UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NEW JERSEY CHAPTER, on behalf of its members; MICHAEL DIRAIMONDO; BRIAN O'NEILL; and ELIZABETH TRINIDAD, *Plaintiffs*, v. EXECUTIVE OFFICE OF IMMIGRATION REVIEW; WILLIAM BARR, in his official capacity as Attorney General of the United States, JAMES MCHENRY, in his official capacity as Director of the Executive office for Immigration Review and DAVID CHENG, in his official capacity as Assistant Chief Immigration Judge for the Newark Immigration Court, *Defendants*	HON. JOHN MICHAEL VASQUEZ *Civil Action No.* 20-9748 (JMV)

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

The defendants Executive Office of Immigration Review ("EOIR"), William Barr, Attorney General of the United States, James McHenry, Director of EOIR, and David Cheng, Assistant Chief Immigration Judge of the Newark Immigration Court respectfully submit this memorandum of law in opposition to the plaintiffs' motion for a preliminary injunction.

PRELIMINARY STATEMENT

The plaintiffs — three individual attorneys and the American Immigration Lawyers Association, New Jersey Chapter ("NJ-AILA") — seek to enjoin immigration judges from holding "in-person" hearings at the Newark Immigration Court. Specifically, on the basis of the COVID-19 global pandemic, the plaintiffs seek a preliminary injunction enjoining for an unspecified period of time any "compelled in-person proceedings" at the Newark Immigration Court on the non-detained docket.

For all of the reasons that follow, this Court should deny the plaintiffs' motion for a preliminary injunction because plaintiffs cannot meet the high standard for the extraordinary relief that they seek here. First, the allegations in plaintiffs' motion regarding the current status of immigration proceedings at the Newark Immigration Court are simply not true. Plaintiffs incorrectly claim that the Newark Immigration Court does not allow any option for attorneys to appear by videoconference. But even before the pandemic, EOIR offered videoconferencing for non-detained hearings through EOIR's video teleconferencing ("VTC") proprietary software, which allows attorneys and/or their clients to sit in an empty courtroom and connect to the necessary participants for their hearings. EOIR has encouraged increased use of VTC

since the COVID-19 pandemic.[1] The Complaint and Motion for Preliminary Injunction omit any mention of VTC's availability and claim that EOIR does not allow for videoconferencing.[2] To the extent Plaintiffs seek videoconferencing by Zoom, Skype or other third-party software platform, this is not feasible because such off-the-shelf platforms do not have the necessary features offered by EOIR's proprietary VTC software, including audio transcription (the immigration courts do not have court stenographers to transcribe immigration proceedings) and security features. Moreover, the Newark Immigration Court's computers are not equipped with web cameras to support videoconferencing through these third-party software applications.[3] As such, the VTC terminals, located at the Newark Immigration Court, are the only videoconferencing options available for immigration proceedings. Further, in addition to the in-person and VTC options, immigration attorneys also have the option of appearing by telephone by simply making a motion to do so, even if their clients do not wish to appear by telephone (which is their right). Given the

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[1] In fact, the detained docket has remained open since the COVID-19 pandemic began and has relied exclusively on VTC hearings, and the Newark Immigration Court non-detained docket has similarly encouraged use of VTC and telephonic hearings since its reopening.

[2] *See* ECF No. 1 ¶ 4 (claiming that "the Newark Immigration Court does not provide the option for attorneys or others to appear by videoconference for cases on the non-detained docket."); *id.* ¶ 6 (claiming that "Defendants have provided no explanation for failing to utilize recognized, available videoconference hearing options."); *id.* (Prayer for Relief (d) seeking to compel Defendants to provide attorneys with the option to appear for hearings by videoconference).

[3] The Newark Immigration Court has never used these other third-party software applications to conduct any immigration proceedings and is unable to do so for logistical and cost reasons. Declaration of Assistant Chief Immigration Judge David Cheng ("Cheng Decl.") at ¶¶ 50, 62.

limitations on use of the third-party software platforms for immigration proceedings, all or most immigration hearings at the Newark Immigration Court would be effectively stayed if the Court ordered the relief plaintiffs seek here.

Further, EOIR recognizes the seriousness of the COVID-19 pandemic and has implemented policies, practices, and guidance through EOIR's Office of the Director to mitigate the risks presented by COVID-19 to those within EOIR's space while ensuring that critical functions of the immigration court continue. This includes, but is not limited to, suspending hearings on the non-detained docket for several months while allowing for electronic filings (which were generally not available for immigration proceedings), and, once hearings resumed, promoting practices that reduce the need for in-person hearings, while maximizing telephonic and VTC options, promoting proper social distancing, hygiene and other appropriate public health measures to ensure the safety of those entering EOIR space. Cheng Decl. ¶¶ 19, 33, 35

As a threshold matter, this Court lacks jurisdiction over this action pursuant to a number of the jurisdiction-limiting provisions of the Immigration and Nationality Act ("INA"), specifically, 8 U.S.C. §§ 1252(a)(2), (a)(5), (b)(9), (g), and (f)(1). Separately, the individual plaintiffs' claims are moot because they do not have hearings scheduled until 2021. For similar reasons, all the plaintiffs, including NJ-AILA, lack standing to advance their claims. Independent of the jurisdictional impediments, the plaintiffs' claims lack merit, and they cannot demonstrate a likelihood of success on either their claims for violations of Fifth Amendment Due Process or the Administrative Procedures Act. As to the other factors for preliminary injunction, the plaintiffs

cannot demonstrate irreparable harm or that the balance of equities and public interest tip in their favor. Accordingly, the Court should deny the plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. This Action

The plaintiffs are three individual immigration lawyers, Michael DiRaimondo, Brian O'Neill and Elizabeth Trindad and a professional association of immigration attorneys, NJ-AILA, on behalf of its members. Compl. (ECF No. 1), at ¶ 7. NJ-AILA describes itself as an organization that provides continuing legal education, information, professional services and expertise and has over 400 members, many of whom regularly practice in the Newark Immigration Court. *Id.* Plaintiffs commenced this action on July 29, 2020, in light of the COVID-19 pandemic, to seek a suspension of "in-person" hearings at the Newark Immigration Court's non-detained docket. They bring two claims: (1) a Fifth Amendment substantive due process claim under the state-created danger theory, and (2) an Administrative Procedure Act ("APA") claim. *See id.* ¶¶ 1-5, 60-70. The plaintiffs now seek a preliminary injunction enjoining immigration judges from compelling appearances at the Newark Immigration Court for an unspecified period of time due to the COVID-19 pandemic.[4] *See id.*, at p. 30

[4] Three lawsuits filed in the District of Columbia, Southern District of New York and District of Oregon, respectively, sought similar relief in light of COVID-19. *See National Immigration Project of the National Lawyers Guild v. EOIR ("NIPNLG")*, No. 20-cv-852 (D.D.C., April 28, 2020); *Ali, et al., Barr, et al.*, No. 20 Civ. 3337 (S.D.N.Y., June 3, 2020); *LAS Americas Immigrant Advocacy Center v. Trump, et al.*, 19-cv-2051 (D. Ore., April 2, 2020). NIPNLG was filed on March 30, 2020, alleging, *inter alia*, that EOIR had failed to enact nationwide policies to address COVID-19 in immigration

(Prayer for Relief). The Complaint also seeks to have this Court compel Defendants to provide attorneys with the option to appear for hearings at the Newark Immigration Court by videoconference. *Id*. (Prayer for Relief (d)).

II. The Executive Office for Immigration Review and its Response to COVID-19

A. The Immigration Court Process

The Executive Office for Immigration Review ("EOIR"), which is housed within the Department of Justice, plays a critical role in adjudicating the inadmissibility or removability of hundreds of thousands of aliens alleged to be in the United States in

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courts, and that EOIR's existing policies (which differ by locality) violate certain statutory and constitutional provisions. The plaintiffs in that action sought an order, among other things, suspending in-person immigration hearings nationwide, permitting continuances as of right due to COVID-19, and directing EOIR to promulgate a variety of nationwide procedures. On April 28, 2020, the district court denied the plaintiffs' request for a temporary restraining order. *See National Immigration Project of the National Lawyers Guild v. EOIR*, No. 20-cv-852 (CJN), --- F. Supp. 3d ----. 2020 WL 2026971 (D.D.C. Apr. 28, 2020).

In *Ali*, plaintiffs sought to enjoin the New York Immigration Courts from enforcing filing deadlines, or taking adverse actions in those proceedings based on litigants' failure to comply with such deadlines until 45 days after all stay-at-home and social distancing orders by New York State and New York City are lifted. On June 3, 2020, the motion was denied. *Ali,* No. 20-cv-3337 (NRB), --- F. Supp. 3d ---, 2020 WL 2986692 (S.D.N.Y. June 3, 2020).

In *Las Americas*, plaintiffs sought to enjoin immigration courts nationwide for the duration of the COVID-19 pandemic, or for at least 28 days, from compelling any alien respondent or counsel from appearing in immigration court, or from requiring any hearing from going forward without respondent's or counsel's consent; enjoining the courts from entering *in absentia* removal orders and certain other procedural actions by the Court while also seeking an order requiring the immigration courts to toll all court deadlines, including appeals, and to grant all continuances when requested. On April 2, 2020, the plaintiffs' motion was denied. *Las Americas Immigrant Advocacy Center v. Trump*, No. 19-cv-2051 (IM), --- F. Supp. 3d ---, 2020 WL 1671584 (D. Ore. April 2, 2020).

violation of the immigration laws as well as their applications for relief and protection from removal. EOIR, through its 69 U.S. Immigration Courts, is responsible for adjudicating immigration cases brought pursuant to the Immigration and Nationality Act ("INA"), Title 8 United States Code, and its implementing regulations. Immigration court proceedings begin when the Department of Homeland Security ("DHS") charges an alien with being in the United States in violation of the immigration laws. *See* Cheng Decl., at ¶ 3.

