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By Email

Regina Rau
Acting Court Administrator
New York City Immigration Court
26 Federal Plaza
New York, NY 10278

Ms. Rau:

My name is Jose Pagliery. I am the investigative reporter for Univision 41 WXTV, the local Spanish-language television news station. I am writing to express concern and seek redress for my recent expulsion from a courtroom under your supervision -- an incident that violated court rules and infringed upon my Constitutionally-protected right to engage in journalistic activity.

I. Background

At approximately 10:45 am on Tuesday, July 16, 2019, I was present in the 12th floor courtroom of Immigration Judge Jem Sponzo. Inside the courtroom were at least 15 members of the public: minor respondents, temporary guardians, and attorneys. I was taking handwritten notes and exercising my First Amendment right as a credentialed member of the press, quietly observing administrative removal proceedings in cases regarding "Unaccompanied Alien Children."

The judge called the next case, that of a Central American teenage boy. An attorney serving as the boy's guardian notified Judge Sponzo of my presence. Judge Sponzo looked directly at me and asked if any members of the press were present. I identified myself. Judge Sponzo then asked if I had notified the court's public affairs office. I indicated that I have been in communication with that office.

The judge stated that this attorney was requesting that members of the "press" not be present for the remainder of the hearing. The judge indicated special circumstances that closed the courtroom – but only to me as a member of the press. I asked the judge to clarify if I was being forced out for the duration of the boy's testimony or the remainder of the hearing. The boy's attorney said the restriction applied only to the next boy's testimony. Judge Sponzo said the attorney would inform me when that boy's testimony was over and I could return. I exited. The others in the courtroom remained.

A few minutes later outside the courtroom, I approached the attorney and asked why I was forced out, and if the boy's testimony included details that would put him in danger. She said the boy did not – and would not have – shared details that posed any danger. I asked why the hearing was not closed entirely to the public. She said her decision was solely driven to prevent "the press" from witnessing his testimony.

II. Argument

The actions of Judge Sponzo violate the rules as described in the *Immigration Court Practice Manual* that clearly state "hearings in removal proceedings are generally open to the public." See Immigration Court Practice Manual 4.9(a)(i).

And while an immigration judge has the authority to limit access to the courtroom, such as when the respondent "expressly requests that the hearing be closed" during an evidentiary hearing, see 8 CFR § 1240.11(c)(3)(i), that closure applies to everyone – and does not single out a single member of the press, as Judge Sponzo did. By law, a respondent may request "that the hearing be closed," but nothing in the law indicates that a respondent can keep a hearing "open" to the public but "closed" to a journalist. See *id.*

In fact, the policy is the exact opposite. For while an immigration judge "may place reasonable limitations upon the number in attendance at any one time," she is specifically instructed to do so "with priority being given to the press over the general public." See 8 CFR § 1003.27(a). And courts have recognized that the right of access does not permit government officials to deprive select journalists of access to information made available to others. See, e.g., Nicholas v. N.Y.C., 2017 WL 766905, at *1 (SDNY 2017) (denying government's motion to dismiss lawsuit challenging revocation of press pass where photojournalist was excluded from scene arbitrarily or based on viewpoint and others were permitted); see also Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) ("[O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.").

A preliminary injunction has already been granted at least once by the U.S. District Court for the Southern District of New York after an immigration judge restricted public access to deportation proceedings in the New York City Immigration Court. See Pechter v. Lyons, 441 F. Supp. 115, 117 (SDNY 1977). There, the district court held that Immigration Judge Francis J. Lyons "abused his discretion" by barring members of the public from attending deportation proceedings, even though he had specifically exempted members of the press from his ban.

The Executive Office for Immigration Review's rules governing public access under 8 CFR § 1003.27 are among countless manifestations of a public policy that is nearly 400 years old.[1] Namely, that "judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection of the

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[1] In 1641, the General Court of Massachusetts Bay Colony enacted "The Massachusetts Body of Liberties," the first code of laws established in New England, and therefore in a very real sense the American version of a "Magna Carta." This code including the following passage: "Every man whether Inhabitant or forreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting..."

individual from unwarranted and arbitrary conviction, but also to protect the public from lax prosecution." See *Id.* at 117. This tradition of open courtrooms does not only apply to the Judicial Branch of government. While 8 CFR § 1003 specifically provides for public hearings within the Executive Office of Immigration Review, "there is a general policy favoring disclosure of administrative agency proceedings" throughout the Executive Branch. See FCC v. Schreiber, 381 U.S. 279 (1965) (upholding FCC's procedural rule that "establish[ed] a presumption in favor of public proceedings," since it "accords with the general policy favoring disclosure of administrative agency proceedings"); see also N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 290 (2d Cir. 2012) ("The public's right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding.").

