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UNITED STATES DISTRICT COURT

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EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER

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RESTRAINING ORDER

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

Plaintiffs seek a temporary injunction under the All Writs Act to require Defendants to take reasonable steps to protect public health in the immigration courts, similar to steps taken by other federal and state courts across the country. The relief that Plaintiffs seek by this motion is

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

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

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been confirmed by laboratory tests,⁵ more than any other country in the world. Over 1,300 people have died in the United States alone. Experts estimate that, after the pandemic runs its course, between 160 and 214 million people in the United States may become infected.⁶ The virus could take the lives of somewhere between 200,000 and 2.2 million people—again, in the United States alone.⁷ There is no vaccine. Declaration of Joshua Sharfstein in Support of

Plaintiffs' Motion for Temporary Restraining Order ("Shar657 (h)-3 (a)-(194(a)-5 ID 161-2230 the 28 AT 1 --(8)).

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

A. Plaintiffs’ Underlying Civil Action

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

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

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second order declaring the Clerk's Office closed to the public in all locations.¹⁶ Federal judicial districts across the country, as well as the U.S. Supreme Court and several of the Circuit Courts

of Appeal, have taken similar measures. The W

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

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

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

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

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

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

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

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

and safety in the immigration court system. Defendants' Twitter stream of changing court rules and procedures, *see, e.g.*, n.11, exemplifies their ad hoc approach to this public health crisis, and leaves both Plaintiffs and this Court at sea as to the operative immigration court system. Where Defendants have attempted to respond, they have done so either in secret—with little or no notice to attorneys or pro se respondents—or in ways that actually subvert the statutorily required full and fair adjudication of cases and requests for humanitarian relief. Specifically, Defendants continue to require attorneys, respondents, judges, and staff to appear in person at

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2. The McHenry Memo

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

3. Tweeting the Postponement of Non-Detained Hearings

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

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

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

²⁷ Dahab Decl. ¶ 4, Ex. B at 4.

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

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

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immigration judges typically have exercised their discretion to accept as timely such filings with proof of mailing despite the lack of a record of receipt in the court's own system. Love. Decl. ¶

17. Without hearings at which an immigration judge may exercise such discretion, however, there will no longer be an opportunity (m)n(hout)-2 O6 (s)012 (hee)4 bngad(hee)4aour(t)-2 ()-1 (pi)-2 ()-10 (r)3

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

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

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

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

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

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

Not only do the Defendants' responses to COVID-19 create dangerous congregate spaces at the physical courthouses and detained courts, their inadequate responses have widened the circle of danger by forcing Plaintiffs and the people they serve to engage in risky public health activities or face potential harm to their cases. P(a)6 2uctiv i (y)20n(t)3 (oith)2oithoÍ !"< DÀdi®à d~AŽ!0

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

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

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

II. ARGUMENT

The Court, going to Equitable hearing (2/14/21) ITJ 119700117 [(1)(3)-(e)4.(b)1 To(0)(7)(E)2f(e)4(s)s)H(d)6

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

The All Writs Act provides this Court with the ability to construct a remedy to right a “wrong [which] may [otherwise] stand uncorrected.” *United States v. Morgan*, 346 U.S. 502, 512 (1954). Should the Defendants be allowed to turn the immigration courts into a public health hazard, the Plaintiffs underlying claims seeking a full and fair immigration court adjudication system would be subverted. *Dean Foods Co.*, 384 U.S. De3 Drt

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

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

counsel and respondents whose lives are endangered. So long as the courts continue to

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

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

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

The pandemic that plagues the United States, and that the Defendants have further allowed to spread within the immigration courts, will cause harm and death *right now* unless an immediate order is issued,

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

III. REMEDY

Immediate and irreparable threats to the ongoing exercise of this Court's jurisdiction resulting from Defendants' failure to protect the immigration court system from the COVID-19 pandemic requires immediate, t

DATED: March 27, 2020

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