The Newark Immigration Court is a non-detained court. There are 13 Immigration Judges ("IJs") assigned to the court who preside over removal proceedings, withholding-only proceedings, credible fear and reasonable fear reviews, as well as other types of proceedings specified under various provisions of the Immigration and Nationality Act ("INA") and its implementing regulations. The most common type of case adjudicated by IJs presiding over the non-detained docket are removal proceedings held pursuant to INA § 240, 8 U.S.C. § 1229a. As of August 24, 2020, Newark has a pending caseload of approximately 67,500 removal cases on the non-detained docket. *Id.*, ¶ 7.

Removal proceedings begin when DHS issues a Notice to Appear ("NTA") against an alien, which is the charging document used to commence removal proceedings, and files that charging document with the appropriate immigration court. *See* 8 C.F.R. §§ 287.3(b); 1239.1(a); *see also* Cheng Decl., ¶ 8.

During removal proceedings, an immigration judge will first determine "removability", *i.e.*, whether the alien, referred to as the "respondent," is legally removable as charged by DHS in the NTA. Cheng Decl. ¶ 9 (*citing* 8 U.S.C. § 1229a;

8 C.F.R. § 1240.1–15). If the respondent is not removable as charged, the immigration judge may terminate removal proceedings. *Id.* If the respondent is removable, the immigration judge will then determine whether the respondent is eligible for relief or protection from removal. *Id.* At the proceedings, a DHS attorney from U.S. Immigration and Customs Enforcement ("ICE") represents the government. The alien may be represented by counsel at no expense to the government. 8 U.S.C. § 1229a(b)(3).

There are generally two types of hearings in removal proceedings: master calendar hearings and merits hearings. Master calendar hearings are hearings where an IJ will handle preliminary matters. *See* Immigration Court Practice Manual ("ICPM"), attached hereto as Exhibit 1, at Ch. 4.15 (2016). At the initial master calendar hearing, the IJ will provide an explanation of the respondent's rights and responsibilities in removal proceedings (through an interpreter if necessary), advise the respondent of his or her opportunity to obtain counsel at no expense to the government and provide a list of pro bono legal service providers to unrepresented respondents, explain the charges and allegations in the NTA, and address other preliminary matters. *See* 8 C.F.R. § 1240.10(a); Ex. 1, ICPM at Ch. 4.15. The IJ may also take pleadings, determine removability, and ascertain apparent eligibility for relief or protection provided for by law. *Id.* At the conclusion of the initial master calendar hearing, the IJ will ordinarily continue the case for a further hearing. *See* Ex. 1, ICPM at Ch. 4.15; *See* Cheng Decl. at ¶ 10.

Once the case is ready, it will proceed to a merits hearing (also known as an individual hearing), during which the IJ will conduct a hearing (including taking

testimony) on any application for relief or protection from removal. *See* 8 U.S.C. § 1229a(b)(1), (4); *see also* Ex. 1, ICPM at Ch. 4.16. At the conclusion of the merits hearing, the IJ will render an oral or written decision and enter an order of removal or an order granting relief or protection from removal. 8 U.S.C. § 1229a(c)(1), 8 C.F.R. § 1240.12. Either DHS or the respondent may appeal the IJ's decision to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. § 1003.1(b). After exhaustion of any appeal with the BIA, a respondent may also file a petition for review of the administratively final removal order with the appropriate circuit court of appeals. 8 U.S.C. § 1252(b)(9); *see* Cheng Decl. at ¶ 11.

IJs have independent discretion to regulate the course of removal proceedings, *see* 8 C.F.R. § 1240.1(c), so long as they do so in accordance with the INA, the regulations, and any applicable BIA and Attorney General precedent or federal case law. Cheng Decl. at ¶ 12. During the course of removal proceedings, IJs have broad authority to set filing deadlines for submissions necessary to the adjudication of the case, including for example, applications for relief, motions, responses to motions, briefs, pre-trial statements, exhibits (including evidentiary submissions), and witness lists. *See* Ex. 1, ICPM at Ch. 3.1(b). Similarly, IJs have authority to continue a hearing for "good cause shown." 8 C.F.R. § 1003.29; *see also Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018) ("continuances are a legitimate and appropriate case-management tool for immigration judges . . . . Yet the regulation authorizing continuances, 8 C.F.R. § 1003.29, limits their use by imposing a good-cause standard."). Whether good cause exists depends on the specific facts of each case. IJs

also have authority to *sua sponte* adjourn cases. 8 C.F.R. § 1240.6; Cheng Decl. at ¶ ¶ 13-14.

In regulating the course of removal proceedings and deciding individual cases before them, IJs "shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [INA] and regulations that it is necessary and appropriate for the disposition of such cases." 8 C.F.R. § 1003.10(b). Only the BIA, when adjudicating an appeal from a decision of an IJ, may direct the result of an adjudication assigned to an IJ. *See* 8 C.F.R. § 1003.9 (stating that "the Chief Immigration Judge shall have no authority to direct the result of an adjudication assigned to another immigration judge"); *compare* 8 C.F.R. § 1003.1(b)(3), (d)(1) (authority of the BIA); *see* Cheng Decl. at ¶ 15.

B. Newark Immigration Courts' Response to the COVID-19 Pandemic

Like many courts across the nation, since the outset of the COVID-19 pandemic, the immigration courts have been grappling "with how to continue to achieve [EOIR's] mission of fairly, efficiently, and effectively adjudicating immigration matters while also protecting everyone involved in matters before the immigration courts, including aliens, witnesses, family members, practitioners and EOIR employees." Cheng Decl. ¶ 5.

Since the onset of the pandemic, the Office of Chief Immigration Judge ("OCIJ") has been actively monitoring the situation and working to implement policies, practices, and guidance set by EOIR's Office of the Director in conjunction with OCIJ leadership to ensure that critical functions continue while working to mitigate the

risks presented by COVID-19 to those within EOIR space.[5] *Id.* at ¶ 16. Those policies, practices, and guidance were informed by multiple sources, including the Department of Justice ("DOJ"), the Office of Management and Budget ("OMB"), the Office of Personnel Management ("OPM"), the Centers for Disease Control and Prevention ("CDC"), the General Services Administration ("GSA"), and the operations of other court systems. *Id.* at ¶ 17. EOIR has not adopted a "one size fits all" policy for every immigration court, though it has issued generally-applicable guidance regarding access to EOIR space, the promotion of practices that reduce the need for hearings, and the maximization of telephonic and VTC means through which to hold hearings. *See* Ex. 2, EOIR, Policy Memorandum ("PM") 20-10: Immigration Court Practices During the Declared National Emergency Related to the COVID-19 Outbreak (Mar. 18, 2020); *see also* Ex. 3 EOIR, PM 20-13: Updating Practices Relating to the COVID-19 Outbreak (June 11, 2020). The following chronology sets forth EOIR's efforts since March:

- On March 18, 2020, in response to the COVID-19 pandemic, EOIR postponed all removal hearings in non-detained cases throughout the country through April 10, 2020. In a series of subsequent announcements, EOIR further postponed all removal hearings in non-detained cases until June 15, 2020, when the Honolulu Immigration Court resumed hearing non-detained cases. *See* Cheng Decl. at ¶ 19. EOIR maintains an operational status website, and notice of all postponements are posted to the website as well as to EOIR's social media pages. EOIR Operational Status During Coronavirus Pandemic.[6]

[5] The Government refers the Court to the Cheng Declaration for a full recitation of the measures EOIR has taken to address COVID-19 and for further background information.

[6] https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic.

- On April 1, 2020, to facilitate filings while minimizing the risk of COVID-19, EOIR began accepting email filings at the immigration courts, which had not been generally available. *See generally*, EOIR, Filing by Email – Immigration Courts. [7] Two days later, EOIR issued a Policy Memorandum explaining that it would allow electronic signatures on filings. *See* Ex. 4, EOIR, PM 20-11: Filings and Signatures (Apr. 3, 2020); Cheng Decl., ¶ 20.

- On June 11, 2020, EOIR issued a Policy Memorandum updating its guidance related to COVID-19. *See* Ex. 3, EOIR, PM 20-13: EOIR Practices Related to the COVID-19 Outbreak. In it, EOIR's Director explained that "[a]s most of the country, including the federal government, moves toward restarting activities limited by COVID-19, EOIR, too, is moving toward reengaging its operations that have been postponed, including the resumption of non-detained hearings." *Id*. The Director also issued updated guidance regarding access to EOIR space, the promotion of practices that reduce the need for hearings, and the maximization of telephonic and VTC hearings. *Id*.

- On June 19, 2020, in the interest of public health and safety, Judge Cheng issued a Standing Order regarding telephonic appearances for master calendar and merits hearings. Ex. 5, Standing Order, dated June 19, 2020. The Standing Order provides that all master calendar hearings for represented respondents will be conducted telephonically without the need for a motion for telephonic appearance. It further waives the presence of all represented respondents for master calendar hearings in accordance with 8 C.F.R. § 1003.25(a). *See* Ex. 5, June 19 Standing Order; Cheng Decl. at ¶ 23.