It is highly questionable whether the members of the public permitted to stay in Judge Sponzo's courtroom are well positioned to serve as "public scrutiny" of the judicial process, Pechter, 441 F. Supp. at 117, when the dozen or so persons in the courtroom were largely made up of undocumented children who do not speak English and are already confused about the judicial proceedings they face, or adult guardians who are sworn to secrecy as a condition of employment at government-funded shelters, or legal counsel whose chief duty is to represent an individual client rather than to inform the American public.

Immigration judges do have a certain degree of discretion for holding a closed hearing, as I have personally witnessed in my capacity as a journalist while reporting inside several courtrooms at 26 Federal Plaza. For example, in one recent instance a courtroom was closed when a Honduran teenager chose to inform the judge that he is gay and fears lethal retribution from his uncles if forced to return to his country of origin (as I would later discover through journalistic technique). But in that instance, the judge appropriately determined that the testimony was "concerning an abused alien child," as provided in 8 CFR § 1003.27(c), and closing the hearing served "the purpose of protecting [a party,]" as provided in 8 CFR § 1003.27(b). Everyone in the courtroom was forced to exit temporarily.

However, Judge Sponzo did not "hold a closed hearing" to protect a party, as allowed in 8 CFR § 1003.27(b). She permitted others to remain in the courtroom, thus keeping the hearing open to all but a member of the press. Furthermore, no explanation was given in open court that described the oral or written motion asking Judge Sponzo to close the hearing, which should have "set forth in detail the reason(s) for requesting that the hearing be closed." See Immigration Court Practice Manual 4.9(a)(iii).

Additionally, this incident marks the second time that Judge Sponzo has questioned this reporter to ensure that we have previously coordinated with the Executive Office of Immigration Review's public affairs office before entering her courtroom to observe proceedings. The rules do indicate that "news media are strongly encouraged to notify the Office of Communications," but such coordination is not required. See Immigration Court Practice Manual 4.9(b).

This immigration judge's decision to single out a member of the press and have him exit her courtroom must be viewed in context. There is now increased scrutiny of the Executive Branch's power and a heightened public concern about fair treatment of undocumented

immigrants. The Trump administration has moved to erase a sense of stability to thousands of families by eliminating the Deferred Action for Childhood Arrivals program.[3] It created a "zero tolerance" policy at the border that forcibly separated thousands of immigrant children from their families.[4] It sought to temporarily halt a program that offers legal help to detained migrants facing deportation proceedings.[5] It stripped migrants who fled their home countries from the ability to cite gang violence as a reason for asylum.[6]

Against this backdrop, forcing a journalist out of an open courtroom further impairs the protection afforded the public by the presence of the press – what has been deemed the Fourth Estate of power.[8] "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty." See Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (recognizing right of access to immigration hearings).

III. Conclusion

For the foregoing reasons, I ask that the New York City Immigration Court administrator direct all judges to rightfully keep their courtrooms open to the public as provided in the Immigration Court Practice Manual, prohibit judges from closing the hearings to members of the press, and release to Univision 41 the Digital Audio Recording of the July 16, 2019 morning hearings before Judge Sponzo.

Respectfully submitted,

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cc:

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[3] U.S. Department of Homeland Security. (5 September 2017). *Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA).* Elaine C. Duke, Acting Secretary of Homeland Security.

[4] U.S. Department of Justice. (6 April 2018). *Memorandum for Federal Prosecutors Along the Southwest Border.* Jeff B. Sessions, Attorney General of the United States.

[5] The Washington Post. (10 April 2018). Justice Dept. to halt legal-advice program for immigrants in detention. Maria Sacchetti.

[6] U.S. Department of Justice. (11 June 2018). *Matter of A-B-, Respondent.* Jeff B. Sessions, Attorney General of the United States.

[8] As stated in Thomas Carlyle's fifth lecture in "On Heroes" written in 1840: "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all."