

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL IMMIGRATION PROJECT)
OF THE NATIONAL LAWYERS GUILD,)
et al.,)

Plaintiffs,)

v.)

EXECUTIVE OFFICE FOR)
IMMIGRATION REVIEW)
et al.,)

Defendants.)

Case No. 1:20-cv-00852 (CJN)

**BRIEF OF THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES
AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CORPORATE DISCLOSURE STATEMENT 1

INTEREST OF AMICUS CURIAE 2

STATEMENT OF AMICUS CURIAE 3

CONCLUSION..... 9

TABLE OF AUTHORITIES

Rules

8 C.F.R. § 1003.19 8
8 C.F.R. § 1003.42(c)..... 9
8 C.F.R. § 1208.31(g) 9

Other Authorities

EOIR Performance Plan,
ABA Journal..... 6
Memorandum from James R. McHenry III to all Immigration Judges and Staff,
Case Priorities and Immigration Court Performance Measures App. A (Jan. 17, 2018)..... 6
Monyak, Suzanne,
Amid Pandemic, Hearings for Detained Migrant Kids Go On,
Law360 (Apr. 19, 2020),..... 6
U.S. Dep’t of Justice, Exec. Office for Immigration Review,
Immigration Court Practice Manual § 9.3(e) (April 10, 2020)d 8

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the National Association of Immigration Judges is a non-partisan, non-profit, voluntary association of United States immigration judges. Since 1979, the NAIJ has been the recognized representative of all (currently approximately 440) non-managerial immigration judges across the country for collective bargaining purposes. The NAIJ is affiliated with the International Federation of Professional and Technical Engineers, a diverse labor union that advocates on behalf of more than 80,000 women and men in professional, technical, administrative, and associated occupations in the United States and Canada. No publicly held company has 10% or greater ownership in the NAIJ.

INTEREST OF AMICUS CURIAE¹

Amicus curiae is the National Association of Immigration Judges (NAIJ). The NAIJ is a non-partisan, non-profit, voluntary association of United States immigration judges. Since 1979, the NAIJ has been the recognized representative of all non-managerial immigration judges across the country for collective bargaining purposes. Our mission is to promote the independence of immigration judges and to enhance the professionalism, dignity, and efficiency of the immigration courts, which are the trial-level tribunals where removal proceedings initiated by the Department of Homeland Security (DHS) are conducted. We work to improve our court system through educating the public, legal community and media; providing testimony at congressional oversight hearings; and advocating to safeguard and ensure the integrity and independence of the immigration courts.

As immigration judges we work for the Department of Justice within the Executive Office for Immigration Review (EOIR), which oversees the immigration court, the Board of Immigration Appeals and the Office of the Chief Administrative Officer (OCAHO). We conduct a variety of immigration court hearings and other adjudications, such as bond redetermination matters. The proceedings involve both individuals who are within the United States and not detained (“non-detained” individuals) and those who are detained and held in Immigration and Customs Enforcement (ICE) custody (“detained” individuals).

¹ In accordance with Local Rule 7(o), the NAIJ certifies that (1) this brief was authored entirely by its counsel and not by counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from amicus curiae, its members, and its counsel, no other person contributed money to fund preparing or submitting this brief.

The NAIJ submits this brief in support of neither party to help the Court by providing the perspectives of immigration judges on the important issues raised in this case.²

STATEMENT OF AMICUS CURIAE

In late March 2020, after multiple requests by all frontline stakeholders, including NAIJ, EOIR suspended all non-detained hearings through at least May 1, 2020, as an appropriate measure to protect its employees, stakeholders, and members of the public from the spread of the COVID-19 virus. But EOIR has refused requests to delay detained hearings, which continue to be conducted at immigration courts around the country. The failure to take appropriate steps with respect to detained hearings raises serious concerns.

1. *Operating immigration courts involves close contact among judges, court staff, detainees, and members of the public.* EOIR's refusal to close detained courts continues to cause a cascade of social interactions that puts all of us at risk. It requires immigration judges and court staff to continue to travel to detained courtroom settings and to work shoulder-to-shoulder in offices and hearings. The design of our courtrooms and common workspace in the vast number of our locations simply does not allow for social distancing. Immigration court interpreters continue to appear at detained immigration court hearings to provide essential services for the hundreds of languages immigration detainees speak, which often involves travel from distant locales. Once in a courtroom, they must be placed close enough to the respondent to hear, a situation complicated exponentially if the people in court wear masks.

² The views expressed herein are those of the NAIJ, developed after extensive consultation with the membership, and are not presented by NAIJ as employees or representatives of the U.S. Department of Justice, Executive Office for Immigration Review. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review.

