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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,

Case No. 3:19-cv-02051-SB

EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER PURSUANT TO 28
U.S.C. § 1651(a)

EXPEDITED HEARING REQUESTED

EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER

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v.

DONALD J. TRUMP, in his official capacity as President of the United States;
WILLIAM BARR, in his official capacity as Attorney General of the United States;
U.S. DEPARTMENT OF JUSTICE;
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; AND JAMES MCHENRY, in his official capacity as EOIR Director of the United States,

Defendants.

EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER

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INTRODUCTION

Defendants' actions, in the course of an unprecedented pandemic, have threatened the lives of Plaintiffs, the people they serve, and the communities in which they live and work. Notwithstanding the COVID-19 crisis that has unfolded in every U.S. state and 176 countries worldwide—a crisis proven to worsen exponentially day by day in congregate spaces like courthouses—Defendants continue to require attorneys, respondents, judges, and staff to appear in person at immigration courts; refuse to extend immigration court deadlines even though compliance is dangerous and often impossible; have failed to provide adequate notice of emergency court closures and procedures; and have ordered immigration judges to fast-track cases to completion—and, ultimately, to order deportation—in the absence of respondents and counsel. Defendants' conduct has turned the immigration court system into a public health hazard, an effect going to the heart of the Court's jurisdiction in this case and its ability to fashion effective relief on Plaintiffs' claims. Plaintiffs are six nonprofit organizations who provide legal services to immigrants and practice in the immigration court system. Plaintiffs require immediate, essential, and temporary relief. Without such relief, the very health and lives of staff of the Plaintiff organizations, as well as every individual who has contact with any person involved in the immigration court system, is in great jeopardy. Plaintiffs seek an emergency order because the extraordinary nature of the crisis caused by the COVID-19 pandemic requires it.

Defendants are using COVID-19 as a tool to further weaponize the immigration court system, without regard for the resulting public health implications. By refusing to adopt immigration court policies and procedures that are supported by science, protect the public health, and preserve the system's potential for fundamental fairness, as is required under federal law, Defendants have forced Plaintiffs, including their staff, attorneys, and volunteers, into the

impossible position of choosing between competently serving their clients and protecting the public health and the lives of many, including themselves.

Plaintiffs seek a temporary injunction under the All Writs Act to require Defendants to take reasonable steps to protect public health in the immigration courts, similar to steps taken by other federal and state courts across the country. The relief that Plaintiffs seek by this motion is necessary and appropriate to protect and preserve this Court's exercise of jurisdiction over the case before it.

MOTION

Pursuant to 28 U.S.C. § 1651(a), Plaintiffs respectfully move this Court for an emergency order enjoining Defendants from compelling any respondent or respondent's counsel to appear in person for any reason at any U.S. immigration court, from requiring any hearing to go forward without the consent of the respondent or their counsel and from invoking the *in absentia* procedures to order a respondent removed if they fail to appear in any immigration court because of their fear of contagion or because a public health order exists cautioning against congregation or public movement. Plaintiffs further request that the Court order Defendants to toll all immigration court deadlines, including the deadline for appeals to the BIA, and grant continuances where requested by respondent or respondent's counsel, without any negative impact to a respondent's asylum clock used to calculate eligibility for work authorization. Plaintiffs request that this Court order Defendants to waive their original signature requirement on filings and waive their hard-copy filing requirements where electronic filing is not operational. Finally, Defendants should be enjoined from deeming abandoned any petition or application for immigration relief or deeming any petition or application as untimely that was or is not otherwise timely filed during the national emergency, and enjoined from holding any attorney in contempt for failing to appear in person at a proceeding because of their fear of contagion or because a public health order exists cautioning against congregation or public

movement. Plaintiffs request that this order be in effect for the duration of the national emergency¹ or until 28 days have elapsed, whichever occurs first.² As explained below, Plaintiffs' motion presents urgent cause for this Court to invoke its inherent power to take action "essential to the administration of justice," *Michaelson v. United States*, 266 U.S. 42, 65–66 (1924), is "necessary or appropriate in aid of [the Court's] jurisdic[tio]n," and is "agreeable to the usages and principles of law," 28 U.S.C. § 1651(a).³ This motion is supported by the attached Declarations of Linda Corchado, Nadia Dahab, Allegra Love, Michelle Mendez, Ariel Prado, Swapna Reddy, Laura G. Rivera, Kate Voigt, and Joshua M. Sharfstein.

On March 26, 2020, Plaintiffs notified Defendants of their intent to file this motion.⁴ On March 27, Plaintiffs conferred telephonically with Defendants about the subject and timing of

¹ Proclamation on Declaring a National Emergency During the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. This Court may take judicial notice of information made publicly available on the internet by the government. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (it is appropriate to take judicial notice of publicly-available information by government entities where "neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein").

² As explained below, under Federal Rule of Civil Procedure 65, the Court may issue an immediate order without notice or hearing so long as the order is set to expire after 14 days. FRCP 65(b)(2). All Writs Act injunctions generally need not strictly comply with the requirements of Rule 65, however. The circumstances here warrant an immediate order without a hearing. *United States v. Yielding*, 657 F.3d 722, 727 (8th Cir. 2011) ("[I]njunctive relief under the All Writs Act need not rigidly comply with Rule 65's prescriptions so long as the injunction is 'specific and definite enough to apprise those within its scope of the conduct that is being proscribed.'" (quoting *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 338 (2d Cir. 1985))).

³ Defendants have filed a Motion to Dismiss challenging, among other things, this Court's jurisdiction over Plaintiffs' claims. ECF 24. But "[u]ntil [the court's] judgment declining jurisdiction [is] announced, [the court has] authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition." *United States v. Shipp*, 203 U.S. 563, 573 (1906).

⁴ As demonstrated herein, the pandemic's impact on the communities in which the immigration courts are located, the people it serves, and the people who operate it has been

this emergency motion. Defendants requested two additional business days, until Wednesday, April 1, 2020, to file a brief in opposition. In Plaintiffs' view, the circumstances that Defendants have created in the immigration court system demand immediate relief, given how rapidly COVID-19 has, and will continue to, spread and the pace at which it has taken human lives. Plaintiffs therefore request that the Court immediately schedule a telephonic hearing on this motion.

MEMORANDUM OF LAW

This Court has the power to immediately and temporarily enjoin Defendants' actions to protect the public health and preserve its jurisdiction in this civil action. The All Writs Act, 28 U.S.C. § 1651(a), affords this Court the authority "to issue such temporary injunctions as may be necessary to protect its own jurisdiction." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). Absent immediate injunctive relief in this case, the immigration court system will, if it has not already, become a public health hazard, putting at risk the lives of the very people for whom the system exists and the staff of the organizational Plaintiffs. If that occurs, any relief this Court might provide in Plaintiffs' underlying civil action, which seeks to protect the full and fair adjudication of cases in the immigration court system as a whole, would be subverted. An All Writs Act injunction is therefore necessary to protect the ongoing exercise of this Court's jurisdiction in these proceedings.

I. BACKGROUND

The impacts of the novel coronavirus, the cause of the Coronavirus Disease of 2019 (COVID-19), have been swift and unprecedented. In the United States, over 85,000 cases have

known to Defendants for weeks. Defendants have heard from their own immigration judges, the immigration court prosecutors, the immigration lawyer communities, the immigrant communities and plainly have seen the State and local orders forcing people to shelter in place multiple times in multiple ways. In a pandemic, where infections spread exponentially, every single day matters to protect the public health.

been confirmed by laboratory tests,⁵ more than any other country in the world. Over 1,300 people have died in the United States alone. Experts estimate that, after the pandemic runs its course, between 160 and 214 million people in the United States may become infected.⁶ The virus could take the lives of somewhere between 200,000 and 2.2 million people—again, in the United States alone.⁷ There is no vaccine. Declaration of Joshua Sharfstein in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Sharfstein Decl.”) ¶ 6. There is no known cure. Sharfstein Decl. ¶ 6. Currently, the only way to control the spread of the virus is to use preventive strategies, including social distancing. Sharfstein Decl. ¶ 6. The President has declared a national emergency; forty-eight U.S. states have declared states of emergency; and more than a dozen states, and many more local jurisdictions, have issued “shelter-in-place” or “stay-at-home” orders requiring residents to stay in their homes. These measures all seek to “flatten the curve” by reducing the spread of the coronavirus and, ultimately, saving lives.⁸

Federal and state courts across the country have responded, taking all measures necessary to eliminate congregate spaces within and throughout their respective court systems in which transmissions can occur. In this District, for example, the Chief Judge immediately issued Standing Order 2020-4, “to protect public health, and reduce the size of public gatherings and

⁵ This figure likely underestimates the number of actual cases, given the lack of adequate testing and the inability to account for most cases of people who are asymptomatic but still infectious.

