Testimony by the New York Legal Assistance Group (NYLAG)

before the NYC Council Committee on Immigration regarding:

Legal Services for Asylum Seekers

October 18, 2023

Chair Hanif, Council Members, and staff, good afternoon and thank you for the opportunity to speak to the Immigration Committee about Legal Services for Asylum Seekers in New York City. My name is Melissa Chua, and I am the Associate Director of the Immigrant Protection Unit at the New York Legal Assistance Group (NYLAG). NYLAG uses the power of the law to help New Yorkers in need combat social, racial, and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, financial counseling, and community education. NYLAG serves immigrants, seniors, the home-bound, families facing foreclosure, renters facing eviction, low-income consumers, those in need of government assistance, children in need of special education, domestic violence survivors, persons with disabilities, patients with chronic illness or disease, low-wage workers, low-income members of the LGBTQ community, Holocaust survivors, veterans, as well as others in need of free legal services.

We appreciate the opportunity to testify to the Immigration Committee regarding legal services for asylum seekers in New York City. NYLAG is proud to operate in a City that values its immigrant citizens and supports much-needed services to them through its budget. Long-term, continued investment in legal services – including organizations with deep expertise – is crucial to meeting the current and future needs of immigrant families in New York. We cannot treat the question of legal services and other support for new New Yorkers as a temporary issue. Instead, we must support the investment in expertise, programming, and services to continue to meet the

ongoing and ever-changing legal needs of the immigrant community in New York City long term. Legal service providers need funding that meets our costs and supports our ability to provide innovative, culturally and linguistically competent services, and assist immigrants in navigating the complexities of the immigration legal system.

The Current Immigration Landscape

Although New York City has welcomed large numbers of migrants seeking refuge in the last year and a half, the lack of significant additional investment in legal services organizations has resulted in a diminished ability to leverage our expertise to serve newly arrived immigrants and the overstretching of existing programming at the expense of existing clients and communities.

There has been a large influx of migrants at the Southern Border since the Spring of 2022. While initially most families and individuals coming to New York from the Southern Border were from Venezuela, the newly arrived immigrants now come from several different countries worldwide, including Ecuador, Peru, Colombia, Afghanistan, Mauritania, Guinea, Russia, and Burkina Faso. The vast majority of these families and individuals are granted entry into the United States in order to begin removal (deportation) proceedings and are asked to report to Immigration and Customs Enforcement (ICE). However, the breakdown of the ICE surveillance programs and the inability of the Immigration Courts to process and schedule hearings for these migrants has created an urgent crisis in the immigration legal field. These individuals and families are desperate for information to interpret documents, guide them as to the requirements and next steps, and advise them how to navigate this broken system. Many migrants are rapidly approaching their one-year anniversary in the United States and must file an application for asylum to preserve their right to seek protection. Where and how they can file this complex twelve-page English only application

is a major source of confusion as most people are in a procedural limbo and will need legal assistance in filing. Obstacles to quality, free legal advice and guidance will cause families to seek information from poorly skilled or unscrupulous providers who prey on their desperation.

Continued Investment in Legal Expertise and Long-Term Programming

To meet the incredible need for legal services, a vision for the long-term that invests in flexible programming and expertise is vitally important. Last year, in response to the large numbers of newly arrived immigrants, community-based organizations and legal Service providers, NYLAG among them, came together to develop innovative programming to maximize the limited legal resources and personnel and to provide community oriented, high quality legal assistance. One of the programs that was developed during this process was the Pro Se Plus Project (PSPP), which was established through private investment and now receives support from the City and State. The PSPP, a collective of organizations including NYLAG, African Communities Together, Central American Legal Assistance (CALA), Catholic Migration Services (CMS), MASA, UnLocal, and Venezuelans and Immigrants Aid (VIA), aims to empower recently arrived migrants with the knowledge and tools to advocate for themselves throughout their immigration process and mobilizes community supporters. The PSPP believes that while full representation remains essential, *pro se* assistance that is robust and delivered by lawyers and non-lawyers who have meaningful training and supervision can fill some of the gaps in services. PSPP is also founded on the belief that while *pro se* application assistance is an important initial step, *it is only the first part* of a long and complicated process during which continued support and information are crucial. Since its inception at the end of last year to date, PSPP has provided information, training, and *pro se* assistance to over 10,000 immigrants and supporters throughout New York City.

