UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

P.L., et al., individually and on behalf all others similarly situated, Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al., Defendants.	No. 19-cv-01336-ALC

BRIEF OF CENTER FOR CONSTITUTIONAL RIGHTS, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTERESTS OF *AMICI CURIAE*

Amici consist of leading immigrant defense and legal assistance organizations and a leading constitutional rights group. As groups that work closely with immigrants, their families, and their communities in matters involving U.S. immigration courts and authorities, they have a profound interest in ensuring that the rights of immigrants facing removal are protected and that immigrants are provided fair procedures throughout those proceedings.[1]

The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for racial and immigrant justice and protection from indefinite detention and solitary confinement. CCR regularly works with immigrant communities that face distinct vulnerabilities at the intersection of the criminal justice system and immigration, and has brought numerous cases to ensure that non-citizens are afforded the protections established under the Constitution.

Central American Legal Assistance ("CALA") is a Brooklyn-based non-profit 501(c)(3) organization whose mission is to provide high-quality asylum representation to low-income asylum applicants and, as such, has an interest in ensuring that due process protections are respected in removal proceedings, including high-stakes proceedings concerning asylum, withholding of removal, and protection under the Convention Against Torture. CALA represents hundreds of asylum seekers each year, including detained immigrants who have been forced to

[1] The Court granted *amici*'s motion for leave to file an amicus brief on April 2, 2019. (Dkt. 72). No party's counsel authored this brief in whole or in part, and no party's counsel or other person contributed money intended to fund preparing or submitting this brief.

participate in their own immigration hearings through video teleconference at the Varick Street Immigration Court. CALA has a strong interest in ensuring that detained immigrants receive meaningful adjudication of what are often factually and legally complicated claims where the stakes are life and death.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that works to secure fairness and justice for immigrants in the United States. IDP provides attorneys, judges, immigrants, and community-based organizations with expert legal advice, publications, and training on issues involving the interplay between immigration and criminal law. IDP seeks to improve the quality of justice for immigrants in the immigration detention, deportation, and criminal justice systems, and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP regularly appears as *amicus curiae* in key cases before the federal courts involving the interplay between criminal and immigration law and the rights of immigrants in the criminal justice and immigration systems.

The New York Immigration Coalition ("NYIC") represents over 200 organizational members and partners working on behalf of immigrants, including those in detention, throughout New York State. The NYIC has taken a lead in coordinating legal services for immigrants, including acting as a liaison between legal service providers and federal immigration agencies, running the legal efforts at JFK Airport in response to the travel ban and helping coordinate a legal services effort to serve the over 300 asylum seekers transferred to the Albany County Jail and, more recently, organizing and running a collaborative of over 80 groups to improve resources for legal services organizations. The NYIC acts as a liaison between non-profit legal

organizations and local offices of the federal immigration agencies, including the New York-based immigration courts that adjudicate cases of detained immigrants.

The New Sanctuary Coalition ("NSC") is an immigrant-led New York organization that coordinates volunteer efforts to provide legal and social support for many hundreds of immigrants, their families, and their communities. NSC is grounded in New York's faith-based and social justice communities. NSC aims to stop the inhumane system of deportation and detention through accompaniment to mandatory ICE check-ins and immigration court hearings; legal support and referrals through clinics staffed by volunteer lawyers and trained laypeople; assistance with asylum applications; advice on *pro se* defense at court hearings; provision of a bond fund; rights trainings; and advocacy to increase detained immigrants' access to legal defense tools.

INTRODUCTION

In June 2018, the ICE New York Field Office ended its longstanding practice of producing detainees to immigration court for their removal proceedings and implemented a new policy (the "VTC Policy") of conducting removal proceedings for detained immigrants exclusively over video teleconference ("VTC"). Seeking immediate relief from violations of their rights under, *inter alia*, the U.S. Constitution's Due Process Clause, Plaintiffs have moved for a preliminary injunction requiring Defendants to produce Plaintiffs in person for all hearings in their immigration proceedings. For the reasons set out below, *amici* urge the Court to consider the severity of the consequences of a removal proceeding—which can equal or exceed those in many criminal proceedings—as well as the empirical evidence confirming the concreteness and gravity of the constitutional injuries asserted by Plaintiffs. These factors are crucial in weighing Plaintiffs' likelihood of success, the balance of harms, and the public interests at stake, and therefore grant Plaintiffs' motion for a preliminary injunction.

