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Submitted via email February 1, 2021

## Re: Continued Issues in Immigration Courts During COVID-19 Pandemic

Dear Deputy Director Olavarria, Special Assistant Moran, and Acting Director King,

The undersigned organizations and their members across the country provide legal services to and advocate for individuals in removal proceedings as well as those detained by U.S. Immigration and Customs Enforcement (ICE). This letter follows our March 23, 2020, [letter](#) raising major concerns about the ICE and Executive Office for Immigration Review (EOIR) response to what was then the first wave of the novel coronavirus, also known as COVID-19. Since our initial letter, more than 400,000 people in the United States have died from contracting the virus, which scientists have confirmed is spread primarily through airborne transmission of respiratory droplets.

We write today to call specific attention to EOIR policies that continue to place everyone's health at risk during what has become the greatest period of community spread of COVID-19, when record numbers of people inside the United States have contracted the virus. We respectfully request that you address several previous recommendations that have not yet been implemented, and that you effectuate new emergency responses as the virus threatens to overrun local health systems across the nation.

### The Ongoing Impact of the COVID-19 Pandemic on Immigration Courts

As of the date of this letter, a majority of immigration courts have reopened for in-person hearings,<sup>1</sup> including in cities that have recently imposed new restrictions due to community spread of COVID-19.<sup>2</sup>

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<sup>1</sup> EOIR, *Operational Status Map*, <https://www.justice.gov/eoir-operational-status/operational-status-map>.

<sup>2</sup> For example, the Los Angeles immigration court remains fully open, despite the County imposing a new stay-at-home order. See Marc Cota-Robles & Sid Garcia, *LA County's new stay-at-home order kicks in Monday, one day after 5K new COVID cases reported*, ABC7, December 1, 2020, <https://abc7.com/la-county-coronavirus-los-angeles-covid-covid-19-stay-at-home/8370432/>.

Over the past two months, nearly every one of these courts has been forced to shut down at some point due to COVID-19 exposures, with some courts shutting multiple times. During this continued moment of crisis, to protect the health of government employees and contractors, detained persons, legal service providers, and the public, while protecting basic due process rights, we urge you to immediately re-suspend in-person immigration court hearings until EOIR has implemented precautionary measures in place in locations that have reopened since March, with limited exceptions listed below.

Should EOIR continue to keep courts open, it should take further steps to move hearings to video or telephone.<sup>3</sup> We commend EOIR for acting on our prior recommendation by permitting the expansion of video teleconferencing (VTC) through a new memorandum allowing hearings through Webex and telephone.<sup>4</sup> However, we remain concerned that these measures are insufficient to address public health concerns, especially as Webex has still not been deployed in most detained immigration courts and its use remains up to the discretion of the immigration judge.<sup>5</sup> In fact, practitioners have reported several cases in which a judge refused to grant a continuance when the respondent or attorney tested positive for COVID-19 or was exhibiting symptoms.

EOIR has recently exacerbated the situation further by ending its successful practice of allowing the filing of documents via email in certain courts. This poses a heightened risk to both counsel and detained populations where the spread of the virus is pervasive. For example, the court at the Adelanto Detention Center ended e-filing on November 20th and now requires the submission of documents by mail or in person. The court has subsequently been forced to close down due to COVID-19 exposures on more than one occasion.<sup>6</sup>

To ensure consistent national practice across all immigration courts that remain open during this public health crisis, we urge EOIR to go further than the November 6, 2020, guidance. EOIR should immediately prioritize the expansion of Webex across the immigration court system, require immigration judges to permit telephonic or VTC appearance by legal representatives when requested (without onerous conditions like waiving evidentiary objections), and restore e-filing in all courts that remain open during this public health crisis.

In addition, we wish to express our grave concern with EOIR's recent decision to have Assistant Chief Immigration Judges (ACIJJs) issue orders setting new filing deadlines in a wide variety of cases, including

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<sup>3</sup> As we explained in our March letter, we do not support the blanket use of VTC or telephonic hearings during non-pandemic times, as it threatens to undermine due process. However, given the public health issues involved, we support the use of such measures during the declared national emergency for the COVID-19 pandemic.

<sup>4</sup> James R. McHenry III, Director, Policy Memorandum 21-03, Immigration Court Hearings Conducted by Telephone and Video Teleconference, November 6, 2020, <https://www.justice.gov/eoir/page/file/1335096/download>.

