

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOWSHIN ALI, SONIA MONIR, RON
CERRETA, UNLOCAL, INC., and CATHOLIC
MIGRATION SERVICES,

Plaintiffs,

v.

WILLIAM BARR, Attorney General of the United
States; and JAMES MCHENRY, Director of the
Executive Office of Immigration Review (EOIR),

Defendants.

COMPLAINT

20 Civ. _____

INTRODUCTION

1. In the face of an unprecedented public health crisis, Defendants are forcing Plaintiffs to make an impossible choice - to risk their health to meet filing deadlines that the Immigration Courts have left in place despite a stay-at-home order issued by New York State, or to risk deportation of themselves or their clients by complying with said order. Globally, more than 170,000 people have died from the COVID-19 pandemic to date, with a quarter of these deaths occurring in the United States. In New York City alone, over 146,000 people have been infected and over 11,000 people have died.¹ And yet, in the middle of this global pandemic, Attorney General William Barr and Director James McHenry continue to require litigants and their representative to gather and prepare hundreds of pages for submission to the Immigration Court and meet strict filing deadlines, heedlessly placing people at risk contracting or spreading the COVID-19 infection.

¹ Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE), JOHNS HOPKINS UNIVERSITY (JHU), *available at* <https://coronavirus.jhu.edu/map.html>.

2. This action is brought by the following Plaintiff group: two low-income immigrants with serious underlying health conditions (one of whom may have already contracted COVID-19) who are unable to meet Immigration Court deadlines without unreasonable risk to their lives; one attorney living with AIDS who cannot meet deadlines in his clients' cases without unreasonable risk to his life; and two non-profit organizations whose clients and staff are actively risking their health in order to comply with Immigration Court deadlines.

3. In this action, Plaintiffs seek an order from this Court enjoining enforcement of Immigration Court deadlines until 45 days after New York State and New York City lift all stay at home and social distance orders applicable to advocates and litigants appearing in NYC. While the stay-at-home orders remain, Plaintiffs should not be forced to risk their lives and their staff members' lives to meet Defendants' deadlines.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the claims asserted in this action pursuant to 28 U.S.C. § 1331.

5. Jurisdiction is also proper pursuant to 5 U.S.C. § 704, as Plaintiffs are aggrieved by adverse agency action which this Court is authorized to remedy under the Administrative Procedures Act, 5 U.S.C. §§ 702 *et seq.*

6. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 2201-02, which authorizes the issuance of declaratory judgments.

7. Plaintiffs seek costs and fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. §§ 2412(2) *et seq.*

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because this judicial district is where the events underlying the Complaint have occurred.

PARTIES

Plaintiffs:

9. Plaintiff Nowshin Ali is a citizen of India and is currently in removal proceedings before the New York Immigration Court. Ms. Ali lives in Brooklyn, New York.

10. Plaintiff Sonia Monir is a citizen of Bangladesh and is currently in removal proceedings before the New York Immigration Court. Ms. Monir lives in Brooklyn, New York.

11. Plaintiff Ron Cerreta is a Senior Staff Attorney in the Immigrant Community Law Center of African Services Committee, a non-profit organization in New York City.

12. Plaintiff UnLocal, Inc. is a community-centered non-profit organization that was founded in 2008. UnLocal, Inc.'s principal place of business is 45 West 29th Street, Suite 203, New York, NY 10001.

13. Plaintiff Catholic Migration Services is a non-profit organization that was founded in 1971. Catholic Migration Services' principal place of business is 191 Joralemon Street, Fourth Floor, Brooklyn, NY 11201.

Defendants:

14. Defendant William Barr is the Attorney General of the United States with executive authority over the U.S. Department of Justice.

15. Defendant James McHenry is the Executive Office of Immigration Review (EOIR). Defendant McHenry is named in his official capacity. EOIR operates the Immigration Court system. EOIR operates three Immigration Courts in New York City: 290 Broadway (also known as the Broadway court), 26 Federal Plaza (also known as the Federal Plaza court), and 201 Varick Street (also known as the Varick Street court).

FACTUAL ALLEGATIONS

A. The COVID-19 Epidemic Poses a Grave Risk of Harm, Including Serious Illness or Death to Litigants and Lawyers

16. The novel coronavirus known as “COVID-19” has caused a pandemic that began in Wuhan, China in December 2019, and has since spread to almost every country in the world.²

17. Coronaviruses are a large family of viruses that can cause varying levels of disease, from a common cold to severe organ malfunction, and, in many cases, death. COVID-19 is an extremely contagious virus that is usually spread person-to-person through respiratory droplets. It is also possible for a person to contract COVID-19 by touching surfaces or objects that have the virus on them and then touching their own mouth, nose, or eyes. Asymptomatic and pre-symptomatic individuals can infect others.³

18. On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) declared the outbreak a “public health emergency of international concern” (PHEIC).⁴ On March 11, 2020, WHO characterized COVID-19 as a pandemic.⁵ On March 13, 2020, the President of the United States declared the COVID-19 outbreak a national emergency.⁶

² Coronavirus Disease 2019 (COVID-19), Situation Summary, updated April 19, 2020, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

³ Coronavirus disease 2019 (COVID-19), Symptoms and Causes, MAYO CLINIC, *available at* <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>.

⁴ WHO DIRECTOR-GENERAL’S OPENING REMARKS AT THE MEDIA BRIEFING ON COVID-19, WORLD HEALTH ORGANIZATION (March 11, 2020), *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁵ WHO DIRECTOR-GENERAL’S OPENING REMARKS AT THE MEDIA BRIEFING ON COVID-19, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁶ White House Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

19. As of April 24, 2020, nearly three million people have been infected worldwide, and over 190,000 people have died. In the United States, over 870,000 people are known to be infected and over 50,000 people have died.⁷ As of April 24, 2020, the number of confirmed cases in New York State is approximately 263,000 including 146,000 in New York City alone. At least 15,700 persons in New York State have so far died from the virus with at least 11,200 coming from New York City. On April 14, 2020, New York City sharply increased its death toll by more than 3,700 victims after officials said they were now including people who had never tested positive for the virus but were presumed to have died of it.⁸ These cases account for approximately 25% of the total number of confirmed cases nationwide to date. The number of cases continues to rise.⁹

20. The Centers for Disease Control and Prevention (CDC) has stated that older individuals and those with underlying health conditions, including some of the individual Plaintiffs and many of the organizational Plaintiffs' members, have a higher risk of serious illness or death if they contract COVID-19.¹⁰ Young people, however, are not immune to

⁷ Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE), JOHNS HOPKINS UNIVERSITY (JHU), *available at* <https://coronavirus.jhu.edu/map.html>.

⁸ David Goodman and William K. Rashbaum, *N.Y.C. Death Toll Soars Past 10,000 in Revised Virus Count*, THE NEW YORK TIMES (April 14, 2020), *available at* <https://www.nytimes.com/2020/04/14/nyregion/new-york-coronavirus-deaths.html>.

⁹ *See* Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE), JOHNS HOPKINS UNIVERSITY (JHU), *available at* <https://coronavirus.jhu.edu/map.html>.

¹⁰ Coronavirus disease 2019 (COVID-2019), U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *People Who Are at Higher Risk*, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

COVID-19, and numerous reports highlight younger people who have faced life-threatening complications and death as a result of contracting the virus.¹¹

21. COVID-19 has had a disparate impact on people with cases in Immigration Court, since they are often low-income and racial minorities. Many of the individual Plaintiffs and employees of the organizational Plaintiffs share these characteristics.

22. Recent data highlights that Black and Brown communities are dying at the highest rates from COVID-19 in New York City. Nearly thirty four percent of the deaths in New York City are of Latinx residents and twenty eight percent come from Black New Yorkers.¹² Racial minorities who live in poverty are the most vulnerable, as they often lack the financial resources to obtain medical treatment for pre-existing conditions, and are thus at serious risk of life-threatening illness if they contract COVID-19. Many of them do not have health insurance or access to paid sick leave, which places them and the people they interact with at risk of contracting the virus. Additionally, many undocumented people work in the service industry. Some of these jobs have been declared “essential” by the Governor, including restaurants, public transportation, agriculture, construction, and health care. These jobs often require workers to be in close contact with others, putting them at higher risk of contracting COVID-19.¹³

¹¹ See Ryan W. Miller, *Yes, COVID-19 Can be Serious for Younger Adults, too, CDC Report Shows*, USA Today (March 19, 2020), available at <https://www.usatoday.com/story/news/health/2020/03/19/coronavirus-illnesses-can-serious-young-adults-cdc-report/2874271001/>.