The use of VTC in removal proceedings stands in sharp contrast to criminal proceedings. Courts have long recognized a right to be physically present in criminal proceedings where one's life or liberty is at stake. *See United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012) ("[E]very federal appellate court to have considered the question has held that a defendant's right to be present requires [his] physical presence and is not satisfied by participation through videoconference."). Indeed, the defendant's physical presence is the means by which he effectuates his rights to be represented by counsel, present evidence and testimony, and confront evidence offered by the government. Facing the harsh penalty of separation from family and community if ordered removed—a penalty that "may be of greater concern" to a respondent than "any potential jail sentence," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (quoting *Jae Lee v. United States*, 137 S. Ct. 1956, 1968 (2017))—respondents in immigration proceedings must be entitled to the same ability to communicate with counsel, examine evidence against them, and make their case to an adjudicator.

Numerous empirical studies confirm, however, that conducting immigration proceedings by VTC undermines these rights that are essential to a full and fair hearing. In particular, studies demonstrate that the use of VTC in removal proceedings burdens the detained immigrants' right to access and communicate confidentially with counsel. In VTC hearings, attorneys generally appear in the courtroom for the proceeding and are separated from their clients who appear in the detention center. This physical separation of attorney from client both immediately before and during the removal hearing severely impedes open and confidential attorney-client communication, which is critical for effective representation. The use of VTC also hinders a respondent's ability to present evidence on his own behalf and confront the evidence mustered by the Government. In particular, the distortion and loss of non-verbal cues through VTC—

which are well-documented in empirical studies—and the respondent's inability to be physically present in the same courtroom as the Immigration Judge ("IJ") and the government attorneys undermines a respondent's ability to testify effectively on his own behalf; impedes a respondent's ability to both present and examine physical evidence; and makes it significantly more difficult for a respondent to hear and understand the evidence offered against him. Given the great weight placed by IJs on a respondent's credibility and the fact-intensive nature of removal proceedings, the physical presence of a respondent can make the crucial difference between deportation and the right to remain in the United States with family and community.

Studies on the use of VTC demonstrate that VTC also undermines the public's interest in open removal hearings. The public unquestionably has an interest in public access to removal proceedings, and a particularly strong interest in assuring that the family and community members of the respondent can attend the proceeding. Yet studies demonstrate that the use of VTC is a de facto bar on any audience presence in the same physical space as the respondent in removal proceedings and prevents the respondent's family and community members from attending the proceedings in a meaningful way.

For all of these reasons, *amici* urge this Court to grant Plaintiff's motion for a preliminary injunction.

ARGUMENT

I. Facing Severe Immigration Consequences, Immigrants Must Be Physically Present at Removal Hearings to Effectuate Their Due Process Rights

As set out in Plaintiffs' Complaint and preliminary injunction papers, the most basic "requirement of due process is the opportunity to be heard"—an opportunity which must be afforded "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks omitted). "[T]hese rights [to be heard] include, as a

minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948). Importantly, the rights guaranteed by due process cannot be replaced with pro forma substitutes. Instead, these rights must be afforded in a way that "is adequate, effective, and meaningful." *See Bounds v. Smith*, 430 U.S. 817, 822 (1977).

In the criminal context, it is well-established that the right to be heard includes the right to be physically present in proceedings where life or a liberty interest is at stake. *See, e.g.*, *Crosby v. United States*, 506 U.S. 255, 259 (1993) ("[T]he personal presence of the defendant is essential to a valid trial and conviction on a charge of felony."); *Diaz v. United States*, 223 U.S. 442, 456 (1912) (the defendant's right to be present is "scarcely less important to the accused than the right of trial itself"); *United States v. Yannai*, 791 F.3d 226, 239 (2d Cir. 2015) ("[T]he constitutional right to be present at one's own trial exists at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure." (internal quotation marks omitted)); *see also Kentucky v. Stincer*, 482 U.S. 730, 750 (1987) ("Physical presence of the defendant enhances the reliability of the fact-finding process."). Courts have repeatedly held that a criminal defendant's right of presence in trials and other hearings involving live testimony is not satisfied by his appearance through VTC. *See Salim*, 690 F.3d at 122 (noting that "every federal appellate court to have considered the question has held that a defendant's right to be present requires [his] physical presence and is not satisfied by participation through videoconference"); *see, e.g.*, *United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011); *United States v. Thompson*, 599 F.3d 595, 599–600 (7th Cir. 2010); *United States v. Torres-Palma*, 290 F.3d 1244, 1245–48 (10th Cir. 2002); *United States v.*

Lawrence, 248 F.3d 300, 301, 303–04 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 235–39 (5th Cir. 1999).[2]