Immigration detainees are moved by security officers within detention facilities and across the country, as ICE runs a nationwide immigrant detention operation relying on a network of government and contract detention facilities. And, of course, many immigration detainees have recently been released to ICE custody after a stay in federal, state, or local prisons or jails—facilities that are plagued with their own COVID-19 outbreaks. Once they arrive in detention in a facility, detainees are frequently brought to court in large groups, or are required to wait outside courtrooms in large groups before being called to enter individually. Neither the detention facilities nor our immigration courts were designed to observe the currently required amount of social distancing.

The continued operation of detained courts requires immigration attorneys to continue to travel to courthouses. Even when telephonic court appearances have been approved, attorneys often have no way to review court files to prepare for cases without physically visiting the court. Because of severe limitations in speaking with detained respondents by telephone, they often must also travel to detention centers to consult privately with their clients. These visits necessitate wading through security lines and coming into close contact with facility employees, other visitors, and immigration detainees before even entering a courtroom. Moreover, detainees around the country are quarantined and “cohorted” because of COVID-19 exposure, sometimes making it difficult for attorneys to meet with their clients at all. Families of detainees, often including their children (now out of school without available alternate childcare), continue to travel to immigration courthouses in an attempt to see their loved ones and serve as witnesses in their hearings, even when hearings are conducted by video teleconference. They also appear at detention facilities to post bond or to bring to court documents essential for the cases of their loved ones.

Bringing court documents from the outside highlights another risk—namely, that our immigration courts still rely largely on paper filings and documents. Although EOIR has sought to expand electronic filing of documents, a large percentage of detainees are unrepresented by counsel and have no access to electronic filings. Given technological, linguistic, and other obstacles, submitting paper filings in court remains standard practice. Accordingly, to do the court’s work, parties appearing in immigration court must pass papers back and forth—with the result that legal briefs, court orders, paper evidence, and paper court files are passed from hand to hand every day

Another issue of tremendous concern is the lack of sufficient cleaning and protective supplies for staff and all who come to court. According to the general medical consensus regarding the transmission of COVID-19 on hard surfaces, all courtroom furniture (including those in the common areas) need to be sanitized after each use in a timely manner. At present, most EOIR staff have not been provided sanitizer, wipes, or masks. Nor are all the courtrooms in use supplied with those necessities for each person who appears, including attorneys, interpreters, and witnesses. Judges have instead been advised to bring in their own personal protective gear and sanitizing supplies—an unrealistic demand given the general unavailability of those products and supplies. Moreover, to ensure safe social distancing both courtrooms and waiting rooms would need to be reconfigured, tediously monitored to ensure that social distancing is observed, and cleaned after each use. Our staff and contracted janitorial services are ill-equipped and untrained for these tasks.

EOIR has also refused to suspend court appearances for unaccompanied children in removal proceedings who currently live in shelters or foster care homes supervised by the Office of Refugee Resettlement while awaiting family reunification. EOIR has classified these cases as

“detained,” thereby compelling these children to appear in person for their scheduled hearings at the assigned courts during the pandemic. *See* Suzanne Monyak, *Amid Pandemic, Hearings for Detained Migrant Kids Go On*, Law360 (Apr. 19, 2020), <https://www.law360.com/articles/1264877/amid-pandemic-hearings-for-detained-migrant-kids-go-on> (describing challenges of hearings for unaccompanied juveniles during COVID-19 pandemic). EOIR is not protecting any liberty interest with the continued operation of the unaccompanied juvenile docket, because these children are awaiting placement with family members or guardians completely independent of the immigration court process.

2. *Strict and arbitrary quotas and deadlines make immigration judges balance job security against public health.* The quotas and deadlines imposed on immigration courts and judges have exacerbated the risk to judges, immigration court employees, stakeholders, and the general public. For example, EOIR has issued detained case completion goals requiring 85 percent of detained hearings to be completed within 60 days of case filing. *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), <https://www.justice.gov/eoir/page/file/1026721/download>. Judges are rated based on so-called “performance metrics,” and risk poor performance reviews if they continue too many cases or do not make decisions on cases quickly enough. Some of these goals have extremely strict and short deadlines: Immigration judges are required to complete 90 percent of bond hearings on the first scheduled hearing and 95 percent of individual hearings on the first scheduled merits hearing. *See* EOIR Performance Plan, ABA Journal, https://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf. Judges who do not meet these deadlines risk being found unsuccessful in their performance appraisals, which may lead to them losing their jobs.