¹² See Jeffery C. Mays and Andy Newman, *Virus is Twice as Deadly for Black and Latino People Than Whites in N.Y.C.*, THE NEW YORK TIMES (April 8, 2020), available at <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html>.

¹³ See Tracy Jan, *Undocumented workers among those hit first — and worst — by the coronavirus shutdown*, THE WASHINGTON POST (April 4, 2020), available at <https://www.washingtonpost.com/business/2020/04/05/undocumented-immigrants-coronavirus/>.

23. There is currently no medication or vaccine to effectively treat or prevent COVID-19.¹⁴ Scientists have stated that production of a usable coronavirus vaccine is at least eighteen months away.¹⁵ The only known strategies for slowing the spread of the virus are social distancing, wearing protective masks in public, and regularly washing hands with soap and water.¹⁶

24. Doctor Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, is warning against attempts to place concrete time limits on the coronavirus pandemic. Doctor Fauci predicts millions of people will be infected in the U.S. and there will be 100,000 to 240,000 COVID-19 related deaths in the United States.¹⁷

25. On March 29, 2020, the President extended the recommendation for a national shut down for a month, bowing to public health experts, and scientific reality, and warning Americans that up to 2.2 million Americans could die from the virus without measures to stop the spread.¹⁸

¹⁴ Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

¹⁵ See George Petras, Ramon Padilla, and Veronica Bravo, *Why a Coronavirus Vaccine is More Than a Year Away, Despite Medical Researchers' Progress*, USA TODAY (March 11, 2020), available at <https://www.usatoday.com/in-depth/news/2020/03/09/biotech-international-effort-makes-big-push-for-coronavirus-vaccine/4927298002/>.

¹⁶ Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

¹⁷ Michael D. Shear, Michael Crowley, and James Glanz, *Coronavirus May Kill 100,000 to 240,000 in U.S. Despite Actions, Officials Say*, THE NEW YORK TIMES (March 21, 2020), available at <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html>.

¹⁸ Michael D. Shear, *Trump Extends Social Distancing Guidelines Through End of April*, THE NEW YORK TIMES (March 29, 2020), available at <https://www.nytimes.com/2020/03/29/us/politics/trump-coronavirus-guidelines.html>.

B. New York State's and New York City's Emergency Responses to COVID-19 Pandemic

26. Governor Andrew Cuomo and NYC Mayor Bill de Blasio have implemented various orders and directives to the general population to maintain social distancing and work at home policies. New York State, which reported its first case of COVID-19 on March 1, 2020, has become the epicenter of the outbreak in the United States.¹⁹ On March 7, 2020, Governor Cuomo declared a state disaster emergency for the entire State of New York.²⁰ Mayor Bill de Blasio quickly followed, declaring a local state of emergency for New York City on March 12, 2020.²¹ On March 20, 2020, the Governor issued an Executive Order implementing the New York on “PAUSE” plan (Policies Assure Uniform Safety for Everyone) requiring 100% closure of all non-essential businesses, banning non-essential gatherings of any size for any reason, closing down schools, shutting down state courts for all non-essential matters, and tolling all filing deadlines.²²

27. On April 7, 2020, Governor Cuomo issued New York State Executive Order No. 202.14, the 15th Executive Order issued during the COVID-19 state of emergency since the first issued on March 7, 2020. This Executive Order extends the closures of non-essential businesses

¹⁹ Jesse McKinley, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, THE NEW YORK TIMES (March 22, 2020), available at <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html>

²⁰ N.Y. EXEC. ORDER NO. 202: DECLARING A DISASTER EMERGENCY IN THE STATE OF NEW YORK (March 7, 2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

²¹ Gabriela Bhaskar, *De Blasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned*, THE NEW YORK TIMES (March 12, 2020), available at <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html#link-408c01d7>.

²² See Information on Novel Coronavirus, Executive Orders, Governor Andrew M. Cuomo, available at <https://www.governor.ny.gov/keywords/executive-order>; The Official Website of the City of New York, *Mayor de Blasio, NYPD Prepare to Enforce New Guidelines* (March 22, 2020), available at <https://www1.nyc.gov/office-of-the-mayor/news/178-20/mayor-de-blasio-nypd-prepare-enforce-new-guidelines>.

until April 29, 2020.²³ On April 15, 2020, the Governor issued another Executive Order requiring all people in New York to wear masks in public until at least May 15, 2020.²⁴ On April 16, 2020, the Governor issued another Executive Order extending social distancing requirements until May 16, 2020.²⁵ Between March 7, 2020 and April 14, 2020, the Governor has issued eighteen executive orders, each one tightening restrictions on public interactions.²⁶

28. To keep New Yorkers informed as to the status of the outbreak, Governor Cuomo has been giving daily press briefings on the COVID-19 pandemic, during which he has often reiterated that forty to eighty percent of New Yorkers will be infected with COVID-19.²⁷ Mayor de Blasio similarly estimates that half of all New York City residents, approximately 4,000,000 people, will have been infected by the time the virus runs its course.²⁸

29. In response to the COVID-19 pandemic, state and federal courts around the country have taken precautions such as closing or allowing virtual only hearings to limit the

²³ N.Y. EXEC. ORDER No. 202.14: CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY (April 7, 2020), *available at* <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

²⁴ N.Y. EXEC. ORDER No. 202.17: CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY (April 15, 2020), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.17.pdf.

²⁵ N.Y. EXEC. ORDER No. 202.18: CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY (April 16, 2020), *available at* <https://www.governor.ny.gov/news/no-20218-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

²⁶ *See* Information on Novel Coronavirus, Executive Orders, Governor Andrew M. Cuomo, *available at* <https://www.governor.ny.gov/keywords/executive-order>.

²⁷ Elina Tarkazikis, *Coronavirus Cases in NY Grow; Cuomo Says 40 to 80% Will Be Infected*, SPECTRUM NEWS NY1 (March 21, 2020), *available at* <https://www.ny1.com/nyc/all-boroughs/coronavirus-blog/2020/03/21/coronavirus-cases-grow--cuomo-says-40-to-80--in-ny-will-be-infected>.

²⁸ Christina Capatides, *Mayor De Blasio predicts over half of New York City will get coronavirus by the time crisis is over*, CBS NEWS (March 27, 2020), *available at* <https://www.cbsnews.com/news/mayor-bill-de-blasio-projects-that-over-half-of-new-york-city-will-become-infected-coronavirus/>.

spread given that COVID-19 is more likely to spread in these populated facilities.²⁹ On March 22, 2020, the New York Chief Administrative Judge ordered courts and county clerks to not accept any paper filings unless the filing was on the “list of essential matters” until further notice.³⁰ On March 16, 2020, the United States Supreme Court postponed oral arguments scheduled through April 1, 2020.³¹

30. On April 9, 2020, New York Empire State Development issued guidance on Executive Order 202.6 relating to COVID-19. Section 14 of the guidance explains that “lawyers may continue to perform all work necessary for any service so long as it is performed remotely.”³² Therefore, a litigant or legal representative who leaves home in New York to work on an Immigration Court case violates the New York Governor’s orders.

31. Numerous New York officials have warned that violating the New York order to stay home can constitute a crime. In April 2020, the Erie County Executive, Steuben County officials, and the city of Hornell warned that violations of the order could be a criminal misdemeanor with fines of up to \$2,000 and a year in prison.³³ If people with Immigration Court cases violate the New York order by leaving home to prepare and submit filings, they could be

²⁹ See Court Orders and Updates During COVID-19 Pandemic, United States Courts, *available at* <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>; *Coronavirus and the New York State Courts, New York State Courts Remain Open for Essential Business*, *available at* <https://www.nycourts.gov>.

³⁰ ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS LAWRENCE MARKS, AO/78/20, March 22, 2020, *available at* <http://nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

³¹ Supreme Court of the United States, News Media Press Releases, March 16, 2020, *available at* https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

³² *Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders*, NEW YORK STATE EMPIRE STATE DEVELOPMENT, Information Regarding COVID-19 and Executive Order 2026 (April 9, 2020), *available at* <https://esd.ny.gov/guidance-executive-order-2026>.