In rejecting the use of VTC in criminal proceedings, courts have emphasized that a defendant's physical presence in the courtroom is necessary because it is "the means by which he effectuates" his rights to access counsel, confront evidence, and present testimony. *Thompson*, 599 F.3d at 599. Accordingly, without the defendant's physical presence and the personal interactions that take place in a live hearing—which VTC cannot adequately replicate—the force of these rights is diminished. *See id.* at 599–600; *see also, e.g.*, *Williams*, 641 F.3d at 764–65 (concluding that the defendant's right to be present "simply cannot be satisfied by anything less than physical presence in the courtroom"); *Lawrence*, 248 F.3d at 304 (emphasizing that "virtual reality is rarely a substitute for actual presence" and concluding that "the right of a defendant to be present at trial best ensures the right to consult with counsel and to confront adverse witnesses").

The stakes in a removal hearing are equal to—if not higher than—any criminal proceeding, as the Supreme Court has made clear. *See Dimaya*, 138 S. Ct. at 1213 (emphasizing that "deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence'" (quoting *Jae Lee*, 137 S. Ct. at 1968)). The Supreme Court has explained that deportation is the "equivalent of banishment or exile." *Costello v. INS*, 376 U.S. 120, 131 (1964); *see also, e.g.*, *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring) ("To banish [individuals] from home,

[2] Criminal defendants may appear by VTC in certain types of criminal proceedings, such as arraignments, if they consent. *See* Fed. R. Crim. P. 5(f) ("Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents."). But courts have held that a defendant may not appear by VTC in plea, sentencing, and revocation of supervised release hearings. *See, e.g.*, *United States v. Beathea*, 888 F.3d 864, 866–68 (7th Cir. 2018); *Thompson*, 599 F.3d at 599; *Torres-Palma*, 290 F.3d at 1246–48.

family, and adopted country is punishment of the most drastic kind."). Indeed, to "deport one who so claims to be a citizen obviously deprives him of liberty," and "may result also in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.).

Given these stakes, and the fact that the rights to access counsel, confront evidence, and present testimony are essential elements of a fair hearing, Congress and the federal courts have guaranteed these rights to immigrants in removal proceedings. It is well-established that the Sixth Amendment right to counsel in criminal proceedings is necessary to ensure fair adjudication and avoid erroneous decisions. *See, e.g.*, *Geders v. United States*, 425 U.S. 80, 88–89 (1976) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (internal quotation marks omitted)); *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (a defendant "requires the guiding hand of counsel at every step" because "[h]e lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one"). Access to counsel is equally critical in removal proceedings. Indeed, the importance of legal representation is "especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work." *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008); *see also* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo J. Legal Ethics 3, 8 (2008) (access to counsel is essential in avoiding erroneous decisions in removal proceedings because immigrants "are largely strangers" to "the complicated maze of

immigration laws"). Courts have accordingly held that immigrants in removal proceedings have the right to counsel of their choice at their own expense under the Fifth Amendment's Due Process Clause. *See, e.g.*, *Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008) (the "right to counsel concerns fundamental notions of fair play underlying the concept of due process" (internal quotation marks omitted)). Congress has also codified this right in the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1229a(b)(4)(A); *id.* § 1362.

Courts have recognized that a criminal defendant's right to present testimony and confront evidence is another critical element of a full and fair hearing. The defendant's right to present testimony is essential to a fair hearing because "the most important witness for the defense in many criminal cases is the defendant himself," and he has the "right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). The defendant's Sixth Amendment right to confront the evidence offered against him serves to "ensure the reliability of the evidence . . . by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). In recognition of the importance of these rights in ensuring a fair hearing, Congress has guaranteed analogous evidentiary rights to respondents in removal proceedings. *See* 8 U.S.C. § 1229a(b)(4)(B) (providing for the right to "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"). Courts have also recognized that the right to present and confront evidence in removal proceedings is guaranteed by the Fifth Amendment's Due Process Clause. *See, e.g.*, *Al-Muntasr v. Holder*, 376 F. App'x 135, 136 (2d Cir. 2010) ("An alien subject to removal proceedings is entitled to due process, including a reasonable opportunity . . . to present evidence on [his] own behalf." (internal quotation marks and citation omitted));

Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) (same); *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992) (due process requires that respondents in immigration proceedings have a reasonable opportunity to cross-examine witnesses presented by the government).

Both the federal courts and Congress have thus acknowledged that fair removal hearings must include similar rights to access counsel, present evidence and testimony, and examine evidence as are guaranteed in criminal proceedings. Just as a criminal defendant's physical presence is necessary for him to effectuate these rights, a respondent in a removal proceeding cannot fully exercise these guaranteed rights where he is not physically present. Although the respondent's rights arise from a different source—the Due Process Clause of the Fifth Amendment and the INA—the principle underlying the need for physical presence is the same.