It is worth noting that approximately a quarter of all immigration judges are still on probation,³ meaning that they can be fired *without cause* or simply not kept on as permanent hires due to failure to produce these arbitrary number of case completions. Moreover, EOIR has not mitigated the risk posed by the agency's arbitrary quotas. To date—more than five weeks after the President declared a national emergency based on the COVID-19 pandemic—Director James McHenry has not taken any action to relax or excuse strict compliance with his performance metrics or quotas in light of the COVID-19 crisis.

The combination of these factors creates a warped incentive structure in which immigration judges, when faced with a motion to continue a hearing based on COVID-19 exposure of a detainee, a lawyer, an interpreter, or a witness, must weigh protection of the public health against their own job security.

3. *EOIR has failed to act.* The risks posed by the continued operation of the detained courts are demonstrated by multiple incidents across the United States. The New York City Varick Street Immigration Court, the Krome (Miami) Immigration Court, and the Otay Mesa (San Diego) Immigration Court provide illustrative examples of COVID-19 outbreaks associated with immigration detention within detention facilities and the concomitant exposure of COVID-19 to judges, court staff, DHS staff, and the public due to the appearance of immigration detainees in immigration courts. It is therefore not surprising that more than half of the immigration courts nationwide have reported test-confirmed COVID-positive or symptomatic individuals. The harm to health and safety has ranged from symptomatic individuals either working within or appearing at court and spreading the virus, to judges becoming infected with the COVID-19, to a guard at a hybrid court dying from the disease.

³ Immigration judges are generally on probation for two years after their appointments.

EOIR continues to close courts only on an ad hoc basis after cases of exposure to test-confirmed COVID-19 individuals, though EOIR has refused to publicly disclose reasons for many of the court closures or acknowledge the lack of available testing for many individuals who exhibit COVID-19 symptoms. Courts are periodically closed for a varying number of days for “deep cleaning” because of these exposures, but EOIR has not shared the standards used to determine what exposure necessitates closure, for how long, and why certain court staff but not others are required to stay home as a result. There are numerous examples of closures and reopening of immigration courts across the nation. NAIJ has repeatedly expressed concern to EOIR over EOIR’s inability to effectively and efficiently communicate the closures, delaying closure due to lack of communication within management resulting in risk of imminent injury to all court participants.

4. *Essential court work can continue outside the courthouse using available telephonic and digital means.* NAIJ is familiar with the affidavit of Director McHenry, submitted in this matter. While Director McHenry is correct that any temporary closure of detained immigration courts must also take into account the liberty interests of detainees, NAIJ has proposed that the key types of hearings implicating these liberty interests—namely, bond redetermination hearings and “credible fear” and “reasonable fear” review hearings for persons claiming a fear of harm in their countries—may be heard by immigration judges working outside the immigration courthouse. Indeed, many bond redetermination matters may be decided based on electronic document submissions from represented detainees and ICE counsel. *See* 8 C.F.R. § 1003.19 (governing the conduct of bond redeterminations); U.S. Dep’t of Justice, Exec. Office for Immigration Review, Immigration Court Practice Manual § 9.3(e) (April 10, 2020), <https://www.justice.gov/eoir/page/file/1258536/download> (noting that, “In general, bond hearings are

less formal than hearings in [merits] removal proceedings” and that they are not recorded); 8 C.F.R. § 1003.42(c) (noting that credible fear review proceedings may be conducted telephonically by Immigration Judges); 8 C.F.R. § 1208.31(g) (procedures for similar reasonable fear review proceedings before Immigration Judges). Pro se respondents can also readily submit documents for judicial review through the detention staff, similar to what they do now.

EOIR has refused to direct the suspension of all in-court proceedings despite the availability of the OpenVoice conference call technology touted in the declaration of Chief Immigration Judge Christopher Santoro. Because that technology imposes no pertinent limit on the number of individuals who can participate on a conference, it offers a potential alternative to in-court hearings. Hearings could also be done on the record to the extent necessary using existing laptop computers with the required Digital Audio Recording (DAR) software. Neither Director McHenry nor other senior EOIR officials have provided any reason why they have not directed that all in-court proceedings implicating immediate liberty interests be suspended during the COVID-19 pandemic, which would better protect the participants and the public. Courts around the country have already made such temporary shifts in their work.

CONCLUSION

No one can doubt the gravity and complexity of the COVID-19 pandemic and the recognized need for all Americans to take all necessary and reasonable precautions to prevent the spread of the virus, including taking steps to protect all immigration court participants, our overtaxed health care workers, and the public in general. Given the lack of any clear need for in-person detained hearings to proceed at this dangerous time, NAIJ strongly advocates for a temporary suspension of all in-person hearings for detained persons.

Respectfully submitted,

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