- The Standing Order further provides that an individual IJ, in his or her discretion, and upon consent of the respondent, may conduct a telephonic merits hearing in accordance with 8 C.F.R. § 1003.25(a). For any merits hearing, a timely motion for telephonic appearance is required in advance of the hearing and must include a sworn affidavit or declaration from the respondent indicating that he or she has been advised of the right to proceed in person and waives that right. *See* 8 C.F.R. § 1003.25(c). *See* Ex. 5, June 19 Standing Order; Cheng Decl. at ¶ 25.

- Under the Standing Order, parties appearing telephonically waive the right to object to the admissibility of any document on the *sole* basis that they are unable to examine the document. This provision applies to respondents and DHS alike. This provision is meant to foreclose objections to filings served during a telephonic hearing on the *sole* basis

[7] https://www. justice.gov/eoir/filing-email

that the document is unavailable for examination. Parties appearing telephonically may raise any other objection, including an objection that filings served during a telephonic hearing are untimely. The Standing Order does not require parties to generally waive any right to object to evidence. *See* Ex. 5, June 19 Standing Order; Cheng Decl. at ¶ 26.

- The Standing Order also provides that, to ensure the quality of the record, parties appearing telephonically must be in a quiet private location. But, the Standing Order does not require that a respondent and his or her counsel be in the same physical location. To the contrary, the Standing Order warns that scheduling simultaneous appearances in multiple locations does not excuse a failure to appear. *See* Ex 5, June 19 Standing Order, at General Provisions, ¶ 3; Cheng Decl. at ¶ 28.

- On July 8, 2020, EOIR announced that it would resume non-detained master calendar and merits hearings at the Newark Immigration Court, as well as at the Baltimore and Detroit Immigration Courts on July 13, 2020.[8] *See* EOIR, Notice: EOIR to Resume Hearings in Non-Detained Cases at the Baltimore, Detroit, and Newark Immigration Courts; Cheng Decl., ¶ 31.[9] In so doing, the Newark Immigration Court, along with the Baltimore and Detroit Immigration Courts, joined the Honolulu Immigration Court, which reopened on June 15, 2020; the Boston, Buffalo, Hartford, Las Vegas, and New Orleans Immigration Courts, which reopened on June 29, 2020; [10] and the Chicago, Cleveland, Philadelphia, and Saipan Immigration Courts, which reopened on July 6, 2020.[11] *See* Cheng Decl., ¶ 31. Since the Newark Immigration Court has resumed hearing in non-detained cases, the Arlington and Omaha Immigration Courts have also resumed hearing non-detained cases. *See id*.

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[8] On June 24, 2020, EOIR had announced on Twitter that the Newark Immigration court would resume hearing in non-detained cases on July 13, 2020. Cheng Decl., ¶ 30.

[9] https://www.justice.gov/eoir/page/file/1292881/download

[10] Although the Dallas Immigration Court also resumed hearing non-detained cases on June 29, 2020, it subsequently closed on July 6, 2020, and all non-detained cases are currently postponed through September 4, 2020.

[11] https://www.justice.gov/eoir/page/file/1292881/download

EOIR COVID-19 Measures Taken for Resumed Hearings

In its announcement that the Newark Immigration Court would resume hearing non-detained cases on July 13, 2020, EOIR took measures to protect against the spread of COVID-19 in its space. For example:

- EOIR advised that all persons working in or visiting the common spaces of the immigration courts – including waiting rooms, corridors, courtrooms, and other spaces generally open to the public – are required to wear face coverings and should become familiar with the CDC's guidance about COVID-19 posted at https://www.cdc.gov/coronavirus/2019-ncov/index.html. EOIR also noted that other requirements may apply and urged persons with business before the immigration court to check the court's webpage prior to arrival. Cheng Decl., ¶ 32.

- EOIR also directed persons working in or visiting EOIR spaces to review EOIR's Public Heath Notice, posted at https://www.justice.gov/eoir/public-health-notice. *See* Ex. 6. The Public Health Notice advises that: (1) face coverings are required to enter and remain in EOIR space, and other building requirements may apply; (2) individuals with symptoms or a diagnosis of COVID-19 should not enter EOIR space, and represented respondents should call their attorney or representative, while attorneys, representatives, and unrepresented respondents should call the immigration court for further instructions; (3) individuals should practice social distancing, staying six feet (or two arm lengths) away from others; and (4) individuals should practice proper hygiene by washing hands with soap and water or using alcohol-based sanitizer. *Id.*; Cheng Decl., ¶ 33.

- Before resuming hearings in non-detained cases on July 13, 2020, the Newark Immigration Court posted additional guidance on its website to promote the health and safety of respondents, practitioners, and EOIR employees, as well as the efficient operation of the court.[12] *See* Ex. 7, Newark Immigration Court website. In addition to reiterating the guidance in EOIR's Public Health Notice regarding face coverings, a diagnosis or symptoms of COVID-19, social distancing, and proper hygiene, the Newark Immigration Court's website advises that waiting times to enter the building and EOIR space may be significantly longer than usual and suggested that persons with business before the court allow extra time. *Id.* The website also advises that elevator wait times

[12] *See* https://www.justice.gov/eoir/newark-immigration-court.

may be significantly longer than usual in order to comply with social distancing requirements. *Id.* The website further advises that staff or signs may direct individuals to a seat and not to switch seats if instructed to sit in a particular seat. *Id.* Lastly, the website advises that the court may limit entry and not to bring individuals to EOIR space unless they are required to be present for a hearing. *Id.*; *see* Cheng Decl. at ¶ 35.

- Before resuming hearings in non-detained cases, IJs at the Newark Immigration Court were reminded, as they were at the outset of the pandemic, of the well-established practices and procedures that could help minimize the risk of COVID-19, such as waiving appearances, allowing telephonic appearances, granting continuances, limiting physical presence in courtrooms, issuing standing orders, encouraging the parties to resolve cases through written filings, and conducting hearings by telephone and VTC. *See* Ex. 2, EOIR, PM 20-13; *see also* Ex. 1 EOIR PM 20-10. In particular, IJs at the Newark Immigration Court were specifically encouraged to use alternative hearing mediums — such as hearings by telephone or VTC — "to the maximum extent practicable in accordance with the law" to further minimize in-person interaction and reduce the risk of the spread of COVID-19. *See id.*; *see also* 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c); Cheng Decl., ¶¶ 36-37

EOIR's Video-teleconferencing Software (VTC)

Historically, removal proceedings were conducted in-person. However, EOIR has used VTC since the 1990s, and its use was expressly authorized by statute in 1996. *See* 8 U.S.C. § 1229a(b)(2)(A)(iii) ("The proceeding may take place . . . through video conference."). An individual's consent is not necessary to conduct a hearing by VTC. *Id.* In that regard, VTC hearings are treated similarly to in-person hearings (as compared to telephonic hearings, to which an individual must consent). *See* 8 U.S.C. § 1229a(b)(2)(B) ("An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the [respondent] after the [respondent] has been advised of the right to proceed in person or through video conference."); Cheng Decl., ¶ 39.

All courtrooms at the Newark Immigration Court have secure VTC terminals with proprietary technology installed and maintained by EOIR's Office of Information Technology ("OIT"). These VTC terminals are integrated with EOIR's Digital Audio Recording ("DAR") system, a recording tool that utilizes multiple microphones throughout each courtroom to record the respondent, interpreter, practitioners, witnesses, and EOIR employees. EOIR's VTC system is distinct from commercial videoconferencing software programs like Zoom, Skype and Teams. Because EOIR does not employ court reporters, the DAR system allows for the recording and transcription of immigration court hearings. VTC terminals are also available at the Elizabeth Detention Center, as well as at the Bergen, Hudson, and Essex County Jails. Detainees at these locations and their representatives may participate in VTC hearings using these VTC terminals. Parties who are unable go to location with a secure VTC terminal, such as the Newark Immigration Court, or a detention facility maintained, leased, or operated by DHS, can participate in an immigration hearing by telephone. A party who is unable or unwilling to go to a location with a secure VTC terminal or participate in an immigration hearing by telephone must appear in person. *See* Cheng Decl., ¶¶ 40-43

Below are additional facts regarding VTC hearings:

- VTC is frequently used for detained hearings. At the Newark Immigration Court, however, VTC is also used for non-detained hearings. Before the onset of the pandemic, non-detained cases were commonly heard by VTC. In those cases, the parties, including the non-detained respondent, appeared in person at the Newark Immigration Court, while an IJ, often from the New York Immigration Court, conducted the hearing by VTC from his or her home court. The Newark Immigration Court has expanded its use of VTC since the onset of the pandemic. Since resuming non-detained hearings on July 13, 2020, the Newark

Immigration Court has encouraged the use of VTC to the maximum extent practicable in accordance with the law, and in accordance with PM 20-13. Cheng Decl., at ¶ 44; *see* 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c).