The right to physical presence is, moreover, crucial during *all* immigration proceedings. Indeed, in immigration court, any hearing can be dispositive—from master calendar hearings where a respondent must testify that he understands the consequences of accepting voluntary departure, to fact-finding hearings where a respondent must testify to facts underlying his asylum or cancellation of removal claim. Individuals facing these severe immigration consequences should be provided the same opportunity as criminal defendants to be physically present when their most fundamental rights are adjudicated.

II. Empirical Research Confirms That the Use of Video Teleconferencing Undermines Due Process Rights That Are Essential to a Fair Hearing.

Numerous empirical studies unequivocally demonstrate that conducting removal proceedings by VTC burdens the exercise of essential due process rights guaranteed to immigrants in removal proceedings: the right to access counsel and the right to present and confront evidence. This empirical evidence thus confirms the concreteness and gravity of the

constitutional injuries asserted by Plaintiffs, and underscores that respondents must be physically present at removal hearings to fully exercise their due process rights.

A. The Use of Video Teleconferencing Burdens Access to Counsel and the Ability to Communicate Confidentially and Freely with Counsel.

Courts have characterized the right to counsel in removal proceedings as "fundamental" and emphasized that the right "must be respected in substance as well as in name." *Baires v. INS*, 856 F.2d 89, 91 n.2 (9th Cir. 1988). Moreover, courts have recognized that the right to counsel in removal proceedings is the right to the "*effective* assistance of counsel where counsel has been obtained." *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) (emphasis in original); *see also Aris*, 517 F.3d at 600–01 (explaining that "due process concerns may arise when retained counsel provides representation to an immigration proceeding that falls so far short of professional duties as to impinge upon the fundamental fairness of the hearing" (internal quotation marks and alteration omitted)).

Empirical research demonstrates that the use of VTC in removal proceedings turns the right of access to counsel in removal proceedings into an empty promise. Most fundamentally, respondents in VTC proceedings are far less likely to retain counsel than those in live, in-person proceedings. The overwhelming majority of detained immigrants are not represented by counsel, *see* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 31–32 (2015) (finding that only 14% of detained immigrants nationwide had legal representation throughout the duration of the proceedings), but the deficit of legal representation is even more severe among those in VTC proceedings: a recent study found that detained immigrants who appeared in in-person hearings were 35% more likely to obtain counsel than those in VTC hearings. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. L. Rev. 933, 969 (2015).

The low rate of legal representation among respondents in VTC proceedings is particularly troubling as access to legal representation in an immigration case is often decisive. *See, e.g.*, Eagly & Shafer, *supra*, at 9, 70 (2015) (immigrant detainees represented by counsel are over ten times more likely to succeed in their cases and nearly seven times more likely to obtain bond as compared to unrepresented detainees). Indeed, whether an asylum seeker is represented by counsel is "the single most important factor affecting the outcome of her case." Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (noting that the grant rate for represented asylum seekers is almost three times the rate for unrepresented asylum seekers). Individuals without access to legal representation enter removal proceedings at a significant disadvantage. They must navigate an extraordinarily complex area of law, which can be unintelligible to those without legal training. *See Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth." (internal quotation marks omitted)). Detained immigrants without counsel face particularly significant challenges in preparing for their hearings as they have limited access to legal resources and severe restrictions on their ability to communicate with friends and family members who could help them prepare their cases.[3]

[3] Detained immigrants' limited access to legal resources is well-documented. Studies show that some detention centers do not even have law libraries, and of the centers that have libraries, the materials are commonly outdated, unrelated to immigration, and in English. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 78–80 (2012). A recent survey of detained immigrants revealed that they "were typically allowed only an hour a day to access the [detention center's law] library, which they felt was woefully inadequate in gathering useful information." Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. Cal. L. Rev. 999, 1040 (2017).

For detained immigrants who have retained counsel, the use of VTC significantly burdens their access to counsel. VTC forces attorneys into a challenging position: they can either appear at the detention center where they will be able to freely confer with their clients but have reduced access to the immigration court (including the IJ, their client's file, and the government's evidence), or they can appear in court, where they will have greater access to the court but will be physically separated from their client. *See* Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 Pierce L. Rev. 59, 85 (2006). Practical constraints often prevail as many attorneys simply do not have the time or resources to travel to the respondent's detention center, and therefore must appear in the immigration court for the proceeding. *Id.* And in some cases, attorneys do not even have the option of appearing in the detention center with their clients as certain immigration courts (including the Varick Street Immigration Court) require the attorneys to appear in the courtroom. This separation of attorney from client both immediately before and during the removal hearing impedes attorney-client communication, which is essential for effective representation. *See Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) ("A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense.").