PSPP aims to empower the communities we serve through multiple means. The first is robust community education in multiple languages about the U.S. immigration system, and basic services and requirements that intersect with that system (school enrollment, worker's rights, health insurance, identification). Because of deep confusion about the process, and inconsistencies in paperwork and the changing landscape of how migrants are processed, broad group orientations and general information packets are a good starting point for all migrants but are insufficient to properly address the needs. Noncitizens want and need individual guidance and counsel on their options, next steps, and process. The PSPP is centering community-based organizations such as Venezuelan Immigrant Assistance (VIA), MASA, and African Communities Together to provide linguistically and culturally appropriate orientation, information, and guidance. Alongside these community education materials, the PSPP provides trainings to mobilize community supporters to grow the community of individuals supporting newly arrived immigrants.

However, legal orientation must be accompanied by a renewed investment in robust advice and counsel, *pro se* application assistance, and ongoing removal defense representation. Although the number of immigrants in removal proceedings has skyrocketed to more than two million pending cases nationwide, including approximately 200,000 in New York City alone, the funding for removal defense legal services has largely remained static.[1] As has often been reported, having legal representation makes a significant difference in the outcome of an asylum claim. It is critical that the city re-invest in attorneys to provide robust advice and counsel and full representation to not only this population of newly arrived asylum seekers but the thousands of other New York-based asylum seekers who have been on the waitlists of non-profit organizations for years. Additionally, with the ever-fluctuating policies at the border, there are likely to be additional waves of

[1] Historical Immigration Court Backlog Tool, *available at: https://trac.syr.edu/phptools/immigration/court_backlog/*.

migrants coming into the U.S. and to New York in the upcoming months and years and any programming and services should be forward looking and flexible to address future needs as well as the needs from migrants who migrated to New York City this summer.

To respond to this everchanging and growing need, alongside community education, PSPP provides screenings for full immigration relief, robust *pro se* application assistance done by volunteers under highly experienced immigration attorneys, and connection to full representation where possible. Since beginning our programming earlier this year, PSPP has provided full legal screenings to approximately 2000 individuals and families to provide options for immigration relief, triage cases with upcoming deadlines, and provide individualized advice and counsel for large numbers of migrants. PSPP also assists with simple services such as change of addresses and changes of venue, gives guidance and information on the difference between an ICE check-in and an Immigration Court hearing, guides people on how to find out about upcoming court hearings, and eligibility criteria for asylum and other immigration relief. In addition, while PSPP is supported by immigration attorneys with deep asylum experience, we also leverage the existing knowledge in our organizations to screen for all forms of relief, including U and T visas, family-based immigration relief, and TPS, connecting newly arrived immigrants with services for each type of relief where appropriate. PSPP also works with volunteers, pro bono attorneys, and community supporters to prepare asylum applications *pro se.* However, PSPP believes the initial application for asylum is merely the first step to securing long term stability and protection for families. After assisting with the preparation and filing of the *pro se* application, PSPP then supports in the critical next steps of an asylum applicant's journey, understanding that many newly arrived immigrants will have to navigate the entire process alone. PSPP answers follow-up questions about filings, provides guidance and support through the next phases of the immigration process,

and, when the time is appropriate in a case, connect applicants when possible, with full representation. To support asylum applicants through their immigration process, PSPP provides robust training about asylum lawas well as immigration court and its processes and is in the process of producing supporting materials for filings to be made broadly available. We also leverage our deep immigration expertise to provide continuing support for other avenues for immigration relief that applicants may become eligible for, such as employment authorization and TPS. For example, as soon as the redesignation of Temporary Protected Status (TPS) was announced for Venezuelan nationals, PSPP staff began reaching back out to *pro se* applicants we had served to inform them and start scheduling them for assistance applying for TPS. Similarly, PSPP staff tracks the filing of asylum applications, reaching back out to individuals who are nearing 150 days after filing for asylum to let them know they can return to PSPP providers to apply for employment authorization.