- When conducting hearings by telephone or VTC, respondents, practitioners, witnesses, and EOIR employees do not need to be present in the same physical location. This promotes social distancing and reduces the risk of the spread of COVID-19. At the Newark Immigration Court, there are currently two empty courtrooms available for VTC hearings. Since resuming non-detained hearings on July 13, 2020, the IJ and the interpreter have been located in one VTC courtroom, while the respondent and his or her attorney or representative have been located in another VTC courtroom. If the respondent and his or her attorney or representative do not wish to be in the same courtroom, the respondent's attorney or representative may participate in the hearing by telephone. DHS attorneys generally appear by telephone after filing a motion for telephonic appearance, and the IJ typically grants the motion. *See* Cheng Decl., ¶ 45. As an alternative to VTC or telephonic hearings, the parties may appear in-person for a hearing before IJ, which generally requires all participants to be in the same room. However, EOIR has no policy requiring any attorney or representative to appear in-person in any case. The method of an attorney or representative's appearance is subject to the discretion of the IJ. Cheng Decl., ¶ 45.

- If the respondent and his or her attorney or representative arrive at the Newark Immigration Court together, they can proceed directly to an empty courtroom for their VTC hearing, without having to wait in the waiting area. If the respondent has to wait for his or her attorney or representative, or vice versa, they are advised by security personnel to wait outside to promote social distancing and reduce the risk of exposure to COVID-19. Cheng Decl., at ¶ 46.

- Currently, no one other than the respondent and his or her attorney or representative is permitted to enter the courtroom during a VTC hearing. The only exception might be if a witness is testifying in the proceeding. Witnesses are sequestered until it is time to present their testimony. They then give their testimony in the same VTC courtroom as the respondent and his or her attorney or representative. Cheng Decl. at ¶ 47. By contrast, during an in-person hearing, which resumed on July 13, 2020, all or most of the participants, including the respondents, practitioners, and EOIR employees, appear together in one courtroom. *Id*. at ¶ 48. Although in-person hearings resumed on July 13, 2020, the IJs at Newark Immigration Court are encouraged to use alternative hearing mediums, such as VTC or telephone to the "maximum extent

> practicable in accordance with the law" to reduce the risk of exposure to COVID-19. See Ex. 3, EOI PM 20-13; 8 U.S.C. § 1229a(b)(2) ; 8 C.F.R. § 1003.25(c); Cheng Decl., ¶ 48.

EOIR's secure VTC system is the only videoconferencing technology available at the Newark Immigration Court. In addition to the concerns discussed above, which are specific to immigration proceedings, including EOIR's unique DAR system and the confidentiality provisions that govern certain applications for relief and protection from removal, none of the desktop computers at the Newark Immigration Court are currently equipped with web cameras. Asking EOIR to abandon or retrofit its already robust, secure VTC program, in which it has invested heavily over three decades, in favor of commercial videoconferencing software, such as Zoom, Skype, or Teams, is not a viable alternative. Cheng Decl., ¶¶ 50, 62.

OCIJ continues to monitor the situation at the Newark Immigration Court, including challenges posed by COVID-19, and, in coordination with the court administrator and IJs, will continue to ensure that the court takes appropriate action to ensure that court processes remain accessible to those having business before the court, while attempting to minimize the risk to everyone involved in matters before the Newark Immigration Court, including respondents, practitioners, witnesses, family members and EOIR employees. Cheng Decl. at ¶ 49.

III. The Plaintiffs in this Action

A. Michael DiRaimondo

Plaintiff DiRaimondo alleges that he had hearings scheduled for August 7 and August 24, 2020. *See* DiRaimondo Decl., ECF No. 6-3, at ¶¶ 4-5. DiRaimondo alleges he sought continuances of both hearings because of concerns related to COVID-19.

His request for adjournment of the August 7 hearing was denied because the immigration judge held that the hearing could proceed telephonically. *Id*., ¶ 4. This hearing was ultimately adjourned due to the lack of availability of an interpreter, and there is no indication it is going forward this year. *Id.* DiRaimondo also had a hearing scheduled for August 24, 2020. *Id*., ¶ 5. He filed a motion for continuance and this hearing has now been adjourned to April 7, 2021. *Id*., ¶ 5; Cheng Decl., ¶ 59.

B. Brian O'Neill and Elizabeth Trinidad

O'Neill and Trinidad jointly represent a client who had an immigration hearing scheduled for July 27, 2020. *See* Declaration of Brian O'Neill ("O'Neill Decl."), ECF 6-4, at ¶¶ 14-15 and Declaration of Elizabeth Trinidad, ECF 6-5, at ¶ 31. They filed a motion for continuance on July 10, which was denied because they provided no good cause for the continuance beyond general concerns over the pandemic and no specific facts relating to the alien or to the attorneys. *See* Exhibit A attached to O'Neill Declaration; Cheng Decl., ¶¶ 55, 59. The IJ ordered that the hearing could occur telephonically or by VTC. *Id.* DHS had previously made a motion on July 6 to appear telephonically at the July 27 hearing, which the IJ granted on July 24. *See* Exhibits B & C to O'Neill Decl.

On July 27, O'Neill and Trinidad appeared by phone. Their client was on the phone with Trinidad from a public park. When the IJ attempted to conduct a telephonic hearing, the respondent declined to consent to a telephonic hearing, as is his right under 8 U.S.C. § 1229a(b)(2)(B). Trinidad Decl. at ¶ 36; Cheng Decl., ¶ 55. The IJ then scheduled the non-detained respondent for a VTC hearing on August 3, 2020. *Id.* at ¶ 39; Cheng Decl., ¶55. On August 3, 2020, Plaintiffs O'Neill and

Trinidad appeared by telephone, without the respondent, rather than appear for a VTC hearing at the Newark Immigration Court. The respondent did not appear either for his scheduled VTC hearing nor was he present on the phone. Cheng Decl., ¶ 55; Trinidad Decl., ¶ 48. The IJ then scheduled a telephonic hearing for later that same morning. Cheng Decl., ¶ 48. The respondent did not appear and his counsel provided no explanation for the respondent's failure to appear. *Id.* The IJ accordingly ordered the respondent removed *in absentia*, while also noting that due to the respondent's extensive criminal history, she would have denied the respondent's request for relief from removal as a matter of discretion. *Id.*

O'Neill further alleges he has hearings scheduled on August 13 and August 24, 2020. Both of these hearings have now been adjourned; the August 13 hearing has been adjourned with no date and the August 24 hearing has been adjourned to August 26, 2021. *See* Cheng Decl., ¶ 59.

ARGUMENT

THE PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

The Court should deny the plaintiffs' motion for a preliminary injunction because the plaintiffs have not sustained their high burden to establish that they meet the stringent requirements required for the extraordinary relief that they seek. The plaintiffs have not shown a likelihood of success on the merits. Nor have the plaintiffs shown irreparable harm. Lastly, the balance of equities favors enforcement of the immigration laws and permitting the Government to make policy decisions during the global pandemic.

A. Legal Standard for a Preliminary Injunction

Federal Rule of Civil Procedure 65 governs the issuance of a preliminary injunction. Preliminary injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." *Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir.2002). In order to obtain a preliminary injunction, the moving party must show as a prerequisite: (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured ... if relief is not granted.... [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), as amended (June 26, 2017) (*citing Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974).

The Third Circuit has cautioned that preliminary relief is not appropriate if the relief goes beyond maintaining the status quo *pendent lite*. *See Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994) (requiring that movant show that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the *status quo) (citing Del. River Port Auth.*, 501 F.2d 917, 919-20 (3d Cir. 1974). This is because the primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered. *Id.* at 647. Therefore, "[a] party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Id.* at 653.

Granting plaintiffs' request to enjoin hearings at the Newark Immigration Court would alter the status quo. For the reasons explained below, Petitioner does not meet the high burden required for such extraordinary relief.

B. Plaintiffs Cannot Show a Likelihood of Success Because this Court Lacks Jurisdiction over Plaintiffs' Claims

This Court lacks subject matter jurisdiction over the plaintiffs' claims. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Several of IIRIRA's provisions—as well as provisions of the REAL ID Act of 2005, which refined IIRIRA's judicial review scheme—deprive this Court of jurisdiction over the plaintiffs' claims. Specifically, 8 U.S.C. §§ 1252 (a)(5) and (b)(9) deprive the Court of jurisdiction to review actions taken or proceedings brought to remove aliens from the United States, and channel such challenges to the courts of appeals; and § 1252(g) deprives the Court of jurisdiction to review claims arising from the three discrete actions identified in § 1252(g), including, as relevant here, the decision or action to "adjudicate cases."; and § 1252(a)(2) deprives the Court of jurisdiction to review discretionary decisions made in immigration proceedings.

1. 8 U.S.C. §§ 1252(a)(5) and (b)(9) Channel All Challenges Arising From Removal Proceedings to the Courts of Appeals

To start, 8 U.S.C. § 1252(b)(9) eliminates this Court's jurisdiction over the plaintiffs' claims by channeling all challenges to immigration proceedings (and removal orders) to the courts of appeals:

> With respect to review of an order of removal under subsection (a)(1), . . . [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 under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . by any . . . provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphasis added). Section 1252(b)(9) "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999); *E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 184 (3d Cir. 2020). As the court in *E.O.H.C.* succinctly stated:

> "District courts also lack jurisdiction to review most claims that even relate to removal. To prevent piecemeal litigation, the INA usually requires aliens to bring their claims together. In particular, § 1252(b)(9) provides that if a legal claim "aris[es] from any action taken or proceeding brought to remove an alien," then "[j]udicial review of all questions of law and fact . . . shall be available only in judicial review of a final order" of removal. Because judicial review of a final order of removal is available only in the court of appeals, district courts cannot review these "arising from" claims either.