³³ Paul Ross, *New York state enforcing PAUSE orders with fines up to \$10,000*, WKBW (Apr. 6, 2020); Caitlin Murphy, *Steuben County to issue warnings, fines for social distancing violations*, WENY (Apr. 8, 2020); Chris Potter, *Police will enforce social distancing rules*, THE HORNELL EVENING TRIBUNE (Apr. 12, 2020).

convicted of misdemeanors and receive a prison term of up to one year. Misdemeanor convictions can cause a litigant to lose out on certain types of immigration benefits. For example, people seeking Non-Lawful Permanent Resident Cancellation of Removal cannot prove good moral character if they have spent 180 days in jail during the ten years before the court makes its decision on their case.³⁴ If lawyers violate the New York order by leaving home to print, copy, scan, or mail court filings, they could be convicted of misdemeanors and receive a prison term of up to one year. Imprisonment may interfere with their ability to practice law and EOIR can sanction lawyers who have convictions that involve dishonesty or interfering with the administration of justice.³⁵

32. In contrast to the measures taken by other courts and New York State, the New York City Immigration Courts remain open to the public and continue to accept paper filings.³⁶

C. COVID-19 Has Spread in Immigration Courts Throughout the Country, Causing Abrupt Closings and Re-openings of Courthouses with Little Information Available to the Public

33. The NYC Immigration Courts are run by the Executive Office for Immigration Review (“EOIR”). Immigration Courts hold master calendar and merits hearings (also referred to as individual hearings). Master calendars are short, preliminary hearings for the Immigration Court to conference with the parties about the progress of the case. During merits hearings, the Immigration Court decides usually in three hours, whether a person in removal proceedings will be allowed to remain in the United States or will have to return to their country of origin. Filing

³⁴ See INA § 101(f).

³⁵ 8 C.F.R. § 1003.102(h).

³⁶ See *EOIR Operational Status During Coronavirus Pandemic*, U.S. DEPARTMENT OF JUSTICE, available at <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>.

deadlines for individual hearings are set by the Immigration Judge in each case and are usually fifteen or thirty days before the individual hearing.

34. EOIR has engaged in a pattern of behavior that shows no regard for the health concerns of litigants and the lawyers who appear in its Immigration Courts. EOIR's policy of requiring litigants to continue meeting deadlines for the filing of papers in the midst of the COVID-19 pandemic is not consistent with the President's projections regarding COVID-19 and with the measures that are in place in New York State and New York City to stop the spread of the disease.

35. There is no nationwide guidance from EOIR about when and if Immigration Courts should be reopened after a reported COVID-19 case. Since mid-March, Immigration Courts throughout the country have haphazardly closed for short periods of time (one or two days) after reporting confirmed or suspected cases of COVID-19 and then shortly thereafter reopened for filing and for detained hearings.³⁷ After reopening these courts, EOIR has failed to provide clear information to the public as to the measures taken to ensure public health after the various courts close as a result of confirmed cases.

36. Since the start of the pandemic, EOIR has regularly communicated key announcements, sometimes exclusively, through its social media accounts such as Twitter and Facebook.³⁸ This includes announcements about immigration court closures and changes to filing deadlines, which are often announced late in the evening or even on weekends. For instance, on March 13, 2020 at 8:17 p.m., EOIR posted on its Facebook page that non-detained master

³⁷ *See id.*

³⁸ *See* Executive Office for Immigration Review Facebook Account, *available at* <https://www.facebook.com/doj.eoir/> ("EOIR Facebook Account"); Executive Office for Immigration Review Twitter Account, *available at* https://twitter.com/DOJ_EOIR ("EOIR Twitter Account").

calendar hearings the next day in the Boston, Los Angeles (North Los Angeles, Olive, Van Nuys), Newark, New York City (Broadway, Federal Plaza, Varick), Sacramento and San Francisco Immigration Courts would be postponed. Three hours later, EOIR tweeted the same information. Litigants and lawyers who were unaware that EOIR was relaying critical information only via Facebook and Twitter went to Immigration Courts in person on March 14, 2020, only to find that they had unnecessarily risked exposure to COVID-19, thereby increasing their risk of contracting COVID-19, infecting others, and posing a health risk to their loved ones.

37. Since the start of the pandemic, EOIR has opened and closed the different New York City Immigration Courts with very short and limited notice. For instance, on March 23, 2020, EOIR announced on Facebook that following notice of a person with a confirmed case of COVID-19 at the Varick Street Immigration Court in New York City, that court would be closed the next day.³⁹ When the court re-opened on March 25, 2020, EOIR not only failed to announce this publicly,⁴⁰ but it also did not provide information about whether the court had been cleaned or about whether the individual infected had been to the 26 Federal Plaza and 290 Broadway Immigration Courts. Lawyers and litigants were forced to continue appearing at the Varick Street Immigration Court for hearings and to file documents with no assurance from EOIR that the area was no longer contaminated.

38. EOIR's erratic communications, particularly those announcing last-minute deadlines and providing unclear locations for filing of documents, have forced lawyers and

³⁹ See EOIR Facebook Account.

⁴⁰ See Mazin Sidahmed, *Varick St. Immigration Court Reopened Despite Court Staffer Testing Positive for COVID-19*, Documented NY (March 25, 2020), available at <https://documentedny.com/2020/03/25/varick-st-immigration-court-reopened-despite-court-staffer-testing-positive-for-covid-19/>.

litigants to rush to meet filing deadlines despite the risks and difficulties associated with filing documents with such short notice.

39. On March 17, 2020, EOIR announced on its Facebook page that all non-detained hearings nationwide would be postponed from March 18, 2020, through April 10, 2020.⁴¹ It also announced the closure of ten Immigration Courts across the country, including two located in New York City.⁴² Although EOIR did not explicitly state whether filing deadlines had changed for these hearings, its announcement on March 18, 2020 indicated that filing deadlines for non-detained hearings in the ten immigration courts listed had changed: “[e]mergency filing locations for the closed immigration courts are for emergencies only” and “[f]ilings due during the listed closures will be considered timely if received on the relevant court’s next business day. Filing deadlines for open courts remain.”⁴³ Relying on this information, many lawyers and litigants assumed that filing deadlines had changed and altered their course of preparation for the filings.

40. EOIR has also relayed conflicting information about filing locations and due dates through its social media accounts. For instance, in the morning on March 24, 2020, EOIR tweeted that while Immigration Courts in New York City were closed, filings could be delivered to the Elizabeth Immigration Court in New Jersey.⁴⁴ Five hours later, EOIR reversed course, tweeting that “due to a report of the presence of an individual with a test-confirmed coronavirus diagnosis, the Elizabeth Immigration Court will be closed for the rest of the day.” Later that evening, around 6:00 p.m., EOIR, in a since-deleted tweet, announced that certain Immigration

⁴¹ See EOIR Facebook Account.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ EOIR Twitter Account.

Courts would open on March 25th “for the limited purpose of filing” and that one of those courts was the 290 Broadway Immigration Court in New York City. EOIR tweeted that all filings due during the courts’ closures were “now due.”⁴⁵ Two hours later, EOIR updated its tweet to “[a]ny filings due during their closures should be filed by March 30.”⁴⁶ Similar posts were made by EOIR on its Facebook account.⁴⁷

41. EOIR’s March 24, 2020 Facebook announcement stating that any filings due during their court closures should be filed by March 30,⁴⁸ came as an unwelcome surprise, causing chaos, confusion, and fear among lawyers and litigants who were forced to rush to meet filing deadlines they reasonably assumed would be changed based on EOIR’s announcements.

D. EOIR’s Policies Addressing the COVID-19 Pandemic Are Unclear and Inadequate.

42. The CDC has warned that courthouses are especially susceptible to the rapid spread of COVID-19.⁴⁹ Given these warnings, continuing to require litigants and their lawyers to appear in Immigration Court for any reason whatsoever and to meet filing deadlines, is an invitation for a COVID-19 outbreak among people appearing in the Immigration Courts.

43. On March 18, 2020, Defendant McHenry issued a memorandum titled “Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak.” Footnote 2 of the memorandum states that all non-detained hearings, including

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See* EOIR Facebook Account.

⁴⁸ *Id.*

⁴⁹ Coronavirus Disease 2019 (COVID-19), *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

individual hearings through April 10, 2020, would be rescheduled, but detained hearings would not be rescheduled.⁵⁰ The memorandum provides merely recommendations to Immigration Courts in regard to the COVID-19 outbreak and reminds Immigration Judges of their authority to consider applicable public health guidance in making decisions on individual cases, including as to late filings. The memorandum does not provide uniform mandates to close the Immigration Courts, does not direct Immigration Judges to waive all filing deadlines in non-detained cases for non-detained cases, and provides no specific guidance to Immigration Courts on how to proceed to protect the public in the event of COVID-19 confirmed cases in the courts. The uncertainty left by this directive, that an Immigration Judge may or may not decide to excuse a late filing of documents leaves the vast majority of litigants with a difficult decision. Litigants are left to decide whether to risk their health and lives by filing documents according to the set filing deadlines in their cases, or risk that an Immigration Judge may not excuse their late filing and order them removed to their country of origin, where they may face possible death.