Studies demonstrate that detained immigrants in VTC proceedings face significant barriers in communicating with counsel in advance of their removal hearings—which is critical to the attorney's ability to provide effective representation at the hearing, *see, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 170 (1985) ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (when pretrial detainees' interest in effective communication with attorneys is "inadequately respected during pre-trial confinement, the

ultimate fairness of their eventual trial can be comprised"). When removal proceedings are conducted in-person at the immigration court, attorneys can meet clients "in the court's lock-up prior to the hearing," and they typically can confer and strategize with their clients "in the courtrooms prior to the judge taking the bench." Eagly, *supra*, at 985. The use of VTC makes such consultation impossible. Instead, for an attorney representing a respondent in a VTC hearing, the *only* way to consult with his client in advance of the hearing is to travel to the detention center, which are often in "remote locations," and "endur[e] long wait times" for a private meeting room.[4] *Id.* at 985–86. This burdens counsel with substantially higher costs, representational inefficiencies, and logistical difficulties, which necessarily compromises his ability to communicate with their clients.

VTC also impedes confidential attorney-client communication during the removal hearing itself. Because attorneys in VTC proceedings are generally not in the same room as their clients, they "ha[ve] no opportunity to offer their clients a confidential consultation before, during, or after a hearing." *Id.* at 990. If an attorney wishes to communicate confidentially with her client, she has to request that the IJ clear the courtroom, but even then, attorneys surveyed thought they were being overheard, either by people outside the courtroom (including the IJ from chambers) or by guards or other detainees in the detention center. *Id.* at 990–91. In a study of VTC hearings at the Immigration Court in Chicago, the "vast majority" of lawyers surveyed believed that private conference with their clients was impossible in a VTC proceeding. Amanda J. Grant et al., *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, Legal Assistance Found. Metro. Chi. & Chi. Appleseed Fund for Justice 39

[4] One attorney interviewed in a recent study of the use of VTC in removal proceedings explained that the process of driving to the detention center and waiting to meet his client could take hours, and he sometimes had to devote nearly an entire day to simply have a "ten to fifteen minute conversation" with his client. *Id.* at 985 & n.237.

(Aug. 2, 2005), *available at* http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

VTC thus establishes significant barriers to access to counsel in removal proceedings—barriers which would be entirely impermissible in the criminal context. Indeed, courts have rejected policies that impose substantial burdens on a criminal defendant's ability to communicate with his attorney. *See, e.g.*, *Benjamin v. Fraser*, 264 F.3d 175, 184–88 (2d Cir. 2001) (pretrial detainees' right to access the courts and counsel was unjustifiably obstructed where attorneys subjected to long waits to conduct legal visits due, in part, to an inadequate number of legal visitation rooms). Courts have also recognized that a defendant's constitutional "right to privately confer with counsel is nearly sacrosanct." *Nordstrom*, 762 F.3d at 910; *see also Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951) (explaining that the Fifth and Sixth Amendments' "guarantee to persons accused of crime the right privately to consult with counsel both before and during trial" is "a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner"). In light of the critical importance of legal representation in removal proceedings, which involve fundamental decisions concerning life and liberty, detained immigrants must be guaranteed the same unimpeded access to counsel.

B. The Use of Video Teleconferencing Undermines A Respondent's Ability to Testify, Present Evidence, and Confront the Evidence Offered by the Government.

Empirical evidence also confirms that the use of VTC in removal proceedings severely impedes a detained immigrant's ability to present and confront evidence.

First, the use of VTC undermines the respondent's ability to testify on his own behalf. A respondent's testimony is not simply the words he or she utters, but instead encompasses the respondent's non-verbal communication, such as demeanor, body language, and facial expression. Indeed, empirical research confirms that non-verbal signals are powerful forms of

communication that are deeply tied to the meaning conveyed in interpersonal communication. *See* Peter A. Andersen, Nonverbal Communication: Forms and Functions 1–2 (2008) (non-verbal communication is "a vital part of the communication process" and may account for 65% to 93% of social meaning conveyed through verbal communication). These non-verbal signals are critically important in the presentation and evaluation of testimony. As Judge Learned Hand explained, witness demeanor may prove decisive to the jury's resolution of a case:

> [T]he carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor'—is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness.

