March 31, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

EREZ REUVENI
Assistant Director

LAUREN C. BINGHAM
Senior Litigation Counsel

FRANCESCA M. GENOVA
Trial Attorney

/s/ Brian C. Ward
BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-9121
brian.c.ward@usdoj.gov

Attorneys for Defendants