44. Further, the McHenry memorandum includes a statement that in effect deprives respondents of their due process right to a hearing by “encourage[ing] immigration judges to resolve as many cases as practicable without the need for a hearing...” Specifically, the memorandum encouraged parties to resolve cases through pleadings, joint motions, and stipulations including orders of removal or orders of voluntary departure.⁵¹

45. EOIR has not responded to six requests that the NYC Immigration Courts postpone filing deadlines in non-detained cases. Each of the three NYC Immigration Courts

⁵⁰ IMMIGRATION COURT PRACTICES DURING THE DECLARED NATIONAL EMERGENCY CONCERNING THE COVID-19 OUTBREAK, OOD PM 20-10, JAMES R. MCHENRY III, DIRECTOR, March 18, 2020, *available at* <https://www.justice.gov/eoir/file/1259226/download>.

⁵¹ *Id.*

received two motions requesting standing orders that would postpone the filing deadlines in non-detained cases. A coalition of non-profit organizations filed a motion with each of the three NYC Immigration Courts on April 8. LSNYC filed motions for standing orders on March 25, April 3, and April 17. EOIR has not acted on the six motions.

46. Since 2018, immigration judges have strict and arbitrary quotas that force them to balance their job security against public health concerns. EOIR Director McHenry issued non-detained case completion goals requiring eighty five percent of non-detained removal cases to be completed within one year of case filing.⁵² In addition, ninety-five percent of hearings must be completed on the initial scheduled merits hearing date. Judges are rated on performance metrics and risk a poor review if they grant too many continuances so that they complete fewer than seven hundred cases per year.⁵³ Around a quarter of immigration judges are still on probation so they can be fired without cause. Judges who do not meet the quotas risk being fired. EOIR has not relaxed the strict quotas to account for immigration court closures. A litigant who asks an immigration judge to extend time to file documents must overcome the incentive for an immigration judge to value the judge's job security against the public's health, litigants' health, and complying with New York orders to stay home.

E. Defendants' Policies in Response to the COVID-19 Pandemic Endanger the Health of People Appearing in Immigration Court.

47. EOIR currently allows litigants to file documents in person, by mail, or through e-mail. By allowing some of its courts to remain open for filing and enforcing unreasonable

⁵² See Memorandum from James R. McHenry III to all Immigration Judges and Staff, Case Priorities and Immigration Court Performance Measures App. A (Jan. 17, 2018), *available at* <https://www.justice.gov/eoir/page/file/1026721/download>.

⁵³ See EOIR Performance Plan, ABA JOURNAL, *available at* https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf.

deadlines, EOIR has ignored the declared emergency in New York and has violated the orders from the NY Governor and NYC Mayor to close down all non-essential business and strictly adhere to social distancing.

48. Although litigants and their lawyers can file their submissions by mail, which EOIR has encouraged, the vast majority of litigants and lawyers who are working from home do not have the supplies they need to produce and mail documents to the courts. Therefore, they are compelled to leave their homes to purchase those supplies or to go to their offices, despite the lockdown, thus increasing their risk of contracting COVID-19 or passing it on. Further, meeting filing deadlines requires some lawyers and litigants to travel to meet with each other, thus risking exposure to COVID-19.

49. Mailing submissions to the immigration courts requires lawyers and litigants to travel to a post office or another delivery service, when, as often is the case, the envelope is too big to fit in the slot in a street mailbox, or if the advocate prudently decides to obtain proof of mailing. In New York City, where the primary mode of transportation is public transit, going anywhere to file documents will necessarily require litigants and lawyers going into the subway or riding buses and increasing the risk of contracting COVID-19 on the way to the post office and at the post office itself, where it may be difficult to stay six feet away from other people. This is particularly true for low-income litigants such as Plaintiffs, who may not have the means to hire a private car service to avoid public transportation. Even in private cars, the risk of contracting COVID-19 is not completely eliminated because the driver and passenger are not socially distancing.

50. Although on April 21, 2020, EOIR postponed non-detained hearings through May 15, 2020,⁵⁴ filing deadlines, which are usually a month or fifteen days before the merits hearing, remain in place for hearings scheduled after May 15, 2020.

51. EOIR's failure to issue a uniform order extending all deadlines forces litigants and their lawyers to leave their homes unnecessarily to go to a copy store and their offices, and to the post office or another delivery service and in doing so to fail to maintain appropriate social distancing. Because the consequences of not meeting deadlines can be grave, including removal to a country where a litigant may face serious harm or even death, litigants are forced to compromise their health in order to meet these deadlines.

52. Moreover, in light of the erratic pattern of openings and closings at EOIR courts, lawyers and litigants who utilize UPS, the post office or FedEx services have no guarantee that the staff at the courts will receive and accept their filings. Lawyers and litigants dealing with urgent deadlines, such as the one-year deadline for asylum applications, or call-up dates for individual hearings, have been left in a state of uncertainty when they have learned that whatever delivery services they used were unable to access the immigration court to deliver their filings.

53. On March 31, 2020, EOIR announced that it had established temporary e-mail accounts for immigration courts and would accept e-mail filings.⁵⁵ The EOIR Operational Status During Coronavirus Pandemic webpage notes that "all electronically-filed documents must meet the requirements of filings outlined in the Immigration Practice Court Manual,"⁵⁶ a Department of Justice Guide on uniform procedures and requirements for practice before Immigration

⁵⁴ Executive Office for Immigration Review, *EOIR Operational Status During Coronavirus Pandemic*, available at <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> (last visited Apr. 20, 2020).

⁵⁵ See EOIR Operational Status During Coronavirus Pandemic, *Filing by Email - Immigration Courts*, U.S. DEPARTMENT OF JUSTICE, available at <https://www.justice.gov/eoir/filing-email>.

⁵⁶ *Id.*

Courts. Due to the exacting requirements for accepting submissions, the option to e-mail submissions to the immigration court does not meaningfully reduce the unnecessary risks that EOIR's deadlines impose on litigants and lawyers.

54. According to EOIR's e-mail filing instructions, EOIR may reject submissions for reasons like missing page numbers, incorrect document naming, incorrect document format, or poor resolution. This is unreasonably difficult for litigants and lawyers. There is also no assurance by EOIR that if a filing is rejected the litigant will receive additional time added to their deadline to fix the error. Additionally, EOIR can reject the filing at any time after it is filed, even after the deadline for filing has passed. The rejection of a filing by EOIR may have grave legal consequences. For example, it may cost an asylum applicant their eligibility for asylum if they file their application even a day after being in the United States for one year.

55. The option to e-mail filings to EOIR does not alleviate the problems litigants and lawyers face in filing documents and their continued exposure to COVID-19 if they are unable to e-mail their filings. Even those litigants who have access at home to a computer with current software, e-mail, and high-speed Internet, may have their filings rejected by EOIR. Additionally, litigants who do not have a lawyer do not know that EOIR just started accepting filings by e-mail and may continue risking their lives by filing documents in person and through the mail.

56. Many pre-hearing filings are hundreds of pages and are not easily prepared in home offices that lack large-capacity scanners and printers. Seemingly simple requirements imposed by EOIR, such as requiring documents to include page numbers, are impossible from a basic home office. Inserting page numbers requires either printing hundreds of pages, handwriting page numbers, and then rescanning the documents, or specialized software, such as Adobe Pro X (which costs hundreds of dollars) that allows for numbering of PDFs, which would

also require scanning hundreds of pages. EOIR may reject filings for lack of page numbers, incorrect document naming, incorrect document format, or improper resolution. Meeting all these requirements is unreasonably difficult, if not impossible, for litigants and lawyers working from home offices.

57. The Immigration Court Practice Manual (ICPM)⁵⁷ contains a plethora of rules that are extremely difficult to meet while the COVID-19 pandemic is ongoing. One such rule is the requirement that all documents not in English be accompanied by a certified English translation.⁵⁸ Affidavits from people who do not understand English must include a certificate of interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands before signing. Because many lawyers' offices are inaccessible due to the lockdown, it will be difficult for them to retrieve such documents received from clients that are only available in physical files in their offices.

58. Additionally, EOIR continues to require signatures from respondents on documents such as affidavits. Although electronic signatures are now permitted, people who have cases in Immigration Court may lack computer literacy or the technology needed to e-mail an electronic signature to their lawyer. Producing an electronic signature requires a phone camera or expensive PDF software. Given the limitations, lawyers would have to travel to their offices or their clients to obtain the documents and signatures, causing exposure to COVID-19. Further, because most, if not all, offices are only operating at partial capacity, if they are operating at all, translation and interpretation services that lawyers could have expected before

⁵⁷ See generally Immigration Court Practice Manual, available at <https://www.justice.gov/eoir/office-chief-immigration-judge-0>.