Dyer v. MacDougall, 201 F.2d 265, 268–69 (2d Cir. 1952) (Hand, J.).

The immigration context is no different. A respondent's cadence of speech, body language, and gaze can *alone* be a sufficient basis for making an adverse credibility determination in a removal proceeding. *See, e.g.*, *Xue v. Gonzales*, 186 F. App'x 139, 140–41 (2d Cir. 2006) (the IJ's observations of respondent's "halting" demeanor, and "voice [that] lacked conviction" substantiated finding the respondent not credible); *Lin v. Att'y Gen.*, 193 F. App'x 26, 28 (2d Cir. 2006) (the IJ's observation that the respondent "testified in a halting manner" and "looked to his counsel . . . for a cue of some sort" was a "reasonable basis for finding [respondent] not credible"). These factual determinations and credibility assessments in removal proceedings are essentially unreviewable by the BIA and federal courts. *See* 8 U.S.C. § 1252(b)(4)(B) (on appeal, the IJ's "findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary" (emphases added)); *see also, e.g.*, *Li v. INS*, 453 F.3d 129, 136 (2d Cir. 2006) ("[W]e recognize that, in the design of the INA, the factual determinations at the heart of many asylum and withholding of removal claims cannot be

made by courts, but are committed to the EOIR."); *Paredes-Urrestaurazu v. U.S. I.N.S.*, 36 F.3d 801, 819 (9th Cir. 1994) (holding that the IJ's "exclusively demeanor-based" adverse credibility finding was entitled to "special deference").

The use of VTC compromises the transmission of these critically important non-verbal cues, which consequently skews how a respondent's testimony is perceived and assessed. Empirical research demonstrates that non-verbal cues are "simply less effective" and "do[] not have the same effect" over VTC as compared to face-to-face interactions. Gwyneth Doherty-Sneddon et al., *Face-to-Face and Video-Mediated Communication: A Comparison of Dialogue Structure and Task Performance*, 3 J. Experimental Psychol.: Applied 105, 120 (1997). In VTC systems that have transmission delays or poor visual or audio quality—which are well-documented in the Varick Street Immigration Court's VTC courtrooms—non-verbal signals may be "degraded, distorted, or attenuated." Chris Fullwood et al., *Like What You See? The Effect of Video-Mediated Gazing on Information Recall and Impression Formation*, Electronic J. of Commc'n (2013), *available at* http://www.cios.org/EJCPUBLIC/023/1/023124.html; *see also* Gwyneth Doherty-Sneddon et al., *supra*, at 120 ("[T]echnologies may . . . actually distort the shape of gestures and thereby affect information transfer."). Even where VTC functions properly, non-verbal cues can still be distorted due to the distance or angle of the camera. For example, where the VTC camera is configured to capture only a head shot, facial expressions are overemphasized while hand gestures and body language are entirely omitted. *See* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tulane L. Rev. 1089, 1109 (2004).

VTC also fails to replicate natural eye contact, which plays an important role in impression formation. The presence or absence of eye contact affects the perception of

emotional expression and the establishment of trust, *see* Leanne S. Bohannon, et al., *Eye Contact and Video-Mediated Communication: A Review*, 34 Displays 177, 179 (2012), and studies demonstrate that people are judged less favorably on a number of dimensions, including honesty and intelligence, when they avoid eye contact, *see* Fullwood, *supra*. Yet normal eye contact is impossible through VTC. The camera in VTC is typically placed above the monitor, so when communicators gaze at their communication partners (*i.e.*, at their image on the monitor), it gives the impression that they are looking in a downward direction. Bohannon, *supra*, at 183.

Taken together, the distortion and loss of non-verbal cues through VTC undermines a respondent's ability to meaningfully testify on his own behalf. The respondent's non-verbal signals comprise a large part of the meaning conveyed in his testimony—and are explicitly considered and relied on by the IJ in assessing his credibility—but accurate evaluations of such cues are simply not possible in VTC. Empirical research confirms that the difficulties inherent in mediating communication over VTC work to the respondent's detriment: studies on the use of VTC in courtrooms demonstrate that fact-finders evaluate televised testimony as less credible than in-court testimony. *See, e.g.*, Sara Landstrom et al., *Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory*, 12 Legal & Criminological Psychol. 333, 344 (2007) (finding that jurors perceived in-person child testimony as more convincing than child testimony by video); Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 Law & Hum. Behav. 165, 196 (1998) ("The direct effect of testifying over CCTV was to lower children's credibility in the eyes of the jurors.").