⁶ Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

⁷ *Id.* (estimating a death toll of up to 1.7 million); *see also* Neil M. Ferguson *et al.*, Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand, Imperial College of London (Mar. 16, 2020), *available at* <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf> (estimating a death toll of up to 2.2 million) (attached to Declaration of Nadia Dahab in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Dahab Decl.”) ¶ 3, Ex. A).

⁸ Flattening the Curve, <https://www.flattenthecurve.com/> (last visited Mar. 24, 2020).

unnecessary travel,” continuing all civil and criminal jury selections and jury trials; continuing all grand jury proceedings; and continuing all in-court appearances scheduled before April 26, 2020, including all associated deadlines. Shortly thereafter, the Chief Judge issued Standing Order 2020-5, “aimed at maintaining public health,” which declared the District Clerk’s Office closed to the public in all locations. Federal judicial districts across the country, as well as the U.S. Supreme Court and several of the Circuit Courts of Appeal, have taken similar measures.⁹

In the immigration courts, however, the spread of disease continues unabated. Defendants have implemented policy guidance that encourages immigration judges to fast-track cases to completion and issue orders of deportation without any hearing at all.¹⁰ Deadlines for filings—many of which happen in person at courthouses, because the Executive Office for Immigration Review (EOIR) lacks an adequate electronic filing system—remain in place at all immigration courts where Plaintiffs appear and at other immigration court locations across the nation. Even where EOIR has encouraged filings by mail, it has subverted the public’s ability to make such filings by closing courthouses and changing filing guidance in an erratic, unpredictable, and inconsistent way. Changes in courthouse practices and policies have been announced unofficially and via Twitter,¹¹ without notice to attorneys and the majority of pro se

⁹ The Brennan Center for Justice, a nonprofit public interest organization, is compiling the formal policy responses of federal courts, immigration courts, and state courts to the COVID-19 public health crisis. *See* Brennan Center for Justice, Courts’ Responses to the Covid-19 Crisis, <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis> (last updated Mar. 24, 2020).

¹⁰ *See* Policy Memorandum 20-10, “Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak,” (Mar. 18, 2020), *available at* <https://www.justice.gov/eoir/file/1259226/download> (attached as Exhibit B to Dahab Decl. ¶ 4).

¹¹ *See, e.g.*, DOJ EOIR (@DOJ_EOIR), Twitter (Mar. 24, 2020, 4:51 PM) (announcing a new “rule” requiring all filings due during certain immigration court pandemic-related closures must be filed by March 30, just six days after the message was posted; as explained in more detail below, this Tweet followed an earlier, but later deleted, Tweet announcing that filings would be “now due”); DOJ EOIR (@DOJ_EOIR), Twitter (Mar. 17, 2020, 8:52 PM) (announcing that EOIR’s online and telephonic case information hotline should not be relied

respondents whose deadlines may be imminent or whose hearings may have been postponed. Immigrant respondents must continue to appear at courthouses—putting the public health at risk—lest they be ordered deported or deemed ineligible for important humanitarian relief for failure to comply with court deadlines. No consideration is given to those who are in high-risk groups due to age or pre-existing medical conditions. As a result, Plaintiffs’ staff, attorneys, and volunteers are forced into the impossible position of choosing between protecting their health, the health of their families, and the health of the public, on one hand, and protecting their clients’ rights, on the other. Attorneys, advocates, immigration court prosecutors, and immigration judges themselves have called for Defendants to act, but Defendants have not meaningfully responded.¹² In short, rather than move forward in an effective, considered manner, Defendants have turned the immigration court system into a public health hazard, and they refuse to take any meaningful steps to mitigate it.¹³

A. Plaintiffs’ Underlying Civil Action

Plaintiffs filed the underlying civil action in December 2019, alleging that Defendants President Donald J. Trump, U.S. Attorney General William Barr, the U.S. Department of Justice, EOIR, and Director of EOIR James McHenry have taken unlawful actions with respect to the

upon during the pandemic); *see also generally* DOJ EOIR (@DOJ_EOIR), Twitter (announcing daily, sometimes hourly, updates on immigration court closures and known COVID-19 exposures inside immigration courts).

¹² *See* Letter of Amiena Khan, Executive Vice President, National Ass’n of Immigration Judges to Andrew Cuomo, Gov. of NY & Letitia James, Attorney General of NY (Mar. 24, 2020), <https://www.naij-usa.org/images/uploads/newsroom/2020.03.25.00.pdf> (“NAIJ asks you to intervene to close the immigration courts in New York State.”) (attached as Exhibit C to Dahab Decl. ¶ 5); Statement of AILA, NAIJ, and ICE Professionals Union, As COVID-19 Rapidly Spreads, So Does Health Risk Created by Keeping the Nation’s Immigration Courts Open (Mar. 22, 2020), <https://www.aila.org/advo-media/press-releases/2020/close-immigration-courts>.

¹³ The only serious action Defendants have taken to prevent the spread of COVID-19 in the immigration court system is to postpone in-person hearings for non-detained individuals. As explained below, that action simply does not suffice and only creates further chaos.

immigration court system that denied Plaintiffs “a fair forum in which to vindicate their organizational missions.” Complaint ¶ 13. Specifically, Plaintiffs’ Complaint alleges, among other things, that Defendants have failed to Take Care that the laws relating to the immigration court system be faithfully executed, Complaint ¶¶ 193–200, and seeks to enjoin Defendants’ implementation of policies, including the IJ Enforcement Metrics Policy and the Family Unit Directive, that Plaintiffs allege subvert the case-by-case adjudication standards of the Immigration and Nationality Act (INA), Complaint ¶¶ 208–42 & p. 62. Plaintiffs seek declaratory and injunctive relief prohibiting Defendants from implementing certain policies and requiring Defendants to take specific corrective actions to ameliorate and mitigate the dysfunctionality of the immigration court system that has harmed Plaintiffs and the communities they serve. Complaint at p. 62. On March 20, 2020, Defendants filed a Motion to Dismiss Plaintiffs’ Complaint. ECF 24. Defendants’ Motion to Dismiss has not yet been heard by this Court.

B. Public Response to the COVID-19 Pandemic

In recent weeks, extraordinary circumstances have developed as the COVID-19 pandemic has struck 176 countries worldwide and every U.S. state. The impacts of the pandemic are staggering. On March 13, President Trump declared a national emergency due to the outbreak in the United States.¹⁴ Also on March 13, the Chief Judge of this Court issued an order continuing all civil and criminal jury selections and jury trials; continuing all grand jury proceedings; and continuing all in-court appearances scheduled before April 26, 2020, including the deadlines associated with those appearances.¹⁵ On March 17, the Chief Judge issued a

¹⁴ See Presidential Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease of 2019 (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹⁵ In re Court Operations in Response to COVID-19, Standing Order 2020-4 (D. Or. Mar. 13, 2020), <https://www.ord.uscourts.gov/phocadownload/userupload/StandingOrders/Standing>

second order declaring the Clerk’s Office closed to the public in all locations.¹⁶ Federal judicial districts across the country, as well as the U.S. Supreme Court and several of the Circuit Courts of Appeal, have taken similar measures. The White House itself has warned all federal government agencies to “immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.”¹⁷ As of March 26, the United States had reported more cases of COVID-19 than any other country in the world.¹⁸