⁵⁸ *Id.* at Ch. 3, Section 3, pg. 43.

the pandemic are likely not available to the same extent, thus making it extremely difficult to meet this requirement.

59. There are additional issues with EOIR's acceptance of filings by e-mail. EOIR's ICPM and the federal regulations do not authorize serving ICE counsel electronically.⁵⁹ Litigants and their lawyers must find a way to send copies to ICE by mail or a delivery service even if EOIR accepts filings by e-mail. ICE counsel provides a program called eService to send documents to them. EOIR's ICPM and the regulations do not authorize serving ICE through eService. When ICE receives documents through eService, it will not immediately give any proof of service, but it may take up to three business days to produce a receipt to the filer that confirms whether ICE accepts or rejects the documents. Additionally, ICE requires that all submissions on eService include a form EOIR-28, which only a lawyer or legal representative can sign.⁶⁰ Litigants who are unrepresented cannot comply with the eService requirements because they do not have a lawyer who can sign an EOIR-28 form. ICE also requires those who use eService to consent to receiving documents from ICE, which is a problem for lawyers and unrepresented litigants who do not have regular access to e-mail or may change e-mails in the future.

60. In the middle of a pandemic where scientists and media outlets are reporting that there will be around 200,000 deaths in the U.S., over 11,000 which have already occurred in New York City and where over 263,000 people in New York State have already been infected and over 15,000 have died, EOIR's behavior recklessly endangers litigants, advocates, and the public in a manner that shocks the conscience.

⁵⁹ Immigration Court Practice Manual 3.2(c); 8 C.F.R. § 1003.23.

⁶⁰ See ICE's eService pamphlet.

F. Defendants' Policies in Response to the COVID-19 Pandemic Endanger the Legal Rights of People Appearing in Immigration Court.

61. EOIR's failure to postpone all filing deadlines not only jeopardizes the health of litigants, lawyers, and the general public, but also severely curtails the legal rights of litigants including their right to counsel under the INA and the Due Process Clause.

62. Although litigants in Immigration Court have a statutory and regulatory right to counsel in immigration proceedings, EOIR's current policies violate this right. Lawyers may be unwilling or unable to meet with their clients to review documents in person, or to go to the post office or to the Immigration Court for in person filings. Further, litigants are deprived of valuable time to meaningfully prepare their cases with their lawyers in person as a result of EOIR's arbitrary deadlines and filing requirements.

63. The COVID-19 pandemic has created barriers for litigants needing to prepare their cases with their lawyers, including making it not only difficult but extremely risky to meet their lawyers or produce affiants for interviewing in person. Given the health risks associated with the spread of COVID-19 and meeting in person, lawyers and their clients are forced to attempt to complete important parts of the case over the telephone. Lawyers' ability to forge and maintain the necessary rapport and trust with their clients is diminished. Rapport and trust between lawyers and their clients is essential to draft and execute completely accurate declarations, which are essential components in their immigration cases. Inaccurate or incomplete declarations could lead to an incomplete record, and in some cases perceived inconsistencies by the Immigration Court. The policies imposed by Defendants in the midst of this pandemic have created a fractured, disjointed and onerous expectations on litigants and their lawyers. EOIR's inadequate policies compromises the quality of work product lawyers provide their clients.

64. In the case of unrepresented litigants, their right to access counsel is hindered because they must find lawyers willing to either represent a new client without meeting and engaging with them in-person to exchange documents and assess credibility the strength of their case or put their safety at risk to meet with new clients and comply with the unreasonable filing deadlines of EOIR. Further, unrepresented litigants may lack the technological equipment to be able to communicate with potential lawyers remotely.

65. With most cities and countries around the world on lock-down due to the COVID-19 pandemic, it has become nearly impossible for lawyers and litigants to gather important documents to support applications for relief from removal. Particularly in asylum cases, where police reports and witness statements are essential to making out a claim for relief, it may become impossible to obtain these documents from a litigant's country of origin. For instance, lawyers in other countries cannot meet with individuals to notarize statements, government agencies are closed, and supporting affiants are not be able to leave their homes to get documents notarized or mail an original document to a person in the United States.

66. Additionally, the inability to leave home in New York for any non-essential business makes it impossible for some witnesses and experts to provide litigants signed statements while complying with the order to stay home. Some witnesses and experts do not have the equipment in their homes needed to prepare signed statements and transmit them to litigants or their lawyers. The inability for witnesses and experts to prepare signed statements hinders lawyers in their ability to represent their clients adequately. It also hinders litigants' ability to receive meaningful representation of counsel and the ability of litigants who do not have lawyers to present their evidence.

67. The legal rights of litigants are also compromised when they and their witnesses cannot speak freely to their lawyer because they are not in secure locations to speak confidentially. Many litigants live in shared spaces or shelters with strangers or other people they may not trust, and may not feel comfortable disclosing traumatic experiences over the phone in the presence of people they do not want to share this information with.

68. Additionally, telephonic and Zoom connections are no replacement for in-person meetings, as there may be lost connections and the lawyer or client can miss very important information from the other person that may affect the outcome of the case.

69. Many legal organizations in New York utilize interdisciplinary work between social workers and attorneys to address the holistic needs of people who have cases in Immigration Court. Often, interdisciplinary work builds the trust necessary for clients to disclose traumatic experiences to their attorneys that affect the outcome of their immigration cases. Given the current pandemic, it is not possible for attorneys to effectively collaborate with social workers to assist clients in feeling more comfortable opening up about extraordinarily traumatic experiences the same way they would in an in-person meeting.

70. Defendants' failure to issue and implement uniform, reasonable policies for filing in the New York City Immigration Courts significantly interferes with Plaintiffs' right to obtain and consult with counsel under the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act.

G. Allegations Regarding Individual Plaintiffs

1. Nowshin Ali

71. Nowshin Ali is a citizen of India who is currently in removal proceedings before the New York Immigration Court. Around April 23, 2014, Ms. Ali filed an affirmative asylum application with the assistance of her prior attorneys. After attending her asylum interview in

2019, the asylum office referred her case to Immigration Court. Ms. Ali retained Brooklyn Legal Services for representation in her immigration case. Ms. Ali is currently seeking asylum and withholding of removal relief as well as relief under the Convention Against Torture.

72. Ms. Ali is currently scheduled for an individual hearing on May 19, 2020 before Immigration Judge Lena Golovnin. The filing deadline for documents in support of her case was April 19, 2020.

73. Ms. Ali's attorneys have not been able to comply with the April 19, 2020 filing deadline. Ms. Ali and her attorneys have not been able to speak in a confidential manner since her attorney's office closed to comply with the New York on PAUSE Executive Order. Ms. Ali currently resides with her minor son. She is a survivor of intimate partner violence, and it is very difficult for her to discuss the details of her case in the presence of her son.

74. Because Ms. Ali is unable to communicate with her attorneys in a confidential manner, her attorney has been unable to adequately draft her declaration. Additionally, the COVID-19 pandemic and related safety precautions have made it difficult for Ms. Ali's attorney to obtain declarations in support of Ms. Ali's case from individuals in India.

75. Around April 8, 2020, Ms. Ali's attorneys filed a motion to continue the May 19, 2020 individual hearing. As of April 24, 2020, Ms. Ali's attorneys have not received a decision on their motion, and the individual hearing remains on the court calendar.

76. Ms. Ali underwent surgery to remove parotid gland tumors and presently suffers from related comorbidities, including swollen lymph nodes, pulmonary problems, and anemia. Because of these health conditions, she is considered an immunocompromised individual. Her doctor has documented the medical condition and wrote a letter in support of the submitted motion to continue stating that, "[i]t is recommended that Nowshin Ali stays on self-quarantine

from present until the resolution of pandemic COVID-19. Ms. Ali is at high risk due to recent surgery, [treatment] of swollen lymph nodes, immunity activity. Her medical condition places her at high risk of morbidity if contact with COVID-19.”

2. Sonia Monir

77. Sonia Monir is a citizen of Bangladesh who is currently in removal proceedings before the New York Immigration Court after falling victim to attorney malpractice. The asylum office referred Ms. Monir to Immigration Court around 2008 after an attorney submitted a fraudulent Form I-589 in 1994. Later, an immigration judge administratively closed Ms. Monir’s case. She sought to reopen her Immigration Court case after a new form of relief became available. Around 2020, Ms. Monir retained Brooklyn Legal Services to help. Ms. Monir is currently seeking to adjust her status to that of a Lawful Permanent Resident before the New York Immigration Court.