Finally, legal triage and *pro se* assistance will not be able to fully address the entire need. There must be increased and continued investment in full representation for individuals and families who cannot proceed *pro se* who will need to challenge a removal order or appeal a case. There needs to be additional programming and funding for other models of service and traditional full representation. Moreover, even with the introduction of the redesignation of TPS for Venezuelans, continued investment in asylum application assistance, including full representation is absolutely crucial. While TPS is an important protection from removal, it is as its name plainly indicates – temporary. While TPS can be extended theoretically every 18 months, it does not provide the holder any permanent protection from harm, nor does it allow for the permanent reunification of families. While many of the recent asylum seekers are Venezuelan nationals who can benefit from TPS, it goes without saying that there are thousands of asylum seekers in New York City who are not Venezuelan nationals and cannot benefit from TPS. Given the diversity of the current migrant populations, case postures, and treatment by federal policies, there is no one size fits all. New York

City is fortunate to have a breadth of legal service providers with different talents, personnel, and areas of expertise and the City would be wise to encourage creativity and diversity in programming to serve existing needs and anticipate future needs.

The recent redesignation of Venezuela for TPS only underscores the ongoing need for sustained investment in legal expertise and flexible programming. While the application for TPS may seem simple on its face, there are a potential number of complexities for many newly arrived Venezuelan nationals, particularly given the intersection with pending and future asylum applications. In these many cases, the need for robust, individualized legal advice and follow-up is crucial in the short term in order to obtain TPS and employment authorization. While asylum applicants are eligible for employment authorization 180 days after an application for asylum is accepted, individuals only become eligible for work authorization when the application for TPS is approved. Although USCIS could theoretically grant employment authorization while an application for TPS is pending, it has not yet announced any plans to do so. As TPS applications will likely be processed within the next few months, issues concerning TPS eligibility will arise almost immediately as opposed to those presented in asylum claims, which are likely to be pending for many years. Practically, what this means is that complicated questions requiring nuanced, individualized advocacy are likely to arise in many TPS cases, almost immediately within the next few weeks. For example, many of the Venezuelan nationals whom NYLAG has identified as eligible for TPS have spent long periods of time – often years – in third countries before coming to the United States. Depending on the particular immigration status, if any, that Venezuelan nationals obtained while in the third country and the nature of their stay, they may be barred from TPS due to having been "firmly resettled" in that third country. Relatedly, children born in third countries to Venezuelan parents may not have any proof of their nationality or citizenship with Venezuela with little ability to obtain those documents in the United States. Moreover, statements made in TPS applications

may have deleterious repercussions on an applicant's asylum case and therefore long-term protection where the two applications are inconsistent, even where the inconsistencies are due to preparer negligence or undertraining.

The recent announcement of TPS only solidifies the importance of flexible funding to provide full-representation or robust *pro se* assistance where necessary to meet the ever-changing needs of newly arrived New Yorkers. While NYLAG has begun providing TPS assistance to Venezuelan nationals, recent cuts in funding to our existing TPS programming has impacted our ability to serve Venezuelan nationals. Building upon our expertise most recently working with the Ukrainian community to file hundreds of TPS applications in the last few months, NYLAG has set up full representation and *pro se* clinics for Venezuelan nationals eligible for TPS. However, due to the cut in the entirety of our funding from the City to specifically serve Ukrainian TPS applicants, we have had to continue using our limited resources to continue our ongoing ethical obligations on existing cases while also stretching to meet the needs of Venezuelan TPS applicants.

Continued Investment in Legal Expertise for Post-Order Work

NYLAG has already seen many newly arrived immigrants who were ordered deported without the opportunity to present their claim for asylum. As set forth in our paper attached to this testimony, we have seen newly arrived immigrants ordered removed *in absentia* through no fault of their own but instead due to administrative failures of the courts to provide proper notice of hearings and the people being turned away from federal buildings due to long lines and confusion at the entrance and then ordered deported for failing to appear at their hearings. Indeed, this trend is consistent with nationwide statistics; as of the third quarter of 2023, the total number of *in absentia* orders was already approximately 116,000 nationwide, nearly double the year before as of only the third quarter.[2] To preserve the rights of asylum seekers with *in absentia* orders, Motions