The states have also responded. More than twenty U.S. states have issued statewide “shelter-in-place” or “stay-at-home” orders requiring residents to stay at home. Here in Oregon, for instance, Governor Kate Brown issued Executive Order 20-12, “Ordering Oregonians to Stay at Home, Closing Specified Retail Businesses, Requiring Social Distancing Measures for Other Public and Private Facilities, and Imposing Requirements for Outdoor Areas and Licensed Childcare Facilities.”¹⁹ The Governor’s Executive Order requires Oregonians to stay home whenever possible, requires social distancing of at least six feet between individuals, mandates the closure of all nonessential businesses, and imposes statewide telework or work-from-home protocols in all workplace environments. As of the time of this filing, twenty-two other states

%20Orders/Court%20Operations/20204%20In%20Re%20Court%20Operations%20In%20Response%20to%20COVID-19.pdf

¹⁶ In re District Clerk’s Office Operations in Response to COVID-19, Standing Order 2020-5 (D. Or. Mar. 17, 2020), [https://www.ord.uscourts.gov/phocadownload/userupload/](https://www.ord.uscourts.gov/phocadownload/userupload/StandingOrders/Standing%20Orders/Court%20Operations/20205%20In%20Re%20District%20Clerks%20Office%20Operations%20in%20Response%20to%20COVID-19.pdf) StandingOrders/Standing%20Orders/Court%20Operations/20205%20In%20Re%20District%20Clerks%20Office%20Operations%20in%20Response%20to%20COVID-19.pdf

¹⁷ <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>; *see also* https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

¹⁸ Coronavirus Live Updates: U.S. Leads the World in Known Cases, N.Y. Times (Mar. 26, 2020, 6:39 PM), <https://www.nytimes.com/2020/03/26/world/coronavirus-news.html#link-8bbde61>

¹⁹ Office of the Governor, Executive Order No. 20-12 (Mar. 23, 2020), *available at* https://govsite-assets.s3.amazonaws.com/jkAULYKcSh6DoDF8wBM0_EO%2020-12.pdf.

have issued similar orders,²⁰ as have several major U.S. cities, including Atlanta, Dallas, Kansas City, Philadelphia, San Francisco, and St. Louis.²¹ Thus, as of the time of this filing, over 217 million people, in 23 states, 84 counties, and 17 cities, and one U.S. territory are subject to “stay-at-home” or “shelter-in-place” orders.²²

And there is good reason for such a sweeping response. COVID-19, the disease caused by the novel zoonotic coronavirus SARS-CoV-2 (“coronavirus”), has no cure, and there is no vaccine to prevent it. Sharfstein Decl. ¶ 6. There is also no preexisting immunity to the virus in the world’s population. Sharfstein Decl. ¶ 6. Thus, at this time, the only way to control the spread of the virus is to use preventive strategies, including social distancing and mitigation through hygiene practices. Sharfstein Decl. ¶ 6.

Across the globe, COVID-19 has spread at a rapid pace through community transmission. It is thought to spread mainly from person to person, between those who are in close contact with one another (within about six feet) and through respiratory droplets produced when an infected person coughs or sneezes. Sharfstein Decl. ¶ 12. The droplets can land in the mouths or noses of people nearby or be inhaled into the lungs; they may also persist in the air for hours. Sharfstein Decl. ¶ 12. A person can contract COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes. Sharfstein Decl. ¶ 12. New research also suggests that a significant proportion of transmission of COVID-19 is from people who are infected but pre-symptomatic, who could already be contagious. Sharfstein Decl. ¶ 13. Thus,

²⁰ Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay Home*, N.Y. Times (last updated Mar. 26, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

²¹ *See, e.g.*, City and County of San Francisco, Order of the Health Officer No. C19-07 (Mar. 16, 2020), <https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf>.

²² *Id.*

asymptomatic people may still spread the virus, without knowing they are doing so, by coming in close contact with other people. Sharfstein Decl. ¶ 13.

If congregate spaces—like the courts—remain open, it will be impossible to enforce aggressive social distancing practices in accordance with public health recommendations, transmission of the virus will continue, and the number of new cases will increase exponentially. Nationally, projections by the Centers for Disease Control and Prevention (CDC) indicate that, without effective public health interventions, over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic, and as many as 2.2 million people may die.²³ Aggressive social distancing consistent with public health recommendations is therefore essential to protect against the spread of disease and, ultimately, prevent a healthcare system collapse. If the healthcare system collapses, the rapid chain effects will be devastating and, in many scenarios, long-lasting. Sharfstein Decl. ¶¶ 24–27. People will die not only from COVID-19, but also potentially from lesser or more treatable illnesses because, without required medical intervention, those illnesses will have more serious impacts. Sharfstein Decl. ¶ 26.

C. Defendants’ Response to the COVID-19 Pandemic in the Immigration Court System

Defendants’ response to the COVID-19 pandemic in the immigration court system stands in stark contrast to the sweeping efforts by state governments and federal courts to protect against the spread of disease. Indeed, despite the exponential growth and staggering impacts of COVID-19, Defendants have failed entirely to take appropriate measures to ensure public health

²³ See Ferguson, Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand, Imperial College of London at 7 (“In total, in an unmitigated epidemic, we would predict approximately 550,000 deaths in [Great Britain] and 2.2 million in the US, not accounting for the potential negative effects of health systems being overwhelmed on mortality.”), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>; Sheri Fink, *White House Takes New Line After Dire Report on Death Toll*, NY Times (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/coronavirus-fatality-rate-white-house.html>.

and safety in the immigration court system. Defendants’ Twitter stream of changing court rules and procedures, *see, e.g.*, n.11, exemplifies their ad hoc approach to this public health crisis, and leaves both Plaintiffs and this Court at sea as to the operative immigration court system. Where Defendants have attempted to respond, they have done so either in secret—with little or no notice to attorneys or pro se respondents—or in ways that actually subvert the statutorily required full and fair adjudication of cases and requests for humanitarian relief. Specifically, Defendants continue to require attorneys, respondents, judges, and staff to appear in person at many immigration courts; refuse to extend immigration court deadlines even though compliance is dangerous and often impossible; have failed to provide adequate notice to anyone of emergency court closures and procedures; and have ordered immigration judges to fast-track cases to completion—and, ultimately, to order deportation—in the absence of respondents and counsel. These policies have turned the system itself into a public health hazard, forcing Plaintiffs’ staff, attorneys, and clients and other members of the communities they serve either to endanger the public health (and, in some cases, individual lives) or risk their ability to seek relief under the federal immigration laws.

1. Removal of COVID-19 Information Posters

Defendants’ actions at the onset of the pandemic show their steadfast disregard for the lives and safety of the human beings who participate in immigration court proceedings. On March 10, just before the President declared a national emergency, EOIR ordered the removal of informational posters about how to prevent the spread of COVID-19, which had been posted in immigration courts nationwide. The posters, provided in both English and Spanish, had been created and disseminated by the CDC as a means to curb the impacts of the deadly virus.²⁴

²⁴ Defendants reversed their position only after press coverage critiqued the policy. *See* Monique O. Madan, “Trump administration orders immigration courts to remove coronavirus posters – then takes it back,” *Miami Herald* (Mar. 10, 2020), <https://www.miamiherald.com/news/local/immigration/article241046076.html>.

2. The McHenry Memo

On March 18, after the President declared the national emergency, Defendant McHenry, on behalf of Defendant EOIR, issued a policy memorandum entitled “Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak.”²⁵ Rather than closing the immigration courts, the EOIR policy memorandum outlines procedures for continuing to operate most of its courts amidst the COVID-19 pandemic. Although the memorandum announced the postponement of non-detained hearings docketed between March 18 and April 10, it encouraged immigration judges to fast-track cases to completion without any hearing at all and resolve others through telephonic or video teleconference (VTC) subject to Standing Orders at individual immigration courts.²⁶ EOIR’s policy memorandum further encouraged immigration judges to issue orders of removal, or orders deeming applications waived or deeming individuals ineligible for relief, if deadlines imposed by the immigration judge are not met during the pandemic.²⁷

3. Tweeting the Postponement of Non-Detained Hearings

Since EOIR issued its policy memorandum, it has taken several other actions that have exacerbated the existing public health crisis and put at risk not only the rights, but also the lives, of every person within the immigration court system. On March 17, at 8:55 p.m., EOIR announced via Twitter that, effective the next day, all hearings for non-detained individuals would be postponed.²⁸ Although an important initial step toward protecting the public health,

²⁵ Dahab Decl. ¶ 4, Ex. B (Policy Memorandum 20-10, “Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak,” (Mar. 18, 2020)).