78. Ms. Monir had an individual hearing scheduled for May 14, 2020, before Immigration Judge Barbara Nelson. The Immigration Judge set a filing deadline for documents in support of her case for April 14, 2020. The hearing has been postponed, but the filing deadline of April 14, 2020 is unchanged. When EOIR postponed non-detained hearings scheduled for May 4, 2020 to May 15, 2020, EOIR did not postpone filing deadlines that judges had set in those cases.

79. Ms. Monir’s first language is Bengali, and it is difficult for her lawyer to find reliable Bengali interpreters who can interpret over the phone. This has created a significant barrier for her ability to communicate with her lawyer.

80. Ms. Monir and her attorney were not able to comply with the April 14, 2020 filing deadline due to significant disruptions to daily life caused by the pandemic. Ms. Monir and her lawyer have not been able to speak in a confidential manner since her legal representative’s

office closed to comply with the New York on PAUSE Executive Order. Ms. Monir currently resides with her daughter. She is a survivor of intimate partner violence and it is very difficult for her to discuss the details of her case, especially the abuse, in the presence of her daughter.

81. Because Ms. Monir was unable to meet with her attorney in a confidential manner, her attorney has been unable to complete the new Form I-485, draft Ms. Monir's affidavit, obtain evidence, including the declarations of family members, or compile the evidence packet. Moreover, Ms. Monir feared that going to the post office to send documents to her attorney would put her at risk of being exposed to COVID-19.

82. Ms. Monir suffers from high blood pressure, also known as hypertension. Ms. Monir's hypertension makes her more susceptible to suffering complications if she contracts COVID-19.

3. Ron Cerreta

83. Ron Cerreta is a Senior Staff Attorney in the Immigrant Community Law Center of African Services Committee, a non-profit organization in New York City that focuses on serving the African community. Mr. Cerreta joined African Services Committee around July 2019 and has been practicing law for approximately eight years. Mr. Cerreta's practice includes representing non-detained clients in removal proceedings, including hearings in all three New York City Immigration Courts.

84. Mr. Cerreta was diagnosed as Human Immunodeficiency Virus (HIV)-positive around January 1986. Around December 1996, Mr. Cerreta was diagnosed with Acquired Immunodeficiency Syndrome (AIDS). Mr. Cerreta's physician is monitoring his medical condition, and he is currently receiving treatment. Due to his diagnosis, Mr. Cerreta is considered an immunocompromised individual.

85. Mr. Cerreta had a filing deadline on March 10, 2020, for an April 10, 2020 individual hearing at the Varick Street Immigration Court. Due to the COVID-19 pandemic, Mr. Cerreta decided he could not comply with the filing deadline because he could not risk his health and safety. The Varick Street Immigration Court had a confirmed case of COVID-19 and at the time remained open for filing purposes. Mr. Cerreta was forced to make the decision between meeting a deadline for his client and his own personal health and safety during the COVID-19 pandemic.

86. On March 16, 2020, Mr. Cerreta was scheduled to appear before Immigration Judge Dorothy Harbeck for an Individual Hearing at 26 Federal Plaza for a withholding-only removal proceeding. Mr. Cerreta's intention was to file a Motion for Continuance so that he would not have to appear that day, because New York State and other medical professionals had already issued guidance stating that immunocompromised individuals should be taking additional precautions and practicing social distancing. Mr. Cerreta could not reach Judge Harbeck's clerk in advance, and therefore felt compelled to appear in person with his motion because he did not want the court to issue an *in-absentia* order of removal for his client.

87. Mr. Cerreta prepared the Motion for Continuance on behalf of his client and prepared to head to 26 Federal Plaza. He did not feel that public transportation was a safe option for him and instead opted for a fifty-dollar taxi ride. Upon arriving to the Immigration Court, Mr. Cerreta noted that security personnel were not wearing protective equipment and were interacting with everyone entering 26 Federal Plaza without the use of masks, gloves, or hand sanitizer. He presented his motion and was forced to disclose on the record that he was requesting the continuance because has a compromised immune system. Immigration Judge

Dorothy Harbeck granted the Motion for Continuance and noted on the record that counsel has a compromised immune system.

88. Mr. Cerreta is afraid of having to risk his health by filing documents with the Court in the future. Mr. Cerreta has an upcoming filing deadline on May 8, 2020, for an individual hearing scheduled for June 8, 2020, at 26 Federal Plaza. Mr. Cerreta anticipates not being able to meet the filing deadline because he is having trouble communicating with his client in order to complete the declaration. Maintaining attorney-client privilege is not possible for Mr. Cerreta's client under the current circumstances. Additionally, without being able to meet his client in person, Mr. Cerreta will encounter logistical challenges in collecting the necessary evidence to support his client's case. Lastly, Mr. Cerreta's ability to print, copy, and scan filings that are several hundreds of pages long is limited.

89. Defendants' actions have caused Mr. Cerreta to place himself in unreasonable danger as an immunocompromised individual by requiring him to attend an Immigration Court appearance during the COVID-19 pandemic. Additionally, Defendants' failure to extend all filing deadlines until the COVID-19 pandemic ends continues to put Mr. Cerreta at risk.

H. Allegations Regarding Organizational Plaintiffs

1. UnLocal, Inc.

90. UnLocal, Inc. ("UnLocal") is a community-centered non-profit organization that was founded in 2008. UnLocal's mission is to provide direct immigration legal representation and community education to New York City's undocumented immigrant communities, including providing legal representation to undocumented immigrants facing removal.

91. UnLocal attorneys work on asylum, cancellation of removal, and other forms of immigration relief for clients in removal proceedings. They focus on cases with highly complex issues of law and collateral social services needs that are not likely to get placed at other

immigration legal service providers. In the first four months of 2020, UnLocal staff had 27 non-detained court appearances scheduled, including 11 individual hearings.

92. Around March 16, 2020, UnLocal closed its offices in anticipation of the city and state-wide shutdown and to protect its staff. Around March 22, 2020, the New York State on PAUSE executive order went into effect.

93. Rebecca Press is UnLocal's Legal Director. In March 2020, Ms. Press contracted COVID-19. Ms. Press appeared at a New York Immigration Court on March 12, 2020 and started demonstrating symptoms of COVID-19 approximately one week later. During this time, she had to go into the UnLocal office to carry out duties related to her filing deadlines in Immigration Court. Ms. Press reasonably believes that she contracted COVID-19 during her appearance at the Immigration Court. Ms. Press also worries that she exposed others to the virus because she did not know she was carrying it during the period she was asymptomatic.

94. Around March 26, 2020, Ms. Press wrote a letter to the New York City Immigration Court informing them that she and at least one UnLocal client had contracted COVID-19 and raising concerns regarding New York City EOIR procedures. The letter read in part:

I have COVID-19, as does at least one client with an upcoming non-detained hearing at Varick. The idea that we have to be following the constant changes, announced at the close of business one day and to be in effect the next day, instead of taking care of ourselves with what is truly a dangerous virus is just abhorrent. Moreover, none of the realities of a well-functioning court system, of what due process requires, of properly preparing for a case, are reflected in these decisions. This is true for all cases, regardless of the C19 status of the respondent or attorney. But it actually shocks the conscience when the reality is that hundreds, if not thousands, of attorneys and respondents who are in proceedings in NYC are infected with C19, and have to contemplate risking their health and the health of others to comply with last minute changes.

NY EOIR responded to Ms. Press to wish her well and reminded her that non-detained cases had been postponed. They did not mention filing deadlines.

95. During Ms. Press's illness, she had filing deadlines scheduled for March 27, 2020 and March 30, 2020. Ms. Press described her illness as having "never been so sick in her life." She was ill for approximately two weeks. Before EOIR announced the postponement of hearings, Ms. Press sent requests to accept untimely filings and asked for continuances during her illness. Notably, the client with the March 30, 2020 filing deadline had also contracted COVID-19.

96. UnLocal has a small staff that is dedicated to the non-detained docket. There are only six staff members, including Ms. Press, that work with non-detained clients in removal proceedings. UnLocal's staff is too small to have staff members replace each another in Immigration Court or to cover filing deadlines if anyone contracts COVID-19. Additionally, UnLocal's staff is very junior, requiring Ms. Press to be involved in all aspects of representation for their clients in the non-detained proceedings. This placed an even further strain on her staff while Ms. Press recovered from her illness.

97. Elizabeth Wu is a staff attorney at UnLocal. Ms. Wu also appeared at a NYC Immigration Court on March 12, 2020. Around March 16, 2020, she traveled to the UnLocal office and then appeared at the Immigration Court. The only reason that Ms. Wu went into the UnLocal office on March 16, 2020, was to prepare for the filing deadline. The UnLocal offices were otherwise closed. Ms. Wu began demonstrating symptoms of COVID-19 around March 19, 2020 and reasonably believed she had contracted COVID-19 during her visits to NY EOIR. Ms. Wu is also concerned that she exposed others to the virus during her visits to NY EOIR and the UnLocal office.