[2] Executive Order for Immigration Review, Adjudication Statistics, https://www.justice.gov/eoir/page/file/1243496/download

to Reopen (MTRs) must generally be filed within 180 days to preserve all claim. The Rapid Response Legal Collaborative (RRLC), made up of NYLAG, UnLocal and Make the Road New York, provides crucial post-order legal services, including MTRs and post-order appeals. These motions and appeals require a specific area of expertise that has been developed over the last four years of RRLC's post-order work. RRLC also takes on for full representation the appeals for denied MTRs, as well as those who have been ordered removed after a hearing, particularly *pro se.* Since July of 2022, NYLAG and its RRLC partners have already filed more than 50 Motions to Reopen cases for newly arrived migrants in this posture but given statutory deadlines, migrants in this position must secure legal assistance very quickly after the final order of removal or forgo their chance at seeking protection. One young man was ordered removed after he failed to appear for a hearing. The Immigration Judge had pressured him to appear with a lawyer and he could not find a legal service provider with capacity. He was then detained by ICE at his surveillance check-in. Fortunately, NYLAG was able to get his deportation halted at the last minute, get his case reopened by the Immigration Judge, and secure his release from ICE custody. This advocacy required many hours of work – drafting motions, arranging for a meeting with the client in custody, and examining the record – in an extremely short period of time. In a number of other cases, NYLAG and the RRLC partners represented individuals who were ordered removed *in absentia* after having being denied entry to the immigration court by guards outside the courts. Indeed, of the over 50 cases filed by the RRLC for individuals ordered removed without due process over the past year, the vast majority – 82% – were reopened, a testament to the crucial expertise needed to respond to these cases in a short period of time.

Flexible and sustained funding for legal services providers must also include continued funding to provide legal services to individuals post removal order. While we understand that the Executive Office for Immigration Review (EOIR) will finally respond to months of advocacy by

NYLAG and other providers by setting up a separate line at 26 Federal Plaza for immigration court attendees, we anticipate that *in absentia* orders will only continue to be issued in record numbers because of administrative errors due to the large number of immigrants being routed to removal proceedings and non-receipt of mail due to changing right to shelter policies, as immigrants in proceedings will certainly continue to fail to receive important notices necessary to ensure their attendance in court. Indeed, NYLAG and the RRLC partners continue to be inundated with requests for assistance for motions to reopen and rescind *in absentia* orders for newly arrived asylum seekers. Notwithstanding the growing need for post-order work for newly arrived asylum seekers, this past year, RRLC's funding was cut, affecting our ability to utilize our deep expertise to act quickly and effectively in these spaces. Sustained and flexible funding is necessary to ensure the ongoing preservation of asylum seekers' rights and ensure their path to employment authorization and protection from harm.

I want to once again take the opportunity to thank Chair Hanif and the members of the Committee for their exceptional leadership and commitment to overseeing issues related to immigration in New York City, and for working to schedule this hearing today. In light of the expanding need for legal services for newly arrived immigrants, we urge the investment in expertise, programming, and services to continue to meet the ongoing and ever-changing legal needs of the immigrant community in New York City long term. The funding for legal services must be kept flexible and consistent; cutting funding precipitously requires legal services providers to absorb the cost of continuing the cases and leaves vulnerable communities without sustained representation. Flexible funding also allows legal services providers to better leverage our programmatic and legal expertise to meet emerging needs. Finally, we would urge greater collaboration with legal services providers and community-based organizations. Closer collaboration would center the communities we serve and allow the City to benefit from the years of experience implementing

programming for immigrants held within these organizations. I welcome the opportunity to discuss any of these matters with the Committee further.

Respectfully submitted,

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How Overenforcement Robs Asylum Seekers of Their Day in Court

Grace Choi, Melissa Chua, Paige Austin
October 13, 2023

Executive Summary

What happens when the government—notwithstanding an abject lack of capacity and viable humanitarian alternatives—insists on an enforcement-only approach to immigration? Thousands of asylum seekers are ordered removed and exposed to the horrors of detention and deportation, through no fault of their own.