950 F.3d at 184.

By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2). Section 1252(a)(5) reiterates that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . 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 entered or

> issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, §[§] 1252(a)(5) and [(b)(9)] mean that *any* issue— whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *E.O.H.C.,* 950 F.3d at 186-87 (district court lacks jurisdiction on respondents' claims if "even . . . any part of the process by which their removability will be determined" is implicated) quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." The petition-for-review process before the court of appeals thus ensures that claims that arise from any part of the removal proceedings have a proper forum and "receive their 'day in court.'" *J.E.F.M.*, 837 F.3d at 1031-32.

The plain text of subsections (a)(5) and (b)(9) eliminates this Court's jurisdiction in the present case and channels the plaintiffs' claims to the court of appeals. The

plaintiffs' claims "aris[e] from . . . proceeding[s] brought to remove . . . alien[s] from the United States," 8 U.S.C. § 1252(b)(9), because they challenge certain procedural aspects of removal proceedings (*e.g.*, continuances, telephonic and VTC appearances) and seek procedural changes to those removal proceedings as relief (no in-person appearances and, at least implicitly, some form of different video conferencing as an alternative to VTC). No aspect of the plaintiffs' claims or the relief they seek is separate from removal proceedings in any respect. Their claims therefore "arise from" removal proceedings within the meaning of § 1252(b)(9), and this provision channels the plaintiffs' claims exclusively to the courts of appeals.

The INA's channeling provision also include "challenges to agency policies," *J.E.F.M.*, 837 F.3d at 1035, and any challenge arising from any aspect of the processes or practices that apply to aliens in immigration court. Simply put, the plaintiffs' claims "are bound up in an inextricable part of the administrative process" and can be raised only in a petition for review. *J.E.F.M.*, 837 F.3d at 1033.

The plaintiffs' claims do not require this Court to precisely delineate the outer limits of § 1252(b)(9)'s broad reach—a task the Supreme Court recently declined to undertake in *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018).[13] Instead, the

[13] The plaintiffs incorrectly suggest that *Jennings* undermines the applicability of § 1252(b)(9) to this matter. *See* Pls. Br. at fn. 42. In *Jennings*, the Supreme Court reversed a judgment of the Ninth Circuit holding that aliens subject to mandatory detention have a statutory right to periodic bond hearings during the course of their ongoing removal proceedings. *Jennings*, 138 S. Ct. at 836. Before the Court reached this conclusion, however, a plurality of three justices *sua sponte* considered whether, among other things, § 1252(b)(9) was an obstacle to the Court's jurisdiction. *Id.* at 839-41 (plurality opinion). The plurality declined to delineate the outer limits of § 1252(b)(9) and instead simply noted § 1252(b)(9) did not "present a jurisdictional bar" to the aliens' claims in that case—a case concerning only whether certain aliens were

plaintiffs' claims are squarely covered by the plain text of § 1252(b)(9) because they "aris[e] from" and likewise challenge aspects of "proceeding[s] brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9).

Further, § 1252(b)(9) channels the individual Plaintiffs' claims into the courts of appeals. The plaintiffs challenge how EOIR is conducting immigration proceedings (*i.e.*, by not suspending in-person hearings). Those claims are covered by § 1252(b)(9) and thus are outside this Court's jurisdiction. *J.E.F.M.*, 837 F.3d at 1029, 1033, 1035 (constitutional and statutory "policies-and-practices challenges" must be raised through the PFR process because they 'arise from' removal proceedings"); *Ali,* No. 20-cv-3337 (NRB), 2020 WL 2986692 at *5 (finding that section 1252(b)(9) deprives court of jurisdiction to grant preliminary injunction to stay immigration court filing deadlines"); *NIPNLG,* No. 20-cv-852 (CJN), 2020 WL 2026971 (D.D.C. Apr. 28, 2020) (Section 1259(b)(9)'s jurisdictional bar applies to deprive court of jurisdiction because challenge to immigration court policies arise as a "part of the process by which ... removability will be determined") *quoting Jennings*, 138 S. Ct. at 841; *see also Aguilar*,

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entitled to receive bond hearings during their removal proceedings—because the aliens "[were] not asking for review of an order of removal; they [were] not challenging the decision to detain them in the first place or to seek removal; and they [were] not even challenging any part of the process by which their removability will be determined." *Id*. at 841 (plurality opinion). Unlike the detention challenge at issue in *Jennings*, the plaintiffs here are plainly "challenging [ ] part of the process by which their removability will be determined." Moreover, the plurality in Jennings explained that "the question is not whether detention is an action taken to remove an alien but whether the legal questions in this case arise from such an action. And for the reasons explained above, those legal questions are too remote from the actions taken to fall within the scope of § 1252(b)(9)." *Jennings*, 138 S. Ct. at 841 n.3 (plurality opinion) (emphasis in original). In contrast to the detention claims at issue in *Jennings*, here the "legal questions" inescapably arise from an action taken to remove an alien.

510 F.3d at 18 (right-to-counsel and procedural-due-process claims, like claims involving "difficulties in calling witnesses and in presenting evidence at the removal proceedings," are subject to § 1252(b)(9)); *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048 (N.D. Cal. 2018) ("Petitioners' challenge based on the potential loss of counsel 'arises from' their removal proceedings and can only be raised through the PFR process, as required by § 1252(a)(5) and § 1252(b)(9).").

Section 1252(b)(9) also divests this Court of jurisdiction over NJ-AILA's claims. "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Congress's decision to consolidate review of claims "arising from" removal proceedings, 8 U.S.C. § 1252(b)(9), into review of the final removal order itself bars organizations from challenging practices in removal proceedings on an individual's behalf.

In sum, because the plaintiffs' claims arise directly from the removal process in any respect, §§ 1252(a)(5) and (b)(9) deprive this Court of jurisdiction over the plaintiffs' claims.

2. 8 U.S.C. § 1252(g) Also Bars District Courts from Interfering With Decisions or Actions to Adjudicate Removal Cases

Further, by its plain terms, 8 U.S.C. § 1252(g) also eliminates district court jurisdiction over the plaintiffs' claims. Section 1252(g) provides that, apart from a petition for review in the appropriate court of appeals, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or

action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," "notwithstanding any other provision of law (statutory or nonstatutory)." 8 U.S.C. § 1252(g). This jurisdictional bar on claims that relate to the manner in which EOIR "adjudicate[s] cases" covers claims related to the "prosecution" of any "of the various stages in the deportation process" and is aimed at preventing the type of piecemeal litigation that the plaintiffs have initiated here, challenging certain aspects of immigration-court procedures outside the context of the specific cases where their claims allegedly arise. *See Reno*, 525 U.S. at 483 (Congress enacted § 1252(g) to prevent "deconstruction, fragmentation, and hence prolongation of removal proceedings").

The Supreme Court's decision in *Reno* considered the reach of § 1252(g). 525 U.S. at 482. The Court explained that with respect to the "three discrete actions" identified in the text of § 1252(g)—commencement of proceedings, adjudication of cases, and execution of removal orders—§ 1252(g) strips the district courts of jurisdiction. *Id.* at 482. Those actions, the Supreme Court observed, are committed to the discretion of the Executive, and § 1252(g) was designed to protect that discretion and avoid the "deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at 487.

Thus, by its plain terms, § 1252(g) bars the plaintiffs' request that this Court enjoin the Newark Immigration Court from holding hearings at the Newark Immigration Court, whether by VTC or in-person, as such request would impermissibly enjoin a decision or action to "adjudicate cases." *Id.*

3. The INA Deprives This Court of Jurisdiction to Grant the Plaintiffs' Requested Injunctive Relief

Independent of the above jurisdictional-limiting provisions, 8 U.S.C. § 1252(f)(1) makes plain that this Court lacks jurisdiction to issue the injunctive relief sought by the plaintiffs. Here, the plaintiffs seek broad relief in this action that would apply to and impact all cases on the non-detained docket of the Newark Immigration Court.[14] Specifically, the plaintiffs seek an order enjoining EOIR from requiring in-person appearances at the Newark Immigration Court, presumably either by VTC (because the VTC equipment is located at the Newark Immigration Court) or for an actual in-person hearing. *See* Pls. Br., ECF 6-1, at 14-16 of 54, *see also* Compl. at 30 (Prayer for Relief).

This Court lacks jurisdiction to enter an injunction as requested by the plaintiffs. Specifically, this Court cannot enter a class-wide injunction that would enjoin or restrain the operation of the immigration courts. The text of 8 U.S.C. § 1252(f)(1) makes plain that this Court lacks jurisdiction to issue such injunctive relief:

> Regardless 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 [sections 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

"By its plain terms," § 1252(f)(1) is "a limit on injunctive relief." *Reno*, 525 U.S. at 481-82. This provision "prohibits federal courts from granting class-wide injunctive

[14] There are currently more than 67,500 removal cases pending on the non-detained docket of the Newark Immigration Courts. *See* Cheng Decl. 58.

relief against the operation of [8 U.S.C.] §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Id.* at 481-82. That is, lower courts may issue injunctions with respect to the application of the removal statutes but only against individuals and not on a class-wide basis. *See Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018) ("*Reno* unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the [petitioners'] detention-based claims.").

The injunctive relief plaintiffs seek would effectively alter the removal process set forth by Congress, and would thus "enjoin or restrain the operation of the provisions of [sections 1221-1232]." 8 U.S.C. § 1252(f)(1). The plaintiffs' requested relief would enjoin or restrain provisions of 8 U.S.C. § 1229a (governing how "[a]n immigration judge shall conduct proceedings") and 8 U.S.C. § 1229 (establishing processes within the immigration court), and would do so on a class-wide—not individual—basis.