²⁶ For merits hearings before the El Paso detained court, Plaintiff Las Americas has been informed that there is no video option for remote appearances due to “security measures” from EOIR’s Office of Information Technology. Declaration of Linda Corchado in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Corchado Decl.”) ¶ 11.

²⁷ Dahab Decl. ¶ 4, Ex. B at 4.

²⁸ DOJ EOIR (@DOJ_EOIR), Twitter (Mar. 17, 2020, 8:55 PM).

EOIR's failure to extend deadlines associated with postponed hearings, combined with the lack of access to electronic filing systems at many immigration courts,²⁹ renders EOIR's action practically meaningless. Attorneys, volunteers, respondents in immigration proceedings, and court staff must still present in person at the immigration courts to make filings and meet important deadlines. And, although individuals on EOIR's detained dockets may prefer to have their cases go forward (especially now, given the risk of a coronavirus outbreak in detention centers), EOIR has taken no action to mitigate the risks for those individuals or their counsel, including those who work for Plaintiff organizations. Thus, respondents in detained settings, and the attorneys and advocates who represent them, continue to be placed in vulnerable positions, in a setting in which the risks of a deadly coronavirus outbreak are much higher than the norm. Indeed, for many of the Plaintiff organizations that serve individuals in detention, their ability to represent their clients has been subverted entirely, with new EOIR and immigration court policies limiting their ability to make filings, develop the record, or confidentially advise their client about how best to proceed with their case. *See generally* Declaration of Linda Corchado in Support of Plaintiffs' Motion for Temporary Restraining ("Corchado Decl."); Declaration of Laura G. Rivera in Support of Plaintiffs' Motion for Temporary Restraining Order ("Rivera Decl."); Declaration of Allegra Love in Support of Plaintiffs' Motion for Temporary Restraining Order ("Love Decl.").

²⁹ Unlike practically every other modern court in the country, Defendant EOIR's immigration courts do not have an online electronic filing system that attorneys, representatives, or respondents in immigration courts may use to file forms, briefs, or other information or evidence relating to their immigration case. The electronic filing system that does exist, the EOIR Courts and Appeals System (ECAS), is available only at certain immigration courts and only to attorneys and registered users. *See* U.S. Department of Justice, EOIR Courts & Appeals System Information Page, <https://www.justice.gov/eoir/ECAS> (listing those courts) (last visited Mar. 26, 2020). At some of those courts, however, Plaintiffs have still been unable to make electronic filings because the e-filing system does not work. For instance, the ECAS system supposedly launched in El Paso on March 12, but has not worked at all for Plaintiff Las Americas. Corchado Decl. ¶ 12.

4. Sporadic & Inconsistent Standing Orders

In addition to the EOIR policy memorandum, Defendants have taken several other bewildering actions over the course of the pandemic. Between March 13 and the date of this filing, Defendants have issued a series of “Standing Orders” governing the policies and procedures at individual immigration courts during the course of the pandemic. The Standing Orders purport to impose sporadic, inconsistent, and unlawful procedures relating to immigration court proceedings, and many are shocking in scope.

For instance, the Immigration Courts in Atlanta, Georgia (undated, added Mar. 20, 2020); Batavia, New York (Detained) (Mar. 24, 2020); Boston, Massachusetts (Mar. 23, 2020); Buffalo, New York (Mar. 24, 2020); Conroe, Texas (Mar. 25, 2020); Dallas, Texas (Mar. 24, 2020); Florence, Arizona (Mar. 23, 2020); Jena, Louisiana (Mar. 25, 2020); Las Vegas, Nevada (Mar. 18, 2020); Varick Street, New York (Mar. 21, 2020); and York, Pennsylvania (Mar. 17, 2020) each published a “Standing Order” that permits “any individual who wishes to appear telephonically” at a hearing scheduled during the national emergency to do so *provided* that the individual forgoes submitting any additional documents during the hearing and waives any objection to the admissibility of Government evidence filed during the hearing on the basis that they are unable to examine the document.³⁰ In other words, the Standing Orders require attorneys and both represented and pro se respondents to choose between their due process rights and the public health.³¹

³⁰ These so-called “Standing Orders” are contained in Appendix R of the Immigration Court Practice Manual. Appendix R was added to the manual on March 16, 2020. The Immigration Court Practice Manual in effect on Mar. 26, 2020 is available at <https://www.justice.gov/eoir/page/file/1258536/download>.

³¹ *See, e.g.*, Standing Order of Immigration Judge H. Kevin Mart Relating to Telephonic Appearances at Master Calendar Hearings (Mar. 21, 2020) (“Any individual who wishes to appear telephonically does so with the understanding that any paper filings to be considered by the Court must be in the official record of proceeding at the time the hearing is scheduled to be held. No additional filings will be accepted at the hearing if counsel does not appear in person, and the decision of the Court will be based on the documents in the record at the close of the

5. Inadequate, Confusing & Chaotic Notice

Throughout the COVID-19 pandemic, Defendants also consistently have failed to provide adequate notice—to attorneys, respondents, or the public—of postponements, court closures, public health risks, or filing deadlines. Between March 10 and the date of this filing, Defendants have made such announcements via Twitter,³² often after ordinary business hours. Many of EOIR’s “tweets” have announced immediate changes to filing deadlines.³³ For instance, on March 24, 2020, at around 7 p.m. Eastern Time, Defendants issued a tweet that ordered “[e]ffective tomorrow, the following immigration courts reopen for the limited purpose of accepting filings. All filings due during the closures and today are *now due*. Due dates for future filings remain.” (Emphasis added.) The Immigration Courts in question, Atlanta (Peachtree); Houston (Gessner); Los Angeles (Olive); Memphis; New York (Broadway); and Sacramento, had been previously “closed” for filings because of the pandemic (closures that were also announced over Twitter). When EOIR’s March 24 tweet was posted, both the impossibility and the danger of compliance plainly existed: EOIR was forcing people to congregate at the immigration courts despite public health orders in place in Atlanta, Los Angeles, New York, and Sacramento.³⁴ About an hour later, Defendants deleted that tweet and

hearing.”) (attached as Exhibit D to Dahab Decl. ¶ 6); Standing Order of the Atlanta Immigration Court – Ted Turner Drive Relating to Telephonic Appearances of Counsel and Permitted Attendees at Detained Master Calendar and Individual Hearings (undated, published Mar. 20, 2020) (“Any attorney appearing telephonically waives the right to object to admissibility of any document offered in Court on the sole basis that they are unable to examine the document.”) (attached as Exhibit E to Dahab Decl. ¶ 7).

³² See generally DOJ EOIR (@DOJ_EOIR), Twitter.com.

³³ Notably, there are approximately 4,802,000 individuals currently in removal proceedings in U.S. immigration courts—more than half are unrepresented and many come from countries where English is not the first language, and thousands of whom are detained. DOJ EOIR has 8143 “followers” on Twitter. Although there is no way for Plaintiffs to know who among those impacted is following EOIR’s account, it almost certainly is not the majority of the individuals impacted by this bizarre and chaotic rulemaking through EOIR’s Twitter feed.

³⁴ Compounding this danger, schools in many of these cities were closed, forcing representatives, including those who work for Plaintiffs, to determine whether they should bring

issued a different tweet, this time setting March 30—just six days later—as the deadline for all filings. On the evening of March 26, EOIR appears to have created an email listserv to “enhance communication with . . . stakeholders[.]”. Dahab Decl. ¶ 13. The email listserv is purportedly described as “nationwide” even though it is only directed to EOIR-registered practitioners, excluding unrepresented individuals, and appears to be only in English. Dahab Decl. ¶ 13. Even so, the inaugural email merely directs practitioners back to EOIR’s Twitter account and website for updates. Dahab Decl. ¶ 13.