98. Ms. Press and her staff had final hearings scheduled for May 5, 2020, May 6, 2020, and May 13, 2020, that have been postponed. UnLocal has an individual hearing scheduled

for May 27, 2020. Two of the four clients are presumed to have contracted COVID-19. The May 27, 2020 hearing is scheduled to move forward after NYC EOIR is scheduled to reopen on May 18, 2020. Ms. Press filed a motion to continue the May 27, 2020 individual hearing. As of April 23, 2020, UnLocal has not received a response to the motion and the hearing remains on the court calendar.

99. Filing deadlines are particularly stressful for UnLocal staff. In light of the New York State on PAUSE Executive Order, the staff is concerned for their safety when needing to go to the post office or leaving their homes to seek out the resources they need in order to prepare filings and have decided against placing themselves in danger. Instead, the staff is focusing on filing motions for late filings and continuances because the staff's inability to adequately prepare the filings is prejudicial to their clients.

100. UnLocal is extremely aware of the challenges that the COVID-19 pandemic places on their clients. In addition to having clients that have contracted COVID-19, their clients are struggling emotionally and financially. These circumstances make it extremely difficult to prepare their clients to testify over the phone and to discuss the worst things that have happened to them in their lives. The failure to extend all deadlines is prejudicial to UnLocal's clients and their immigration cases.

101. UnLocal is tremendously concerned for unrepresented respondents who have had a doubly difficult time finding legal counsel under these extraordinary circumstances. While UnLocal staff does all that it can to continue meeting with new clients telephonically, the reality is that individuals otherwise eligible for UnLocal's services are likely having a more difficult time accessing its help.

2. Catholic Migration Services

102. Catholic Migration Services (“CMS”) is a New York-based non-profit legal services provider affiliated with Catholic Charities Brooklyn and Queens and the Roman Catholic Diocese of Brooklyn. CMS was founded in 1971. Its mission is to empower and serve low-income immigrant communities through legal and educational services, including by assisting individuals facing removal from the United States before the Executive Office for Immigration Review. CMS currently represents more than two hundred non-detained individuals with cases docketed before the New York Immigration Courts.

103. CMS’s Immigration Program handles a variety of cases, including, but not limited to, asylum, humanitarian relief, and removal defense. CMS employs seven attorneys, one law graduate, one immigration paralegal, and one legal assistant who work directly in their Removal Defense Project within the Immigration Program at CMS.

104. CMS closed their office to the public on March 15, 2020, and all employees have been working from home since March 16, 2020. From March 11, 2020 to the present, CMS attorneys assisted in seven ongoing immigration matters with the New York City Immigration Courts, which encompasses the period since New York announced the New York State PAUSE plan.

105. Alexandra Gonçalves-Peña is the managing attorney of the Immigration Program at CMS. Ms. Gonçalves-Peña has three cases that currently are or have already been impacted by the COVID-19 pandemic. For example, one client’s individual hearing was scheduled for April 10, 2020 with a call-up date set for March 26, 2020. As a result of the Immigration Court closures in New York City, the hearing did not move forward, but it was unclear if the filing deadline still applied to the case. Due to the possible dangers of exposure to COVID-19 both to

herself and her client, Ms. Gonçalves-Peña did not file the call-up documents with EOIR on or before the filing deadline.

106. Ms. Gonçalves-Peña also had an Individual Hearing with Immigration Judge Jennifer Chung that was scheduled for May 10, 2020, with a filing deadline of April 14, 2020. As of April 21, 2020, this Individual Hearing will be postponed to an unknown future date. Ms. Gonçalves-Peña's client is a Honduran woman who currently lives in a single room in a shelter. The client shares this room with her adult daughter and three minor children. Ms. Gonçalves-Peña and her client began to work on her declaration prior to the city-wide quarantine and have attempted to continue working on it since then, but it is impossible for Ms. Gonçalves-Peña and the client to have a confidential conversation in light of the client's living arrangements. Ms. Gonçalves-Peña's client lost both her son and her husband on the same day in Honduras and speaking about this trauma over the phone while in a room with her four children was "awful." Ms. Gonçalves-Peña considered other methods of communication including Zoom, but the documented security risks of this program prevented it from being a viable option. Ultimately Ms. Gonçalves-Peña determined with her client that they could not reasonably comply with the call-up date given the circumstances. On Thursday April 2, 2020, Ms. Gonçalves-Peña filed a motion to file out of time, and as of April 23, 2020, she has not received a response to the motion. She did not file call-up documents on or before April 10, 2020. It is unclear if the filing deadline remains despite the individual hearing having since been postponed.

107. Ms. Gonçalves-Peña is also representing a family in an individual hearing before Immigration Judge Evalyn Douchy in NYC Immigration Court scheduled for May 25, 2020 with a May 10, 2020 filing deadline. Ms. Gonçalves-Peña and the client will not be able to prepare an updated Form I-589 because she cannot meet in person with her client and confidential

communication is not possible. There is also evidence, including a letter from the client's sister, that Ms. Gonçalves-Peña cannot obtain due to the global disruptions caused by COVID-19. The client's sister is located in Honduras where notaries are closed and there are issues with the mail due to the pandemic. Ms. Gonçalves-Peña plans to file a motion to file out of time as well as a motion to continue.

108. Ms. Gonçalves-Peña's ability to communicate with her clients has been significantly disrupted as a result of this pandemic, and often requires resources to which she and her clients do not have access. Because motions to file out of time and motions to continue hearings have yet to be decided, these cases quickly become a strain on resources as Ms. Gonçalves-Peña and her colleagues must prepare as if the cases are moving forward on the individual hearing dates. Preparing for an individual hearing under these circumstances requires that Ms. Gonçalves-Peña and her staff expend more time on each case than they otherwise would have to. This takes time away from other areas in their immigration practice.

109. Lynn Neugebauer, a supervising attorney at CMS, has two cases that are currently affected by the COVID-19 pandemic.

110. One of Ms. Neugebauer's clients had a one-year deadline to file his Form I-589 on April 21, 2020. She has been unable to meet with her client since CMS closed on March 15, 2020. Her client is in full self-quarantine because his son has Leukemia and is immunocompromised. Ms. Neugebauer worked with the client over the phone to assemble his application, and on April 8, 2020, she felt compelled to travel to her office to print the application and mail it to her client via the U.S. Postal Service for him to review and sign the I-589. As of April 15, 2020, the package has not been delivered to the client. Ms. Neugebauer is unsure if the client will receive and be able to return the signed documents in time to submit the

I-589 to EOIR within the one-year deadline. When her client mails the application to her, she must return to the office to scan the application and convert it to a PDF with the certificate of service, creating another window of possible exposure to COVID-19.

111. Ms. Neugebauer has an additional case impacted by the COVID-19 pandemic. Ms. Neugebauer's client has an individual hearing scheduled for June 12, 2020, with a filing deadline on June 1, 2020. Ms. Neugebauer is struggling to obtain original documents and declarations to support her client's case. Her client's family is located in El Salvador, where the mail system is down except for the delivery of emergency medical supplies. Additionally, Ms. Neugebauer and her client are having trouble reviewing and finalizing her client's declaration. Her client shares a room with her two children. This living arrangement makes it extremely difficult for her client to discuss any of the details of her case in a confidential manner. Lastly, Ms. Neugebauer's client's landlord has been trying to evict her from her apartment for the past month. This added strain has made it exceedingly difficult for her client to focus on her case.

112. Michael Shannon, a senior staff attorney at CMS, has three cases that are or have been affected by the COVID-19 pandemic.

113. For example, Mr. Shannon represented a client in a non-detained master calendar hearing at the Federal Plaza Immigration Court on March 11, 2020. He and his client both had to take the subway and then wait in the "crowded, poorly ventilated hallway and courtroom with many respondents, attorneys, and court staff." At that time, New York State had already issued guidance on social distancing measures. Attending this hearing put Mr. Shannon's health, his client's health, and the general public's health at risk.

114. Mr. Shannon attended another non-detained individual hearing at the Federal Plaza Immigration Court on March 12, 2020. Mr. Shannon's client is in his late sixties and has

multiple comorbidities, including diabetes, hypertension, hypothyroidism, asthma, and pulmonary disease, all of which put him at higher risk of suffering complications or death should he contract COVID-19. Between March 10, 2020 and March 12, 2020, Mr. Shannon made numerous calls to EOIR in an attempt to reach the Immigration Judge's legal assistant in order to alert the court of the possible health risks for his client and receive guidance on filing an emergency motion to waive his client's appearance at the same hearing. Mr. Shannon prepared the written motion to waive his client's appearance, and on March 12, 2020, he finally reached the assigned ICE Assistant Chief Counsel. The ICE lawyer stated that she would join his motion and informed the immigration judge of the situation. The Immigration Judge signed the order granting relief.