Immigration judges have independent discretion to regulate the course of removal proceedings, including the broad authority to set filing deadlines, grant a telephone hearing, schedule VTC hearings and to grant a continuance of a hearing for "good cause shown." *See* Cheng Decl. ¶¶ 12-15. NJ-AILA describes itself as having over 400 members, most of whom practice regularly before the Newark Immigration Court. NJ-AILA seeks injunctive relief on behalf of its membership that would, if granted, prohibit immigration judges handling cases on the non-detained docket of the Newark Immigration Court from compelling appearances at in-person or VTC (which require that participants be at the courthouse) hearings at the Newark Immigration Court.

Such an order would impinge on the immigration judges' authority to manage their dockets and on their independent adjudicatory authority. Cheng Decl. ¶¶ 67-69. With such an injunction, the removal statutes cannot operate as written, and thus such an order by this Court would run afoul of § 1252(f)(1)'s prohibition. *See Nken v. Holder*, 556 U.S. 418, 431 (2009) (describing § 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of the removal provisions"); *cf. J.E.F.M.*, 837 F.3d at 1038 ("We recognize that a class remedy arguably might be more efficient than requiring each applicant to file a PFR, but that is not a ground for ignoring the jurisdictional statute."); *Pimentel v. Holder*, 2011 U.S. Dist. LEXIS 42369 (D.N.J., April 18, 2011) (finding that § 1252(f)(1) restricted court's jurisdiction to issue class-wide relief to petitioners' challenge to their detention); *Ali,* No. 20-cv-3337 (NRB), 2020 WL 2986692 at *6 (denying claims of organizational plaintiff finding that section 1252(f)(1) deprives the Court of jurisdiction to issue an injunction that would interfere with the operation of INA provisions").

4. 8 U.S.C. 1252(a)(2)(B)(ii) Limits Jurisdiction to Review Discretionary Decisions in Immigration Proceedings

In addition to the prohibition on injunctive relief, the court cannot order EOIR to conduct immigration hearings using commercial videoconferencing equipment, such as Zoom, Teams, or other third-party software application as opposed to its own proprietary VTC system, as Plaintiffs suggest the Court should order. 8 U.S.C. § 1252(a)(2)(B)(ii) provides that no court shall have jurisdiction to review:

> any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.

VTC is employed at the government's discretion. *See* 8 U.S.C. § 1229a(b)(2)(A) ("The proceeding *may* take place (i) in person, (ii) where agreed to by the parties, in the absence of the alien, (iii) through video conference, or (iv) subject to subparagraph (B), through telephone conference." (emphasis added)). IJs have independent discretion to regulate the course of removal proceedings. *See* 8 C.F.R. § 1240.1(c). In regulating the course of removal proceedings and deciding individual cases before them, IJs "shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [INA] and regulations that it is necessary and appropriate for the disposition of such cases." 8 C.F.R. § 1003.10(b). 8 U.S.C. § 1229a(a)(1) authorizes immigration judges to conduct removal proceedings. The grant of authority in 8 U.S.C. § 1229a(b)(2)(A) to set how an immigration proceeding occurs is a matter committed to the expertise and discretion of the IJ. IJs are designees of the Attorney General and are governed by provisions of law regarding the Attorney General. *See Patel v. Gonzales,* 140 Fed. Appx. 425, 427 (3d Cir. 2005). Accordingly, this Court does not have jurisdiction to review the decision of the IJ to grant or deny a motion for continuance or to set the manner and place for a hearing conducted during removal proceedings. *See id.* (finding that district court did not have jurisdiction to review IJ's decision to deny a continuance).[15]

[15] Moreover, as described in the Cheng Declaration, for a variety of reasons, it is not feasible for the immigration court to provide plaintiffs with the software option of their choice, Zoom, Skype or similar application, because the courtrooms are not equipped for it. As described herein and in the Cheng Declaration, the Newark Immigration Court is equipped with VTC and provides this option to participants. *See* Cheng Decl., ¶¶ 41, 50, 62

C. The Plaintiffs Lack Standing

In addition to the above jurisdictional issues, this Court also lacks jurisdiction over the plaintiffs' claims because the plaintiffs lack standing.

1. General Requirements for Standing

The United States Constitution limits the judicial power of the federal courts to decide cases or controversies. U.S. Const. art. III § 2, cl.1. To establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (*quoting Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Injury in fact is a "constitutional requirement" and is the "[f]irst and foremost" of standing's three elements. *Id.* at 1547-48 (*quoting Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)). To be "particularized" the injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1. "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'" *Spokeo, Inc.* 136 S. Ct. at 1548. A "concrete" injury must be "de facto,' that is, it must actually exist" and be "real," and not "abstract." *Id.* While "the risk of real harm" may, in some circumstances, be sufficiently concrete, "imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'" *Lujan*, 504 U.S. at 568.

Each element of standing "must be supported . . . with the manner and degree of evidence required at the pleading stages of the litigation," and at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may

suffice." *Id.* The plaintiffs bear the burden of establishing each element of standing. *Spokeo, Inc.,* 136 S. Ct. at 1547. Where plaintiffs lack standing, the district court lacks subject matter jurisdiction and the complaint must be dismissed. *See* Fed. R. Civ. P. 12(b)(1)

2. The Individual Plaintiffs Lack Article III Standing and Their Claims Are Now Moot

The thrust of this action is the plaintiffs' request for an injunction that would essentially provide a blanket prohibition on in-person or VTC appearances in all non-detained cases at the Newark Immigration Court for an unspecified period of time. *See* Compl. 43 (Request for Relief paragraph b). The plaintiffs lack Article III standing because they do not "satisfy the threshold requirement" of "alleg[ing] an actual case or controversy." *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). Where, as here, the relief sought is prospective relief only, a plaintiff must demonstrate a risk of future injury that is both "real" and "immediate" and neither "conjectural" nor "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983). A plaintiff seeking forward-looking relief bears the burden of proving the existence of a future "threatened injury [that is] certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

The complaint falls short of this standard because the individual plaintiffs' claims are speculative. The individual plaintiffs do not have imminent immigration court hearings because all of their hearings have been postponed. DiRaimondo's hearing that was scheduled for August 24, 2020 has now been adjourned to April 7, 2021. O'Neill's August 24, 2020 hearing has been postponed to August 26, 2021, and another of his hearings scheduled for August 13, 2020 has been postponed without a

new date set. Plaintiff Trinidad has not pled that she has any hearings for the rest of the calendar year.

Moreover, contrary to plaintiffs' assertions, VTC is available on both the detained and non-detained dockets, and telephonic hearings are also available to the plaintiffs if they request one. Cheng Decl., ¶¶ 51-52. With these options available, there is no indication that plaintiffs are facing any imminent threat that they will have to appear at an in-person hearing at the Newark Immigration Court. Moreover, despite their stated fears of attorney sanctions/discipline, none of the plaintiffs have received or even been threatened with discipline for failing to appear at a hearing.

Although O'Neill and Trinidad claim that they "felt compelled" to appear in court in-person, O'Neill and Trinidad have not presented evidence that they were, in fact, compelled. To the contrary, they did not appear at the immigration court despite having a VTC hearing scheduled on August 3. Moreover, their client did not appear at all, neither in-person nor remotely. Cheng Decl., ¶ 55. Their concerns about attorney discipline are speculative as they have not received any or otherwise been put on notice that they may potentially receive discipline or sanctions. Plaintiffs' assertions that EOIR requires that clients and attorneys be in the same room for telephonic hearings is not accurate as there is no prohibition on clients and attorneys being in multiple locations for telephone calls. Cheng Decl., ¶63; Ex. 5, June 19 Standing Order.

Thus, none of the individual plaintiffs can show injury in fact because none has an imminent hearing in immigration court or has sustained any adverse action. *See NIPNLG*, 2020 WL 2026971, at *6-7 (injury in fact requirement not met where the

alleged injury concerned heightened risk of exposure to COVID19 due to in-person hearing in immigration court and there was no imminent in-person hearing in immigration court); *Ali*, 2020 WL 2986692 at *5 (finding that plaintiff immigration attorney lacked standing on his claim to stay filing deadlines because he had the ability to request a continuance of the hearing, and, thus, his alleged injury regarding exposure to COVID-19 was "hypothetical, which is insufficient to establish Article III standing.")

Indeed, the individually named plaintiffs' claims are now moot. A case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Gov't of Virgin Islands*, 842 F.3d 201, 208 (3d Cir. 2016) *quoting County of Los Angeles v. Davis*, 440 U.S. 625, 631, (1979) (internal quotation marks omitted). Here, none of the individually names plaintiffs currently has an in-person hearing scheduled at the Newark Immigration Court until next year. The individual named plaintiffs do not allege any injury other than those associated with attending an in-person hearing, none of which are scheduled until next year. Accordingly, any potential injury or issue due to exposure to COVID-19 is too remote, and the Court therefore lacks subject matter jurisdiction over the individual named plaintiffs' claims in the absence of a case or controversy. *Ali,* 2020 WL 2986692 at *4 ("Plaintiffs' claims have become moot because their hearings, and the corresponding filing deadlines, have been adjourned to the years 2021 and 2022, respectively.")