6. Unrealistic File-by-Mail Mechanisms During Pandemic

Defendant EOIR has also “encouraged” parties to make filings by mail, but has yet to provide any realistic mechanism for any attorney or representative—let alone a pro se respondent—to know of that guidance.³⁵ To make matters worse, Defendants require many filings to include original signatures from respondents and counsel, making in-person contact during the process inevitable or otherwise dangerously lengthy and complicated.³⁶ And, at some Immigration Courts at which filings by mail are required, those courts have refused to accept the filings at all, in direct contravention of their published guidance. For pro se respondents especially, many of whom lack the resources that Defendants’ file-by-mail requirements demand, these circumstances almost certainly will prejudice their individual immigration cases.

children on public transportation to congregate settings to file papers, or whether they would have to put their law licenses at risk by not meeting deadlines for their clients.

³⁵ Even on EOIR’s website, it explains that “[c]ase status and hearing date information may not be updated for those cases postponed due to operational changes during the coronavirus pandemic. Following the issuance of a new hearing notice, such information will be updated. As always, court documents such as notices are your official source of information.” Of course, with 200 million Americans subject to shelter-in-place orders that may keep them from accessing their offices or mail, many have no way of knowing whether or until when their cases have been rescheduled.

³⁶ U.S. Citizenship & Immigration Services, by contrast, has relaxed its original signature requirement during the COVID-19 pandemic. See <https://www.uscis.gov/news/alerts/uscis-announces-flexibility-submitting-required-signatures-during-covid-19-national-emergency>.

For instance, on March 24, 2020, Plaintiff Law Lab attempted to deliver by mail a filing to the Atlanta Immigration Court in order to meet an asylum deadline. Declaration of Ariel Prado In Support of Plaintiffs’ Motion for Temporary Restraining Order (“Prado Decl.”) ¶¶ 16–21. The immigration court did not accept delivery of the filing, so Law Lab was forced to appear in person at the courthouse to investigate; security then prevented Law Lab staff from entering the courthouse. Prado Decl. ¶¶ 16–21. Despite Defendant EOIR’s Twitter announcement encouraging filings by mail, attorneys and representatives have been forced either to appear in person at the immigration court, risking their health and their lives, or, if the court is closed, delay the filing and risk jeopardizing their clients’ case.³⁷ Additionally, both Plaintiffs’ staff and pro se respondents face limited access to businesses that provide mailing services due to shelter-in-place and business closure orders. See Declaration of Swapna Reddy in Support of Plaintiffs’ Motion for Temporary Restraining Order (“Reddy Decl.”) ¶ 17.

Filing by mail with the immigration courts is also historically unreliable, creating legitimate concerns for Plaintiffs about potential prejudice to their clients. In the experience of Plaintiff Santa Fe Dreamers Project (SFDP), mail that has been confirmed delivered through Priority Mail tracking is often not processed once it reaches the immigration court. At hearings,

³⁷ Prado Decl. ¶ 9 (Plaintiff’s staff include persons with preexisting health conditions and vulnerabilities and staff who live with frontline case workers, elderly parents, or immunocompromised family); Corchado Decl. ¶ 14 (describing attempted mail-in filing of a family’s asylum applications to the Federal Plaza and Varick Street immigration courts in order to meet their one-year filing deadline; USPS attempted delivery twice at the Varick court but was unable to complete delivery); Reddy Decl. ¶ 8 (“Defendant EOIR continues to require in-person immigration court hearings in many cases and the mailing of paper filings that potentially place ASAP staff, clients, and the *pro se* respondents we serve at risk.”); ¶ 9-10 (explaining that EOIR’s “inconsistent and haphazard” responses make it “difficult to know when and where filings must be submitted” and providing examples); ¶ 16 (original signature requirement “exacerbates the public health crisis” because “ASAP’s staff must use mail services to send filings to clients, increasing risk of exposure” and “clients must often sign documents and mail them back to ASAP staff.”).

immigration judges typically have exercised their discretion to accept as timely such filings with proof of mailing despite the lack of a record of receipt in the court's own system. Love Decl. ¶ 17. Without hearings at which an immigration judge may exercise such discretion, however, there will no longer be an opportunity to bring extra copies of filings to the court, and clients may be deprived of crucial evidence for their cases. *Id.* Indeed, the EOIR policy memorandum issued on March 18 reminds immigration judges that they may dismiss a case outright if a filing does not reach them on time.³⁸ As a result, given the immigration courts' track record of failing to accept and process mail, without relief from this Court Plaintiffs are likely to miss filing deadlines through no fault of their own. Love Decl. ¶ 17.

7. Unexplained Refusal to Adhere to Universally Accepted Public Health Guidance

Remarkably, Defendants' refusal to meaningfully respond to the national emergency has occurred despite several calls for action, including from the immigration judges and court staff themselves. On March 12, after the World Health Organization declared COVID-19 a global pandemic and thirteen U.S. states declared states of emergency, the National Association of Immigration Judges (NAIJ, the immigration judges' union), sent a letter to Defendant McHenry calling for the immediate suspension of all non-detained master calendar dockets "because they present a continuing and unacceptable risk in the current environment" that is "untenable and irresponsible in light of the current spread of COVID-19 infections across the country."³⁹ Defendants initially did not respond to the judges' union. On March 15, after thirty-nine states had declared states of emergency, NAIJ submitted a Joint Statement with the Immigration &

³⁸ See <https://www.justice.gov/eoir/file/1259226/download>.

³⁹ Letter to EOIR Director James McHenry from NAIJ (Mar. 12, 2020), at 2, https://www.naij-usa.org/images/uploads/newsroom/NAIJ_Letter_to_EOIR_Director_Re_Coronavirus.pdf (attached as Exhibit F to Dahab Decl. ¶ 8).

Customs Enforcement (ICE) Professionals Union and the American Immigration Lawyers Association (AILA), to “call for the emergency closure of the nation’s Immigration Courts.”⁴⁰ The Joint Statement explained that Defendants’ decision to close only the Seattle Immigration Court and limit the size of some master calendar dockets was “woefully insufficient,” citing epidemiological expert Dr. Ashish Jha, Professor of Global Health at the Harvard T.H. Chan School of Public Health, who “provided his unequivocal opinion that to continue to hold any hearings at any Immigration Court at this time presents a high public health risk.”⁴¹

As of the date of this filing, 62 of the 68 immigration courts remain open, including immigration courts located at the epicenter of the COVID-19 crisis in the United States. *See* DOJ EOIR (@DOJ_EOIR), Twitter (Mar. 24, 2020, 6:23 PM) (“The Newark and Seattle immigration courts reopen tomorrow. Filings due during the closure are due March 30, 2020.”). Others have closed “based upon individual incidents,” unexplained to the public and decided “from the very top of the administration” on a case-by-case basis.⁴² Most of those immigration courts are operating in direct violation of mitigation strategies recommended by the CDC.⁴³ Many also remain open in states and local jurisdictions where shelter-in-place orders are in effect, despite warnings from officials about the dangers of ignoring the statewide mandates. In

⁴⁰ *See* Declaration of Kate Voigt in Support of Plaintiffs’ Motion for Temporary Restraining Order; NAIJ, ICE Union, and AILA, “Immigration Judges, Prosecutors and Attorneys Call for the Nationwide Closure of All Immigration Courts: Position on Health and Safety of the Immigration Courts During the COVID-19 Pandemic,” Joint Statement (Mar. 15, 2020), <https://www.naij-usa.org/images/uploads/newsroom/2020.03.15.00.pdf> (attached as Exhibit G to Dahab Decl. ¶ 9).

⁴¹ *Id.*

⁴² *See* Monique O. Madan, *White House Itself Is Choosing Which Immigration Courts Get to Close Amid COVID-19*, Miami Herald (Mar. 19, 2020), <https://www.miamiherald.com/news/local/immigration/article241335126.html> (attached as Exhibit to Dahab Decl. ¶ 10).

⁴³ Centers for Disease Control and Prevention, Schools, Workplaces & Community Locations, <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html> (describing recommended community mitigation plans).