Second, the use of VTC impedes a respondent's ability to both present and examine physical evidence. Because the respondent is not physically present in the same courtroom as

the IJ, the respondent faces significant logistical hurdles in proffering evidence. Whereas documents or other physical evidence can be readily presented in live, in-person hearings, evidence in VTC hearings generally must be submitted "two or three days ahead of time." Eagly, *supra*, at 983–84. Any evidence that a respondent seeks to proffer consequently has to "go through the entire prison system" to reach the immigration court before the hearing begins, creating a significant risk that the evidence will not arrive in time for the hearing. *Id.* In addition to impeding the ability to present evidence, VTC makes it almost impossible for the respondent to examine the evidence offered by the government. In a recent study of the use of VTC in removal proceedings, one IJ explained that to present documents and other physical evidence to respondents, he had to "go up to the camera and show it to them"—which is a far cry from actually reviewing the evidence side-by-side with counsel. *Id.* at 986.

Third, VTC makes it significantly more difficult for a respondent to hear and understand the evidence offered against him. Studies of the use of VTC in removal proceedings indicate that VTC audio often cuts out and even when the VTC is functioning properly, the audio is often of low quality. Eagly, *supra*, at 993. Further, many respondents rely on interpreters, who are less effective over VTC than in person. A study of court interpreters found that interpreting remotely through VTC required the interpreters to utilize more brain power to perform the interpretation, which in turn caused increased fatigue and poorer performance as compared to in-person interpretation. *See* Barbara Moser-Mercer, *Remote Interpreting: Issues of Multi-Sensory Integration in a Multilingual Task*, 50 META: TRANSLATORS' J. 727 (2005).

These known shortcomings of VTC have caused federal courts to reject the use of VTC in conducting criminal trials and other hearings involving live testimony. These courts have emphasized that VTC cannot adequately replicate the personal interactions that take place in a

live hearing, and the defendant's ability to present testimony and confront evidence remotely over VTC is diminished. As one court explained, a "face-to-face meeting between the defendant and the judge permits the judge to experience those impressions gleaned through any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another." *Thompson*, 599 F.3d at 599 (internal quotation marks and alterations omitted); *see also Lawrence*, 248 F.3d at 304 (emphasizing that "watching an event on the screen remains less than the complete equivalent of actually attending it" and that a defendant's presence at sentencing "gives a defendant one last chance to personally plead his case"). These considerations apply with equal force in removal proceedings, where, as the Supreme Court has time and again recognized, *see supra* at 7–8, the stakes are at least as high as in criminal proceedings and the IJs are charged with making critical (and essentially unreviewable) factual determinations and credibility assessments. A lesser standard for how evidence and testimony is presented should not be permitted in removal proceedings.

III. Conducting Removal Proceedings by Video Teleconferencing Undermines the Public's Interest in Open Removal Hearings.

The public interest is best served by producing detained immigrants for removal hearings because the use of VTC undermines public access to removal proceedings. The public has a significant interest in open hearings, as public access keeps hearings fair and legitimate, both for litigants and for the public at large.[5] *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002) (concluding that the public's interests are best served by open removal proceedings).

[5] In the criminal context, "[t]he shared interest of the defendant and the public in open proceedings enjoys constitutional protection, explicitly through the Sixth Amendment's guarantee of public trials, and implicitly through the First Amendment's guarantee of free speech and a free press." *United States v. Abuhamra*, 389 F.3d 309, 321 (2d Cir. 2004). There is a right to a public hearing in civil cases. *See* Fed. R. Civ. P. 77(b); *see also Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22 (2d Cir. 1984) (explaining that the First Amendment secures a right of access to civil proceedings). Public hearings are also the preferred mode for administrative hearings. *See, e.g., F.C.C. v. Schreiber*, 381 U.S. 279, 283 (1965).

An open hearing assures "that the proceedings [a]re conducted fairly to all concerned" and discourages "the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); *see also Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) ("That we regard an 'open or public hearing'" to be a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged."). Open hearings also serve to protect "the public's right to know what goes on when men's lives and liberty are at stake." *Pechter v. Lyons*, 441 F. Supp. 115, 118 (S.D.N.Y. 1977) (quoting *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965)). With few exceptions, the requirement of public access applies to all immigration hearings. *See* 8 C.F.R. § 1003.27.[6]