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

NJ-AILA also lacks standing. In the Third Circuit, associational standing requires that "(1) the organization's members must have standing to sue on their own; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members." *Philadelphia Taxi Ass'n, Inc v. Uber Techs., Inc.*, 886 F.3d 332, 345 (3d Cir. 2018). Regarding the third condition, individual participation, the Supreme Court held that claims may be "properly resolved in a group context" if they do not require "individualized proof." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344, (1977).

NJ-AILA must show, among other things, that at least one of its members has standing to sue in his or her own right. As discussed above, none of the NJ-AILA's members named as individual plaintiffs has shown any concrete injury, and therefore cannot establish Article III standing. Moreover, other than the named plaintiffs, NJ-AILA does not identify an immigration attorney who has a hearing date approaching soon. Accordingly, NJ-AILA lacks standing and its claims are also moot.

In any event, even if they had constitutional standing, the NJ-AILA cannot obtain review under the APA of EOIR's actions because its interests are not within the zone of interests protected by the INA. The APA does not "allow suit by every person suffering injury in fact." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395 (1987). It provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The Supreme Court

has interpreted this provision as imposing a "prudential standing" requirement in addition to the requirements imposed by Article III of the Constitution. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998). Prudential standing requires, among other things, that to be "aggrieved," "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke*, 479 U.S. at 396 (modifications omitted).

Nothing in the INA suggests that it is meant to protect the interests of immigration attorneys. NJ-AILA points to no particular regulation or statute that arguably protects or regulates their interests in this regard. Congress has withdrawn jurisdiction that previously existed for actions challenging removal proceedings in the district courts. Until Congress amended the INA to include the claim channeling provisions of § 1252, a separate provision, 8 U.S.C. § 1329, provided jurisdiction for suits in federal district courts filed by any alien or organization challenging implementation of the immigration laws. *See, e.g.*, *Bains v. Schiltgen*, No. 97-cv-2573, 1998 WL 204977, at *3 (N.D. Cal. Apr. 21, 1998) (describing statute's prior version). But Congress amended § 1329 in 1996, "making clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). This provision makes clear that organizations have no cause of action under the INA to raise challenges related to removal proceedings.

D. Jurisdictional Issues Aside, the Plaintiffs' Claims Lack Merit

Putting aside the above jurisdictional issues, which should be dispositive of this motion (and action), the plaintiffs cannot demonstrate any likelihood of success on the merits of their claims. Plaintiffs' complaint asserts two causes of action: (1) Violations of the Administrative Procedure Act and (2) Violation of the Due Process Clause of the Fifth Amendment by virtue of a State-Created Danger. Plaintiffs cannot show a likelihood of success on either claim.

1. EOIR's Actions Are Not Subject to Review Under the APA and In Any Event Are Not Arbitrary And Capricious or An Abuse of Discretion

a. Not Final Agency Action

The Administrative Procedure Act (APA) creates a right of judicial review of "final agency action for which there is no other adequate remedy in court," 5 U.S.C. § 704. As a threshold matter, the plaintiffs cannot raise an APA claim because they do not identify any "final agency action" subject to APA review. *See* 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-93 (1990). Generally, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process," rather than "be[ing] of a merely tentative or interlocutory nature"; and "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Rather than identifying any final agency action, plaintiffs contend that: (1) the July 8, 2020 decision to resume non-detained hearings at the Newark Immigration Court on July 13, 2020; and (2) ACIJ Cheng's June 19, 2020 Standing Order regarding

telephonic appearances constitute a "final agency action." Plaintiffs fail to explain how either agency action is one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). The only decision in removal proceedings with actual "force and effect of law," *id.* at 177–78, would be a decision by an immigration judge in an individual case and not any decision to adopt or not adopt particular practices with respect to how to conduct hearings. *See, e.g.*, *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) ("courts have defined a non-final agency order as one, for instance, that does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" (internal quotations omitted)). Neither agency action identified here qualifies. Plaintiffs contend that because they could potentially be subject to disciplinary action for choosing not to appear at in-person hearings, they have shown that "legal consequences flow" by the decision to resume non-detained hearings, but this type of speculative assertion (which would require that the plaintiffs not appear for a hearing and that an IJ or other body impose discipline on the attorney) does not establish final agency action for the purpose of APA review. Indeed, as discussed above, none of the plaintiffs even allege they have been threatened with discipline; instead, plaintiffs only indicate they fear they could be disciplined if they fail to appear for hearings (which are now not even scheduled for this year). These allegations do not support a finding that EOIR's decision to resume non-detained hearings or Judge Cheng's Standing Order regarding how telephone hearing are conducted constitute final agency action.

b. Not Arbitrary and Capricious

The APA requires this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 322 (E.D. Pa. June 16, 2018). "The principal purpose of the APA limitations" "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). "If courts were empowered to enter general orders compelling" agencies to carry out their general mandates in particular ways not required by any specific statutory provision, as the plaintiffs ask the Court to do here, "it would ultimately become the task of the supervising court, rather than the agency" to oversee "day-to-day agency management," raising the prospect of pervasive oversight by federal courts" that "is not contemplated by the APA." *Id.* at 66-67. Importantly, a "policy disagreement" with an agency's decision or approach to a problem is not a "basis for substituting [the plaintiffs'] views for the agency's" even where "the record could have supported" the plaintiffs' preferred approach. *Pub. Citizen v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004).

Here, Plaintiffs cannot show a likelihood of success on the merits of their APA claim because EOIR has reasonably exercised its discretion and authority to respond to COVID-19, while ensuring the continuation of critical functions.

For example, all non-detained hearings at the Newark Immigration Court were postponed from March 18 until July 13, 2020. Moreover, contrary to plaintiffs' claim that the Newark Immigration Court offers no video conferencing capabilities, EOIR has offered video teleconferencing for non-detained hearings through EOIR's VTC proprietary technology, which allows attorneys and/or their clients to sit in an empty courtroom and connect to the necessary participants for their hearings. Although this option requires that participants appear at the Newark Immigration Court to access the secure VTC system, the attorney and client are in an empty courtroom without anyone else present in the room, except for when a witness needs to give testimony. Plaintiffs have inexplicably omitted any mention of the VTC option at the Newark Immigration Court. Indeed, the detained immigration docket has been utilizing VTC throughout the COVID-19 pandemic. To the extent that Plaintiffs repeated reference to "in person" appearances in the Complaint and Motion for a Preliminary Injunction implicitly refers also to VTC hearings, they have failed to provide *any* basis for why Newark Immigration Court's implementation of VTC violates the APA.

To the extent plaintiffs seek videoconferencing by Zoom, Skype or other third-party software platforms, this is not feasible because these software applications do not have the necessary features offered by EOIR's proprietary VTC technology, including audio transcription (immigration courts do not have court stenographers to transcribe immigration proceedings) and security features. *See* Cheng Decl., ¶¶ 41, 50, 62. Moreover, the Newark Immigration Court's computers are not equipped with web cameras to support videoconferencing through these third-party software applications. *Id.*, ¶¶ 50, 62. As such, the VTC terminals are the only video

teleconferencing options available for immigration proceedings. The Newark Immigration Court has never used Zoom, Skype, or other third party software applications to conduct any immigration proceedings and is unable to do so for logistical and cost reasons. *Id.*, ¶41, 50, 62. Further, immigration attorneys also have the option of appearing by telephone by simply making a motion to do so, even if their clients do not wish to appear by telephone. *Id.*, ¶ 45.

EOIR has taken the COVID-19 pandemic seriously and has implemented various measures to prevent the spread of COVID-19 in the Newark Immigration Court. In making the announcement that hearings would resume, EOIR advised that all persons working in or visiting the common spaces of the immigration courts are required to wear face coverings and should become familiar with the CDC's guidance about COVID-19. *Id.*, ¶ 32. EOIR also directed persons working in or visiting EOIR spaces to review EOIR's Public Heath Notice, which advises that: (1) face coverings are required to enter and remain in EOIR space, and other building requirements may apply; (2) individuals with symptoms or a diagnosis of COVID-19 should not enter EOIR space, and represented respondents should call their attorney or representative, while attorneys, representatives, and unrepresented respondents should call the immigration court for further instructions; (3) individuals should practice social distancing, staying six feet (or two arm lengths) away from others; and (4) individuals should practice proper hygiene by washing hands with soap and water or using alcohol-based sanitizer. *Id.* at ¶ 33; Ex. 6.

Moreover, IJs at the Newark Immigration Court were reminded, as they were at the outset of the pandemic, of the well-established practices and procedures that

could help minimize the risk of COVID-19, such as waiving appearances, allowing telephonic appearances, granting continuances, limiting physical presence in courtrooms, issuing standing orders, encouraging the parties to resolve cases through written filings, and conducting hearings by telephone and VTC. *See* Cheng Decl., ¶ 36; Ex. 3, EOIR, PM 20-13; Ex. 2, EOIR PM 20-10.

In particular, IJs at the Newark Immigration Court were specifically encouraged to use alternative hearing mediums — such as hearings by telephone or VTC — "to the maximum extent practicable in accordance with the law" to further minimize in-person interaction and reduce the risk of the spread of COVID-19. *See id.*; *see also* 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c).