San Francisco, for instance, the San Francisco Immigration Court has remained open, placing attorneys, respondents, and staff at risk, notwithstanding requests from local leaders to impose measures that mitigate the spread.⁴⁴

Defendants have also failed to promptly close the courts even when COVID-19 exposure within the courthouse space already has occurred. In Denver, the Immigration Court remained open for two full days after a judge, who had presided over hearings while symptomatic the previous week, tested positive for the disease.⁴⁵ Likewise, EOIR failed to take action at the New York Immigration Court after legal aid groups informed Defendants that three attorneys, all of whom had appeared in court the previous week, were symptomatic or recently exposed.⁴⁶

D. Impact of Defendants' Response on Plaintiffs

Defendants' failure to take meaningful action to protect the immigration court system in the face of the COVID-19 pandemic has placed Plaintiffs in an untenable position. Plaintiffs must make the impossible choice between carrying out their missions and competently advocating for their clients or protecting the health of their staff, their clients, their families, and the public.

1. The Danger of Going to Immigration Court

Defendants' response to the pandemic has placed enormous strain on Plaintiffs' ability to fulfill their missions and competently represent their clients. Consistent with federal CDC

⁴⁴ See Letter from Arwen Swink, S.F. Immigration Court Local Representative, to Defendant James McHenry, Director of EOIR (Mar. 19, 2020), available at <https://www.naij-usa.org/images/uploads/newsroom/2020.03.19.00.pdf> (warning that EOIR's "ill-conceived decision encourages parties to flout the Shelter in Place Order; Respondents reasonably fear negative consequences—including removal—for late filings and are more likely to come to court with documents in person.").

⁴⁵ Dara Lind, *Immigration Courts Are Telling Employees to Come to Work-Ignoring Health Risks and Local Shelter-in-Place Orders*, ProPublica (Mar. 20, 2020), <https://www.propublica.org/article/immigration-courts-are-telling-employees-to-come-to-work-ignoring-health-risks-and-local-shelter-in-place-orders>.

⁴⁶ *Id.*

guidance and individual state shelter-in-place orders, Plaintiffs are largely working remotely except in emergency circumstances or where required by EOIR's continued operations. Corchado Decl. ¶ 5; Love Decl. ¶ 7; Prado Decl. ¶ 7. Many Plaintiffs have staff members who are at high risk, or whose family members are at high risk of becoming severely ill through exposure to COVID-19 due to age or existing health conditions. Prado Decl. ¶ 9; Corchado Decl. ¶ 6; Love Decl. ¶ 8; Declaration of Michelle Mendez in Support of Plaintiffs' Motion for Temporary Restraining Order ("Mendez Decl.") ¶ 9. Multiple Plaintiffs have staff members who are immunocompromised or who live with close family members who are particularly susceptible to the virus due to age or pre-existing health conditions. Corchado Decl. ¶ 6; Mendez Decl. ¶ 9; Love Decl. ¶ 8. At SFDP, a staff member's spouse is battling cancer and is severely immunocompromised because she recently completed chemotherapy. Love Decl. ¶ 8. Plaintiffs also have staff members who are pregnant or who have newborns at home. Love Decl. ¶ 8; Prado Decl. ¶ 9.

Because of Defendant EOIR's policies, multiple Plaintiffs have felt compelled to attend court hearings in-person in order to competently advocate for their clients despite the escalating health risks of COVID-19. Plaintiff Las Americas was informed by the El Paso detained court that attorneys were still required to attend court for merits hearings, regardless of the local shelter-in-place order. Corchado Decl. ¶ 11. An attorney at Plaintiff Las Americas was also advised by a detained court administrator that an immigration judge said "there is no reason for [the attorney of record] to appear in court" at a client's master calendar hearing, effectively encouraging the attorney to leave their client to appear alone. *Id.* For Plaintiff Southern Poverty Law Center, an attorney in their Southeast Immigrant Freedom Initiative (SIFI) program was forced to appear in person at the Atlanta Immigration Court—risking her own health and the health of those around her—because, according to that immigration court's local Standing Order, *see supra*, a telephonic appearance would automatically waive her client's right to examine

evidence. *See supra*, Section I(C)(4); Rivera Decl. ¶ 23.

Those who have been forced to attend court in person since the onset of the pandemic have also reported an alarming lack of safety precautions. A co-counsel attorney of Plaintiff CLINIC who made an in-person filing at the Baltimore Immigration Court on March 16, 2020, noted no health or safety precautions being taken in the building. Mendez Decl. ¶ 19. On March 25, 2020, EOIR posted a Tweet announcing that the Baltimore court, along with two other courts, would close as a “precautionary measure”; although EOIR did not explain the closures, the other two courts named in the Tweet have reportedly been recently exposed to COVID-19. *Id.* In the Boston Immigration Court, where CLINIC has a pending pro bono case, there have been no reported COVID-19 cases, but an immigration judge apparently closed a courtroom because she believed the courtroom had been exposed. Mendez Decl. ¶¶ 20. At the Stewart Immigration Court in Lumpkin, GA—where Plaintiff SPLC’s SIFI attorneys have been compelled to make approximately twenty visits since COVID-19 was declared a pandemic—security guards only began taking individuals’ temperatures before they entered the courthouse space on March 24. Rivera Decl. ¶ 13. At the Folkston ICE Processing Center, part of the Atlanta Immigration Court, an SPLC SIFI attorney reported that she and her client were placed in a small courtroom, where they had to sit within six feet of each other despite federal public health guidelines. Rivera Decl. ¶ 24. The security guards at the Folkston Immigration Court had confiscated this attorney’s hand sanitizer upon entry to the building, claiming that it was considered “contraband.” *Id.*

On at least one occasion, EOIR has also failed entirely to accommodate a Plaintiff’s reasonable requests for remote appearance. On March 17, Plaintiff SFDP submitted a motion for telephonic appearance to the Atlanta Immigration Court for a client’s bond hearing. Love Decl. ¶ 11. In the motion, SFDP cited concerns about the COVID-19 pandemic and her exposure if she were compelled to travel 1500 miles for her client’s hearing. *Id.* On March 23, the

immigration judge denied her motion “for lack of good cause,” without further explanation. Love Decl. ¶¶ 12–13.

2. The High-Risk Dangers & Obstacles Posed By Detention in the Pandemic

Plaintiffs providing legal services to detained clients are facing the unique challenge of advocating for clients trapped in a particularly high-risk situation. Because the conditions in detention centers are particularly conducive to the rapid spread of COVID-19, Plaintiffs are concerned that their detained clients could be exposed to outbreaks within the detention centers, with devastating impacts.⁴⁷ Plaintiffs’ concern is especially acute for clients who are already medically fragile, such as those who are HIV positive. Due to the high risks of a COVID-19 outbreak in detention, some Plaintiffs have suspended altogether their detained visitation programs due to fear of inadvertently introducing the coronavirus through their entry to the detention center. Love Decl. ¶ 6; Corchado Decl. ¶¶ 5–6. At some detention centers, even if Plaintiffs attempted to visit a client in person, they would be effectively blocked from visitation clients because they cannot meet ICE’s new requirement that they provide their own personal protective equipment—despite the fact that such equipment is already scarce and desperately needed by frontline healthcare workers.⁴⁸ See Corchado Decl. ¶ 7.

Plaintiffs’ lack of access to detention centers during the COVID-19 pandemic has significantly harmed their ability to provide meaningful legal services to detained individuals.

⁴⁷ See, e.g., Memorandum and Order on Amended Petition for Habeas Corpus, *Basank v. Decker*, No. 20-CV-2518 (S.D.N.Y. Mar. 26, 2020) (attached as Exhibit I to Dahab Decl. ¶ 12).

⁴⁸ See ICE Guidance on COVID-19, Visitation at Detention Facilities, Will Individuals in ICE Custody be able to meet with their legal representatives? (providing response: “ICE will require all legal visitors to provide and wear PPE (e.g., gloves, N-95 masks, and eye protection) while visiting with any client at any facility.”) (updated Mar. 26, 2020), <https://www.ice.gov/covid19>; See also, AILA Practice Alert: Personal Protective Equipment (PPE) Requirements for Attorneys in Detained Courts (Mar. 25, 2020) (“AILA’s ICE Liaison Committee has received reports that many jurisdictions are not allowing attorneys to represent clients in-person at detained courts unless attorneys provide and wear their own Personal Protective Equipment (PPE) (e.g., gloves, N-95 masks, and eye protection.”).