There is a particularly strong public interest in ensuring that removal proceedings are open to the respondent's family and community members. In the criminal context, courts have noted a special concern for assuring the attendance of the family and friends of the accused in criminal proceedings. *See In re Oliver*, 333 U.S. at 271–72 & n.28 ("[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."). Indeed, because criminal proceedings "are of paramount importance to friends and family members of the defendant," they have a strong interest in attending the proceedings. *United States v. Alcantara*, 396 F.3d 189, 198 (2d Cir. 2005). The presence of a defendant's family members and friends at a criminal proceeding is considered essential as it "reminds the participants . . . that the consequences of their actions extend to the broader community." *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012). This reasoning has equal—if not greater force—in the context of removal

[6] One important exception to the general rule of open immigration proceedings is for asylum merits hearings, which may be closed if the applicant makes an "express" request. *Id.* § 1240.11(c)(3)(i).

proceedings where a respondent may be deported. *See Dimaya*, 138 S. Ct. at 1213. A removal proceeding is of unquestionable importance to the family and community members of the respondent—indeed, they are the individuals most likely to be affected by the respondent's potential deportation. There is accordingly a strong public interest in their attendance at removal hearings. *Cf. Rivera*, 682 F.3d at 1230.

The use of VTC undermines this public interest by imposing "a de facto bar on audience presence in the same physical space as" the respondent in removal proceedings. Eagly, *supra*, at 997. A VTC hearing occurs in two locations simultaneously: the IJ's courtroom and the detention center where the respondent is detained. Although technically there is a public right of access to the detention center to view VTC hearings,[7] in practice, it is almost impossible for members of the public to attend removal hearings at the detention center. *See* Eagly, *supra*, at 994–1000. A study of the use of VTC in the Chicago Immigration Court found that "[t]here was no public access to the remote courtroom" in the detention center. Grant, *supra*, at 6. Another study found that detention center officers are often unaware of their obligation to make VTC hearings open; one study reported that, to attend these hearings, one "often ha[s] to involve immigration court officials in Washington, D.C." to get the detention centers to comply. Eagly, *supra*, at 995. Moreover, family and community members may be excluded from detention centers "based on the facility's peculiar regulations, such as rules barring individuals with criminal records or requiring a certain style of clothing." *Id.* at 996.

As a result, when family and community members attend a VTC hearing, they generally must attend the hearing in the immigration court and not in the same room as the respondent. *Id.*

[7] Exec. Office for Immigration Review, *About the Court*, U.S. Dep't of Justice, http://www.justice.gov/eoir/sibpages/was/HQIC.htm [http://perma.cc/7GZP-BDWE] ("Public access to VTC hearings is governed by the provisions of 8 C.F.R. 1003.27 in the same manner as onsite in-person hearings.").

at 999. However, studies of the use of VTC courtrooms demonstrate that this limited audience presence is a far cry from an audience composed of family and friends in the same courtroom as the respondent. In many VTC courtrooms, the only television in the courtroom faces the IJ, so audience members cannot even see the respondent. *Id.* at 998; Grant, *supra*, at 26 & n.43 (noting that the "television does not exist in the new videoconferencing courtroom, and family members can no longer see their relative at the hearing"). Moreover, because the VTC camera in the courtroom is focused on the IJ, the respondent cannot actually see family and community members present in the courtroom. Eagly, *supra*, at 999. The use of VTC thus prevents the family and community members of the respondent from attending the removal hearing in a meaningful way.

The lack of a visible audience composed of family and friends in removal proceedings can have far-reaching effects and implications. The creation of a remote courtroom devoid of an audience can disempower communities that are most directly affected by the immigration court system by limiting their involvement in the proceedings. Moreover, the use of VTC effectively isolates detained immigrants from family and community members, which can impact the perceived fairness of the hearing and respondents' ability to litigate vigorously. Eagly, *supra*, at 999; *cf.* Ryo, *supra*, at 1048 (immigrant detainees' perception that the legal system is punitive, inscrutable, and arbitrary "may have significant negative effects on their ability and willingness to fully pursue the legal relief to which they are entitled under the law"). Indeed, a statistical analysis of immigration court proceedings nationwide revealed that respondents who appear in live, in-person removal hearings are "significantly more likely to engage in the litigation process by retaining counsel and seeking relief" from deportation as compared to those who appear in VTC proceedings; the study found that in-person respondents were 90% more likely to apply for

discretionary relief from deportation and 35% more likely to obtain counsel. Eagly, *supra*, at 968–69. Not having pursued available rights, respondents will necessarily be far less likely to obtain relief for which they are legally eligible.

In sum, in light of the strong public interest in open removal hearings—particularly for the family and community members of the respondent—and the studies confirming that the use of VTC undermines such public access, the public interest is best served by producing detained immigrants for removal hearings.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant Plaintiffs' motion for a preliminary injunction.

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