<sup>5</sup> As of the date of this letter, just six detained courts (Stewart, Tacoma, Imperial, Florence, Eloy, and Batavia) permitted hearings via Webex. EOIR, *Operational Status Map*, <https://www.justice.gov/eoir-operational-status/operational-status-map>. Practitioners have also reported at least some denials of motions for telephonic hearings due to COVID, including a policy in Louisiana where IJs have unilaterally refused to grant motions for telephonic individual hearings unless a practitioner or lawyer has been diagnosed with COVID or is displaying symptoms of the virus.

<sup>6</sup> EOIR, Twitter, 11:41 AM, December 1, 2020, [https://twitter.com/DOJ\\_EOIR/status/1333813471625043974](https://twitter.com/DOJ_EOIR/status/1333813471625043974).

those of unaccompanied children.<sup>7</sup> These filing deadline orders, which contain boilerplate text that is not tailored to the specific facts of the case, have led to significant confusion and disruption.<sup>8</sup> In some cases, practitioners report that the filing deadline orders were not even served on counsel, leading to panicked calls from respondents who were falsely made to believe that their attorneys had made egregious errors.

Requiring respondents in the middle of a pandemic to complete and sign applications months or years before they are scheduled to be filed is more difficult than ever, as many attorneys' offices remain shuttered and client meetings where documents are signed are more difficult to arrange. In addition, the filing deadline notices come at a time when the pandemic has increased delays in obtaining collateral forms of relief. For example, many U.S. Citizenship and Immigration Services offices remain at limited capacity and state and local court systems are experiencing significant delays. Given that this collateral relief would obviate the need for an application for relief to be filed in immigration court, the filing deadline orders create chaos.

The United States has now been dealing with the pandemic for nearly ten months. There is no excuse for failing to implement nationwide consistent and confidential mechanisms for legal service providers to conduct intakes, prepare individuals detained in ICE custody, and allow remote appearances before all immigration courts.

We once again urge EOIR to issue a new policy memorandum with blanket authority for the duration period of this national public health emergency that:

- Disallows reopening or continued operation of physical court installations, including in ICE detention centers, until EOIR can ensure adequate procedures and supplies to disinfect courtrooms, permit social distancing, and ensure sufficient airflow to prevent aerosol spread. Such an order should permit those with urgent matters before the court to file a motion to proceed with an in-person hearing.
- Restores e-filing at every immigration court and allows the filing of all material via email through the end of the national emergency.
- Grants automatic continuances when requested due to COVID-19, dispensing with the requirement for a formal written motion.
- Automatically waives presence of represented respondents for bond hearings and master calendar hearings unless respondents request otherwise.
- Prioritizes adjudication of bond hearings over all other hearings to allow for quick release where possible.
- Ceases issuance of *in absentia orders* during the COVID-19 declared National Emergency.
- Automatically tolls any deadline imposed by statute, regulation, local rule, standing order, or policy guidance.
- Immediately rescind any guidance to ACIJIs instructing them to issue new filing deadline orders and require ACIJIs to immediately rescind all such orders sent out under old guidance. Issue new

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<sup>7</sup> See Shannon Dooling, 'We've Never Seen These Orders Issued Before': New Deadlines In Immigration Court Have Attorneys Scrambling, WBUR, November 24, 2020, <https://www.wbur.org/news/2020/11/24/new-deadlines-immigration-court>.

<sup>8</sup> For example, the boilerplate orders at times falsely claim that the immigration judge ordered applications to be submitted by a specific date. Practitioners also report receiving these scheduling orders in cases where applications have *already* been submitted.

guidance encouraging IJs to take into account COVID risk factors and ability to pay when rendering decisions on bond requests.

Thank you for your time and attention to these urgent concerns.

Sincerely,

American Immigration Council  
American Immigration Lawyers Association  
Rocky Mountain Immigrant Advocacy Network  
Southern Poverty Law Center  
ADL (the Anti-Defamation League)  
Asylum Seeker Advocacy Project (ASAP)  
Center for Gender and Refugee Studies  
Esperanza Immigrant Rights Project  
Freedom Network USA  
HIAS  
Human Rights First  
Innovation Law Lab  
Jewish Family Service of San Diego  
Make the Road New York  
National Immigration Law Center  
National Network for Immigrant & Refugee Rights  
National Partnership for New Americans  
Safe Horizon  
UNITED SIKHS  
Wind of the Spirit Immigrant Resource Center

CC: Angela Kelley, Senior Counselor, U.S. Department of Homeland Security

David Shahoulian, Assistant Secretary for Border Security and Immigration, U.S. Department of Homeland Security