115. In the court prior to the hearing on March 12, 2020, the Immigration Judge and the ICE lawyer both mentioned that visibly sick attorneys and respondents had been present in the courtrooms at the Federal Plaza Immigration Court on that day and in the days leading up to March 12, 2020.

116. Mr. Shannon also represents a client who had a master calendar hearing scheduled on March 16, 2020 at the Broadway Immigration Court. On March 13, 2020, Mr. Shannon called the legal assistant for the Immigration Judge for his client's case and requested an update on the status of the March 16, 2020 hearing. The legal assistant said that there was no COVID-19 guidance and that the hearing was scheduled to move forward. Mr. Shannon asked the legal assistant if he could file a motion to continue or a motion to appear telephonically either by e-mail, fax, or phone. The legal assistant said this was not possible.

117. Mr. Shannon drafted a written motion and used ICE eService to submit the motion. He planned to attend the March 16, 2020 master calendar hearing in person and

recommended to his client that she not appear. On March 13, 2020, at or around midnight, Mr. Shannon learned through an immigrant advocates listserv that EOIR had announced on Twitter that non-detained master calendar hearings in New York City would be adjourned beginning March 16, 2020.

118. Although Mr. Shannon and his client did not have to attend the March 16, 2020 hearing, they are now navigating how to respond to the client's one-year filing deadline on May 7, 2020. As of April 23, 2020, Mr. Shannon is unsure if he will be able to meet the one-year filing deadline due to the unique difficulties of telephonic communication and the socio-economic toll that COVID-19 is having on his client. He and his client have had problems with the phone connection, and there are usually children making noises in the background. Additionally, his client and her neighbors have fallen ill with COVID-19 symptoms and his client has lost her job.

119. Another attorney at CMS has an individual hearing scheduled for May 8, 2020. Although the lawyer has previously submitted an evidentiary packet for the case, the lawyer intends to submit a supplementary filing with a motion to file out of time. In order to prepare for this filing, the lawyer has had to go to the office to obtain the requisite documents and print items, placing the lawyer in danger of contracting COVID-19.

120. The COVID-19 pandemic has greatly reduced CMS's ability to take on new cases, as their intake procedures have ceased. People otherwise eligible for CMS's services cannot meet with CMS staff to retain an attorney for representation. CMS remains concerned for individuals being forced to move forward in Immigration Court as unrepresented respondents.

121. The employees of CMS are acutely aware of the dangers of COVID-19. Their legal director has tested positive for the virus, and many of them have friends and family

members that have been affected. Ms. Gonçalves-Peña believes she cannot ethically ask her employees to risk their health in order to comply with these filing deadlines set forth by the Immigration Courts during the city, state, and national emergency.

FIRST CAUSE OF ACTION

**VIOLATION OF THE FIFTH AMENDMENT - SUBSTANTIVE DUE PROCESS
(STATE-CREATED DANGER)**

122. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein and incorporate them by reference.

123. The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law.

124. Defendants require litigants and their advocates to travel from their homes and interact with members of the public in order to meet their arbitrary filing deadlines. In doing so, Defendants act in a manner that increases the danger Plaintiffs and their members and employees face from COVID-19.

125. Defendants have no need, urgent or otherwise, to enforce filing deadlines for hearings that take place shortly after the projected court opening of May 18, 2020. Hearings and/or filing deadlines can be postponed, including deadlines for motions to re-open for cases with already existing removal orders. Given the rapidly changing nature of the responses to COVID-19, it is possible that Immigration Court closures will be extended past May 15, 2020. Forcing Plaintiffs to risk their health to prepare for hearings that may themselves be postponed is unnecessary and dangerous. Defendants, by refusing to extend filing deadlines until the pandemic ends, have acted with reckless indifference to expose Plaintiffs to grave health risks, and this conduct shocks the conscience.

126. Defendants' failure and refusal to postpone filing deadlines in the New York City Immigration Courts therefore subjects Plaintiffs to a "state-created danger" that violates the Due Process Clause.

SECOND CAUSE OF ACTION

ADMINISTRATIVE PROCEDURE ACT

127. Plaintiffs repeat and reallege the foregoing paragraphs as if fully set forth herein and incorporate them by reference.

128. The Administrative Procedure Act ("APA"), 5 U.S.C. § 702, provides that:

[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Section 706 of the APA further states that the reviewing court shall:

hold unlawful and set aside agency action, findings and conclusions found to be
(A) arbitrary and capricious, an abuse of discretion or otherwise not in
compliance with law [or] ... (D) without observance of procedure required by
law[.]

129. Defendants' lack of policy to postpone the deadlines for filing documents in the midst of a global pandemic, placing at risk the health and lives of both clients and their advocates, to advance proceedings that have no urgency, and failing to provide uniform guidance for Immigration Court deadlines and instead allowing deadlines to be set by each individual judge, is arbitrary and capricious and an abuse of discretion.

130. Defendant's failure to enact a policy to postpone filing deadlines in the New York City Immigration Courts has placed an onerous burden on practitioners, clients, and unrepresented litigants, who have had the additional work of filing motions to continue and motions for untimely filings to request that filings are accepted and that non-detained hearings after May 1, 2020, are postponed. This failure has caused a Catch-22 situation where litigants

and their lawyers are forced to choose between breaking the law, contravening guidance from the federal government and orders from the Governor of New York State (and New Jersey and Connecticut), and endangering their health to comply with filing deadlines.

THIRD CAUSE OF ACTION

IMMIGRATION AND NATIONALITY ACT and the ADMINISTRATIVE PROCEDURE ACT – ACCESS TO COUNSEL

131. All the foregoing allegations are re-alleged and incorporated by reference.

132. The Immigration and Nationality Act, 8 U.S.C. § 1362, provides that “[i]n any removal proceedings before an immigration judge,” the individual “shall have the privilege of being represented” *See also* 8 C.F.R. § 1240.3.

133. The APA, 5 U.S.C. § 555(b), provides that “[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.” Individuals subjected to removal procedures are compelled to appear in person before agency representatives.

134. Defendants’ refusal to postpone arbitrary deadlines in the New York City Immigration Courts has made it difficult if not impossible for unrepresented litigants who have upcoming deadlines to obtain attorneys who are willing to run the attendant health risks in order to represent them. Defendants refusal to postpone deadlines also makes it impossible for attorneys to provide effective and competent assistance to their clients. Defendants therefore have violated Plaintiffs’ right to representation by counsel guaranteed by the INA codified in 8 U.S.C. § 1362 and the APA, U.S.C. § 555(b).

FOURTH CAUSE OF ACTION

**VIOLATION OF THE FIFTH AMENDMENT
(RIGHT TO COUNSEL)**

135. All the foregoing allegations are re-alleged and incorporated by reference.

136. The Fifth Amendment to the U.S. Constitution guarantees the right to an attorney in removal proceedings. This constitutional right is memorialized in Immigration and Nationality Act, 8 U.S.C. § 1362, and Section 555(b) of the APA.

137. Defendants refusal to postpone arbitrary deadlines has made it difficult if not impossible for unrepresented litigants who have upcoming deadlines to obtain attorneys who are willing to run the attendant health risks in order to represent them. Defendants refusal to postpone deadlines also makes it impossible for attorneys to provide effective and competent assistance to their clients. Defendants therefore have violated Plaintiffs' right to representation by counsel guaranteed by the INA codified in 8 U.S.C. § 1362 and the APA, U.S.C. § 555(b).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

- a. Declare Defendants' actions in this matter an abuse of discretion and not in accordance with the law pursuant to 5 U.S.C. § 706(1) and 28 U.S.C. §§ 2201-02, as well as a violation of the Due Process clause of the U.S. Constitution;
- b. Issue a preliminary and permanent injunction pursuant to 28 U.S.C. § 1361 and 5 U.S.C. § 706(1) prohibiting Defendants from enforcing filing deadlines or taking any adverse actions in non-detained New York City Immigration Court cases based on litigants' failure or inability to comply with such deadlines until 45 days after New York State and New York City lift all stay at home and social distance orders applicable to advocates and litigants appearing in NYC;

c. Grant attorneys' fees and costs of this suit under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412(2), *et seq.*; and

d. Grant such other relief as the Court deems necessary and proper.

Dated: April 29, 2020

LEGAL SERVICES NYC

By: /s/ Edward Josephson

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