Plaintiffs SFDP, Law Lab, and Las Americas face challenges to their programming in the El Paso Immigration Collaborative (“EPIC”), which operates based on initial in-person visits with newly detained individuals. Love Decl. ¶ 10; Prado Decl. ¶ 26; Corchado Decl. ¶ 10. The EPIC program relies on these intakes to screen cases and offer legal services to unrepresented individuals. Love Decl. ¶ 10; Prado Decl. ¶ 26; Corchado Decl. ¶ 10. Without such intakes, Plaintiffs are unable to connect with potential clients, undermining EPIC’s model and forcing detained individuals to move forward with their cases pro se despite Plaintiffs’ available legal services. Love Decl. ¶ 10; Prado Decl. ¶ 26–27. Plaintiff CLINIC has also faced challenges providing legal services to detained individuals because its partners are either limiting or ceasing visits to the detention centers—that is, they cannot meet with clients, pick up documents, or obtain signatures in a timely manner. Mendez Decl. ¶ 16.

Plaintiffs have also had great difficulty accessing detained clients with whom they have preexisting legal relationships; as EOIR continues to move forward as normal, Plaintiffs are unable to adequately represent their clients. Plaintiff SPLC’s SIFI project has found that VTC and phone systems are overburdened in detention centers where they work, making it functionally impossible to contact clients for timely legal consultations. Rivera Decl. ¶¶ 8–9, 11–12. Plaintiff SFDP has repeatedly sought to schedule legal calls with detained clients in El Paso, but its requests have been wholly ignored. Love Decl. ¶ 15. When Plaintiff Las Americas has received telephonic consultations with detained clients, ICE has failed to provide access to confidential phone lines, and guards have at times cut attorney conversations short. Corchado Decl. ¶¶ 9–10. One Las Americas client had his phone consultation with his attorney cut short on the day before his merits hearing; the client was forced to use the last of his commissary funds to call his attorney back. Corchado Decl. ¶ 9. Legal calls have also been scheduled on nonsecure lines, depriving Plaintiffs and their clients of confidentiality. Corchado Decl. ¶¶ 9–10. Some Las Americas clients are unwilling to proceed with a call because of the lack of

confidentiality; others have proceeded to discuss sensitive details of their cases despite the presence of ICE, out of their necessity to speak with attorneys. Corchado Decl. ¶ 10.

3. Failure to Automatically Extend Deadlines Extends Dangers Beyond the Physical Courtrooms and Visitation Spaces

Not only do the Defendants' responses to COVID-19 create dangerous congregate spaces at the physical courthouses and detained courts, their inadequate responses have widened the circle of danger by forcing Plaintiffs and the people they serve to engage in risky public health activities or face potential harm to their cases. Plaintiffs have faced serious barriers to meeting with clients, adequately preparing their cases, and obtaining signatures and evidence. Plaintiffs cannot meet with clients in person due to the risk of COVID-19 transmission. One of CLINIC's clients, for example, has been unable to meet with counsel due to the risk of exposing an elderly person with whom he lives. Mendez Decl. ¶ 17. CLINIC staff are also forced to continue checking the mail in their physical office in order to meet important deadlines set by the Board of Immigration Appeals (BIA). *Id.* ¶ 15. Law Lab has struggled to continue providing pro se legal services, as the pandemic has forced its staff to either redesign or cancel asylum workshops. Prado Decl. ¶¶ 10, 22, 24. Law Lab's workshops are designed to help pro se respondents with upcoming hearings or deadlines in immigration court; in the absence of such workshops, Law Lab will be unable to provide legal support in time to help some individuals before their upcoming filing deadlines. Prado Decl. ¶ 22. Pro se respondents receiving legal services from Plaintiff Asylum Seeker Advocacy Project ("ASAP") are concerned that they will have to violate government shelter-in-place orders to mail important immigration court filings. Reddy Decl. ¶ 17.

The COVID-19 pandemic has also impacted some Plaintiffs' ability to produce expert witnesses during their clients' hearings. Plaintiff CLINIC, for instance, had been relying on in-person expert testimony as crucial support for their client's claims in an upcoming April merits hearing; the expert is now concerned about appearing in person due to the pandemic. Mendez

Decl. ¶ 17. Plaintiff Las Americas has already had a proposed witness cancel her remote appearance in a merits hearing because of limited access to phone and internet service, again due to complications from the COVID-19 pandemic. Corchado Decl. ¶ 9.

The public health crisis has also impeded attorneys' ability to promptly access client records in immigration court. Plaintiff CLINIC has had their motion to reopen work particularly impaired by the confluence of COVID-19 and EOIR's inflexible response. Mendez Decl. ¶¶ 11–14. CLINIC is now unable to access their clients' case record that is only immediately available in person, in immigration court. Mendez Decl. ¶¶ 11–12. Without this information, CLINIC's ability to file a complete and accurate motion is severely undermined; yet if they seek this information through FOIA requests, the processing time could prejudice their clients' cases and leave them vulnerable to deportation. Mendez Decl. ¶¶ 13–14.

Although Defendants currently have suspended non-detained hearings for a limited period of time, they have continued to operate most immigration courts across the country, including by imposing deadlines, requiring in-person appearances by Plaintiffs and their clients in courts both inside and outside of detention centers, and forcing many individuals, including *pro se* respondents, to appear in person to make filings and meet deadlines. Plaintiffs' staff, attorneys, volunteers, and clients must take public transportation or hire a private driver, in some cases travel across entire cities and states, and present in person at the immigration court buildings, some of which already have experienced known COVID-19 exposures. In short, Defendants have turned the immigration court system into a public health hazard and have taken no meaningful steps to mitigate it.

II. ARGUMENT

The Court, using the equitable authority of the All Writs Act, should issue an immediate, temporary, emergency order enjoining the Defendants from turning the immigration courts into a public health hazard because it is “essential to the administration of justice” to prevent them

from doing so. *Michaelson*, 266 U.S. at 65-66. Such an order is “necessary or appropriate” in the aid of the Court’s jurisdiction and as outlined in particular below, the Court can fashion such an order to be “agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).⁴⁹

The All Writs Act provides this Court with the ability to construct a remedy to right a “wrong [which] may [otherwise] stand uncorrected.” *United States v. Morgan*, 346 U.S. 502, 512 (1954). Should the Defendants be allowed to turn the immigration courts into a public health hazard, the Plaintiffs underlying claims seeking a full and fair immigration court adjudication system would be subverted. *Dean Foods Co.*, 384 U.S. at 608 (a court has “express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction”); *Michael v. INS*, 48 F.3d 657, 659 (2d Cir. 1995) (All Writs Act injunction of a prisoner’s deportation proper to preserve the court’s jurisdiction over the pending appeal). The Ninth Circuit has held that the All Writs Act “should be broadly construed,” *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1979), to “achieve all rational ends of law,” *California v. M&P Invs.*, 46 F. App’x 876, 878 (9th Cir. 2002) (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)). Courts have “broad power” and “significant flexibility in exercising [their] authority under the Act,” *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012).

A. The Emergency Order is Necessary or Appropriate to Aid this Court’s Jurisdiction.

Plaintiffs’ requested relief is necessary and appropriate to aid in the exercise of this Court’s jurisdiction.⁵⁰ In this civil action, Plaintiffs have invoked the jurisdiction of this Court to

⁴⁹ The All Writs Act provides in full that “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

⁵⁰ To be sure, the court must already have an independent basis for exercising its jurisdiction in order to issue relief under the All Writs Act. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (“Because the All Writs Act does not confer jurisdiction on the federal courts, . . . it cannot confer the original jurisdiction required to support removal under § 1441.”). In this case, Defendants challenged the Court’s jurisdiction in their Motion to

protect against Defendants' failure to Take Care, *see* U.S. Const. Art. II, § 3, that the laws relating to the immigration court system be faithfully executed, and to enjoin Defendants' implementation of policies that subvert the ability of the immigration courts to fully and fairly adjudicate cases and, as a result, deprive Plaintiffs a fair forum in which to fulfill their organizational missions. In their Complaint, Plaintiffs seek injunctive relief prohibiting Defendants from implementing certain policies that undermine fundamental fairness and requiring Defendants to take specific corrective actions to ameliorate and mitigate the dysfunctionality of the immigration court system that has resulted in a failure of the system to provide impartial adjudication. Complaint at p. 62. If the Court grants such relief, Plaintiffs will be able to fulfill their organizational missions to represent individuals in a fair and impartial system of justice, as federal law requires.