Given the above measures that EOIR has implemented as part of its decision to resume hearings, the decision to resume hearings is entitled to significant deference. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978); *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004); *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). This is especially so in the immigration context where "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

To the extent plaintiffs argue that there was no rationale given for resuming hearings, this allegations is unsupported. To the contrary, when issuing PM 20-13, EOIR explained that "[a]s most of the country, including the federal government, moves toward restarting activities limited by COVID-19, EOIR, too, is moving toward reengaging its operations that have been postponed, including the resumption of non-

detained hearings." *See* Ex. 3; Cheng Decl., ¶ 61. In so doing, EOIR explained that its policies, practices, and guidance were informed by multiple sources, including the DOJ, OMB, OPM, CDC, GSA, and the operations of other court systems. *Id*.

EOIR's approach, including the deference given to individual immigration courts to exercise their expertise and discretion over certain local decisions, is consistent with the guidance from the Administrative Office of the United States Courts, which encourages jurisdiction-by-jurisdiction and case-by-case approaches for the judiciary. *See* Administrative Office of the U.S. Courts, *Judiciary Preparedness for Coronavirus (COVID-19)*[16]

To the extent that any individual has good cause for a continuance of a hearing, that person should submit a properly supported request. Defendants are not aware of any reasonable and properly supported requests for continuances, extensions, or requests for telephone or VTC appearances being systematically denied. *See* Cheng Decl. ¶ 57. Plaintiffs' demand for a sweeping injunction ignores the individualized determination an IJ must bring to each case. The needs of an individual alien or attorney in the proceedings and any request related to COVID-19 must be judged based on the specific individual circumstances, and the plaintiffs cannot plausibly argue that every attorney or case will be harmed by the absence of the policies they demand. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, the plaintiffs' APA claim is without merit.

[16] https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19.

2. EOIR's Conduct Does Not Violate Substantive Due Process Under the State-Created Danger Theory

Courts have recognized that the Government may be liable under the Due Process Clause for conduct that "affirmatively place[s] [a] plaintiff in a position of danger," with "knowledge of the danger." *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (internal quotation marks omitted)

The Third Circuit has identified the four elements of a state-created danger claim

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Kaucher v. Cnty. of Bucks, 455 F.3d 418, 431 (3d Cir. 2006) (*quoting Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)).

Here, plaintiffs can avoid any perceived danger by requesting telephonic appearances. This is so, even if the respondent refuses to consent to a telephonic hearing and chooses a VTC or in-person hearing. *See* Cheng Decl. ¶¶ 28, 45, 63. In other words, if an attorney does not wish to come to the Newark Immigration Court for an in-person hearing of a VTC hearing, he or she has the opportunity to appear by telephone, by making a motion to the IJ, even if the client does not agree to participate by telephone. Indeed, there is no requirement at the Newark Immigration Court

(merely a preference) that attorneys and clients must be in the same physical location during a telephonic hearing. Cheng Decl., ¶ 63.

Plaintiffs argue that the telephonic hearing option is not a feasible option because the June 19 Standing Order indicates that, during a telephonic hearing, parties waive the right to object to evidence on the sole basis that they cannot examine it. *See* June 19 Sanding Order. They also argue that they do not prefer telephonic hearings because they do not afford an opportunity to see the judge or witness' facial expressions. First the attorney plaintiffs do not have standing to raise claims regarding their clients' alleged denials of the right to counsel or procedural due process because those rights belong to their alien clients, not the attorneys. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017). Moreover, Plaintiffs can also avoid any perceived danger (again, state-created or not) by filing a properly supported motion for a continuance for the IJ's consideration, alleging specific harms to themselves or the aliens they represent. If any issue related to an IJ's ruling on a request for a continuance or a waiver of appearance arises, an alien (or DHS attorney) may file an appeal with the BIA, including an interlocutory appeal. Such an appeal may be filed in any case that the party believes an IJ made a legal error in denying a continuance or request for a telephonic or VTC appearance due to circumstances related to the pandemic. *See* 8 C.F.R. 1003.1(b); Cheng Decl. at ¶¶ 57, 58, 66.

Further, as described above, EOIR has issued guidance to the public, the IJs and other EOIR employees regarding proper protocols and best practice to follow during the pandemic. IJs have been encouraged to maximize practices that reduce the need for in-person appearances, including allowing telephone and VTC

appearances to the maximum extent feasible. Moreover, although VTC requires appearing at the Newark Immigration Court, the VTC option allows attorneys and clients to be in an empty courtroom during the hearings. These practices militate against any finding of a state created danger. Cheng Decl. at ¶¶ 33, 35, 37, 48, 51, 53.

Finally, plaintiffs' non-specific allegations regarding, for example, that an IJ who would not call an attorney's client during a telephonic hearing because the client was not in the same room with the attorney, *see* Declaration of Jayson DiMaria, ECF No. 6-8, at ¶ 5-8, or IJs and interpreters who did not wear a face mask, *see* Declaration of Monica Kazemi, ECF No. 6-7, at ¶¶ 4-8, are not persuasive. Plaintiffs' allegations lack specific detail that would facilitate an investigation and appear to be anecdotal, isolated incidents, especially when viewed in the context of the Newark Immigration Court's vast non-detained docket.[17]

E. Plaintiffs Cannot Demonstrate Irreparable Harm

Plaintiffs allege they will suffer irreparable harm if compelled to attend hearings at Newark Immigration Court because of potential exposure to COVID-19. Plaintiffs' assertion of irreparable harm is not supported. First, Plaintiffs' allegation that EOIR fails to provide a videoconference option on the non-detained docket is inaccurate. The Newark Immigration Court has employed VTC on the non-detained docket since before the pandemic and has expanded its use since. Plaintiffs utilizing a VTC option will be in an empty courtroom with only their client (assuming their

[17] The declarants have failed to provide even basic information such as their clients' alien numbers, which are necessary for EOIR to review the allegations. Cheng Decl., ¶ 64.

client chooses to attend the VTC hearing as opposed to attending by telephone), with the possible exception of when a sequestered witness will have to testify. As further described above, EOIR has taken reasonable measures to ensure the safety of attorneys and others who appear the court for hearings. Second, as discussed, the plaintiffs can avoid any risk of exposure to COVID-19 by requesting telephonic appearances (which would not require the attorney to appear in Court) or by filing properly supported motions for continuances. To the extent an individual believes an immigration judge made a legal error or abused his or her discretion in denying a continuance request they may file an appeal to the BIA and if necessary to the circuit court of appeals. *See* 8 C.F.R. § 1003.1(b) (BIA jurisdiction); 8 U.S.C. § 1252(b)(9).

Third, plaintiffs fail to establish how the possibility of being subject to discipline or a sanction would constitute irreparable harm, as such a claim is wholly speculative and rests on pure conjecture. Hypothetical – and, indeed, unlikely – injury is insufficient to establish irreparable injury for purposes of a preliminary injunction. *See, e.g.*, *Safari Club International v. Jewell*, 47 F. Supp. 3d 29 at 34-35 (D.D.C. 2014) (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)) ("Irreparable harm must be great and certain, not speculative."). Finally, none of the named plaintiffs have a scheduled hearing until 2021, by which time concerns about exposure to COVID-19 may be significantly different. Accordingly, plaintiffs cannot establish irreparable harm and they are not entitled to a blanket suspension of in-person and VTC hearings at the Newark Immigration Court.

F. Balance of the Equities and Public Interest

The balance-of-equities factors "merge" because the government is the opposing party, and the government's interest *is* the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, this factor weighs strongly in the government's favor and heavily against granting injunctive relief. As discussed above, granting the preliminary injunctive relief that the plaintiffs seek would alter, rather than preserve, the status quo. The plaintiffs seek injunctive relief altering EOIR's operations but the disruptive effect of ordering the relief that the plaintiffs seek based on these temporary circumstances would long survive the COVID-19 pandemic, and the precedent would serve to allow organizations and individuals to rewrite the immigration statutes and change federal policy and procedure. Granting such extraordinary relief based on temporary circumstances is not in the public interest. The public interest is instead best served by deferring to the reasonable measures put in place by the Newark Immigration Court and allowing the orderly processes and protocols designed to safeguard the essential functions of the immigration system, and implemented by government professionals, to proceed. *See Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982) (urging judicial deference and finding presumption of validity for decisions of medical professionals concerning conditions of confinement). The burden and attendant harm caused by the relief the plaintiffs seek, and its impact on EOIR's operations at the Newark Immigration Court, is not justified at this preliminary stage. As described above and in the Cheng Declaration, granting the relief sought here would effectively stay all proceedings in the Newark Immigration Court unless the alien respondent consented to a telephone hearing. Cheng Decl., ¶ 68. The requested

relief would impinge on the court's authority to manage its dockets. Id., ¶ 67. Moreover, as described above, requiring the Newark Immigration Court to provide a third party software for videoconferencing would require a major overhaul of how videoconferencing is conducted and would require expenditures to equip the immigration court's computers with web cameras. Moreover, there would be an additional burden caused by switching to a third party platform for videoconferencing because the court does not employ stenographers and relies on the audio transcription services provided by the VTC platform. In sum, the cost and burden to the Government of the requested relief would be substantial.

Moreover, it is well-settled that the public interest in enforcement of United States immigration laws is significant. *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (additional citation omitted)); *see also Nken*, 556 U.S. 435. An injunction prohibiting EOIR from conducting in-person or VTC hearings on the non-detained docket would work significant hardship on the Government. The balance of hardships and public interest weigh in favor of the government and heavily against the plaintiffs.

CONCLUSION

For the foregoing reasons, the Court should deny the plaintiffs' motion for a preliminary injunction.

Dated: August 24, 2020
Newark, New Jersey

Respectfully submitted,

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