If Defendants are permitted to allow COVID-19 to spread within and throughout the immigration court system and ICE detention facilities, and then outward into the cities, states, and nation at large, Plaintiffs' lawsuit could become functionally irrelevant. An immigration court system that is a viral vector of a disease for which there is no immunity or vaccine, and which can cause long-lasting illness and death, cannot meaningfully become a fair adjudication system. Under the Defendants current *modus operandi*, deadlines for immigration filings remain in place (filings that, again, often must happen in person, at courthouses), so people will continue to congregate in cramped courthouse spaces, increasing exponentially the transmission of the disease. Pro se respondents will continue to appear in person because they have no notice of the status of their case, placing the system further at risk of the growing COVID-19-related system collapse. Court hearings continue to happen, under penalty of deportation, against the wishes of

Dismiss, filed on March 20, 2020. *See* ECF 24. As noted above, however, *see supra* n.3, “[u]ntil [the court’s] judgment declining jurisdiction should be announced, [the court has] authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition.” *Shipp*, 203 U.S. at 573. The Court therefore has jurisdiction to consider this motion and issue the requested relief, unless and until it orders otherwise.

counsel and respondents whose lives are endangered. So long as the courts continue to adjudicate cases and decline to extend important deadlines, everyone in the system is put at risk. Plaintiffs’ staff, attorneys, and volunteers, as well as respondents in immigration court proceedings, will be faced with life-threatening illnesses and possibly death. Those fortunate enough to avoid contracting and spreading COVID-19—because they chose not to expose themselves in the immigration courts—will almost certainly be ordered deported.

Importantly, the “jurisdiction” to be aided under the Act is flexibly understood—thus, courts may enjoin acts that have the “practical effect” of frustrating or threatening a court’s power to achieve the ends of justice. *Klay v. United Healthgrp., Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004) (internal quotation marks omitted); *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (injunction aids the court’s jurisdiction if it operates to “curb conduct which threatened improperly to impede or defeat” the power of the court).

Moreover, an issuing court need not consider the merits of an underlying action when issuing an All Writs Act injunction, *Makekau v. State*, 943 F.3d 1200, 1204 (9th Cir. 2019), and the traditional test for issuing an injunction does not apply, *Klay*, 376 F.3d at 1100 (so holding); *In re Baldwin-United Corp.*, 770 F.2d at 338 (holding that “injunctions issued under the authority of the All-Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65” and therefore such an injunction need “not comply with the [Rule’s] requirements”); *see also Flores v. Barr*, 407 F. Supp. 3d 909, 929 n.16 (C.D. Cal. 2019) (“The Ninth Circuit does not appear to require courts to examine the traditional requirements for obtaining injunctive relief in order to issue such relief under the All Writs Act.” (citing *M&P Invs.*, 46 F. App’x at 878)). “Courts normally exercise their jurisdiction . . . in order to protect the legal rights of the parties.” *United States v. New York Tel. Co.*, 434 U.S. 159, 1725 n.23 (1977).

B. The Emergency Order is Consistent with the Usages and Principles of Law.

Plaintiffs’ requested relief is equitable in nature and fashioned around common court practices and sound principles of law. The All Writs Act permits the issuance of relief that is “agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). The Supreme Court has explained that courts should “fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.” *Harris v. Nelson*, 394 U.S. 286, 299 (1969). Like the Federal and State Courts which have extended deadlines, broadly continued hearings, and, for those who so desire, provided meaningful and realistic alternatives to in-person appearances, filings, and preparation consistent with due process because of the COVID-19 pandemic, the emergency order here would implement similar temporary practices.

C. An Immediate and Temporary Emergency Order Will Provide Relief.

The pandemic that plagues the United States, and that the Defendants have further allowed to spread within the immigration courts, will cause harm and death *right now* unless an immediate order is issued, yet the nature of a pandemic also means the order can be temporary because the danger abates over time. The All Writs Act leaves to the sound discretion of the court the scope of the relief and instructs the court to “avail itself of [the Act] when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.” *New York Tel. Co.*, 434 U.S. at 172–73 (internal quotation marks omitted). Under the All Writs Act, the Court is “empower[ed] to fashion extraordinary remedies when the need arises.” *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985).⁵¹ Here, an extraordinary event is taking place—one without contemporary precedent—and the Defendants have

⁵¹ The conduct enjoined need not arise out of the allegedly unlawful conduct forming the basis of the claims in the underlying complaint. As discussed in more detail below, the Ninth Circuit recently has explained that an All Writs Act injunction is appropriate where there is simply a “relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint.” *Al Otro Lado v. Wolf*, -- F.3d --, 2020 WL 1059682, at *4 n.6 (9th Cir. Mar. 5, 2020) (injunction of third-country transit ban necessary to preserve the district court’s jurisdiction over the plaintiffs’ underlying metering claims).

squandered precious time aggravating the situation. In a pandemic, time is the one thing that cannot be squandered. Accordingly, the order here should be immediate and temporary.

III. REMEDY

Immediate and irreparable threats to the ongoing exercise of this Court's jurisdiction resulting from Defendants' failure to protect the immigration court system from the COVID-19 pandemic requires immediate, temporary relief from this Court.

A. Scope of Remedy

Plaintiffs therefore respectfully request that the Court order Defendants as follows:

- (1) Defendants should be enjoined from compelling any respondent or respondent's counsel to appear in person for any reason at any U.S. immigration court, and from requiring any hearing to go forward without the consent of the respondent or their counsel;
- (2) Defendants should be enjoined from invoking the *in absentia* procedures to order a respondent removed if they fail to appear in any immigration court because of their fear of contagion or because a public health order exists cautioning against congregation or public movement;
- (3) Defendants should be required to toll all immigration court deadlines, including the deadline for appeals to the BIA, and grant continuances where requested by respondent or respondent's counsel, without any negative impact to a respondent's asylum clock used to calculate eligibility for work authorization;
- (4) Defendants should be required to waive their original signature requirement on filings, and waive their hard-copy filing requirements where electronic filing is not operational;
- (5) Defendants should be enjoined from deeming abandoned any petition or application for immigration relief or deeming any petition or application as

untimely that was or is not otherwise timely filed during the national emergency;
and

- (6) Defendants should be enjoined from holding any attorney in contempt for failing to appear in person at a proceeding because of their fear of contagion or because a public health order exists cautioning against congregation or public movement.

B. Duration of Remedy

The circumstances here warrant immediate issuance of a temporary restraining order for a period of 28 days, or until the National Emergency is rescinded, whichever happens first. *See* Fed. R. Civ. P. 65(b)(1). *But see FTC v. Ames. for Fin. Reform*, 720 F. App'x 380, 383 (9th Cir. 2017) (authority afforded under the All Writs Act is broader than that afforded under Rule 65); *Yielding*, 657 F.3d at 727 (“[I]njunctive relief under the All Writs Act need not rigidly comply with Rule 65’s prescriptions so long as the injunction is ‘specific and definite enough to apprise those within its scope of the conduct that is being proscribed.’” (quoting *In re Baldwin-United Corp.*, 770 F.2d at 338)).

CONCLUSION

Plaintiffs have demonstrated that an immediate and temporary order from this Court is necessary and appropriate to protect or preserve the ongoing exercise of this Court’s jurisdiction in these proceedings. 28 U.S.C. § 1651(a). Accordingly, they respectfully request that the Court grant this emergency motion and issue an emergency order and provide any other relief that the Court deems just and proper.

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