In immigration court, an individual can be ordered removed (i.e. deported) for failing to appear at their hearing, even if their failure to appear is through no fault of their own.[1] That removal order is issued "*in absentia*" because it is issued in the individual's absence. A motion to reopen and rescind an *in absentia* order ("MTR") is the legal mechanism for asking the court to rescind the removal order and thereby "reopen" the case closed by the removal order.[2]

NYLAG, Make the Road New York ("MRNY"), and UnLocal together provide crucial legal services to individuals with final orders of removal through the Rapid Response Legal Collaborative ("RRLC"). As part of NYLAG and MRNY's work with the RRLC, between September 2022 and September 2023, NYLAG and MRNY prepared 57 motions to reopen and rescind *in absentia* removal orders on behalf of 64 clients. (RRLC organizations also provide numerous other forms of assistance, such as MTRs for removal orders that are not in absentia and assistance in fear proceedings.) These MTRs were filed just as approximately 100,000 asylum seekers[3] arrived in—and many were placed in removal proceedings in—New York City.[4]

[1] *See* INA § 240(b)(5)(A).
[2] *See* INA § 240(b)(5)(C).
[3] *See As Asylum Seekers in City's Care Tops 54,800, Mayor Adams Announces new Policy to Help Asylum Seekers Move From Shelter*, NYC (July 19, 2023), https://www.nyc.gov/office-of-the-mayor/news/519-23/as-asylum-seekers-city-s-care-tops-54-800-mayor-adams-new-policy-help-asylum#/0.
[4] These MTRs were also filed during a year when the total number of *in absentia* orders was approximately 116,000 nationwide, nearly double the year before as of only the third quarter. Executive Order for Immigration Review, Adjudication Statistics, https://www.justice.gov/eoir/page/file/1243496/download.

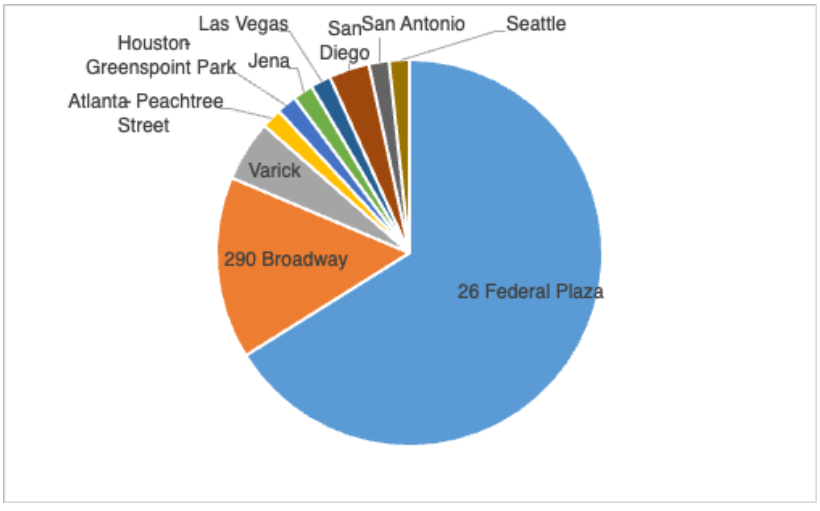
We found that government errors from overenforcement caused asylum seekers to miss their hearings and receive *in absentia* orders. Asylum seekers with every intention of attending their immigration court hearings were ordered removed because of avoidable government negligence and confusion. We noted the following trends:

- The Executive Office of Immigration Review (EOIR) ordered individuals removed *in absentia* despite individuals being denied entry to 26 Federal Plaza by government employees and contractors;
- EOIR and/or the Department of Homeland Security (DHS) issued flawed hearing notices or Notices to Appear (NTAs);
- Immigration and Customs Enforcement (ICE) officers provided incorrect and confusing information about hearing dates or failed to provide basic and crucial information about the lack of connection between ICE and the immigration court (despite their colocation in the same building in Manhattan);
- ICE officers noted the wrong address or venue;
- EOIR were unable to reschedule hearings in the event of illness; and
- EOIR lacked a mechanism for those intending but unable to appear at their hearings to notify the Court.

In this paper, we delve into the motions we prepared and each of the above-mentioned issues.

Background Statistics

Between September 2022 and September 2023, NYLAG and MRNY prepared 57 motions to reopen and rescind *in absentia* removal orders, on behalf of 64 clients. These motions were primarily for cases before the three New York City immigration courts (39 at 26 Federal Plaza, 9 at 290 Broadway, and 3 at Varick), but we also filed one motion each for cases at the Atlanta (Peachtree Street), Houston (Greenspoint Park), Jena, Las Vegas, San Antonio, Seattle and San Diego immigration courts.



As of October 16, 2023, 50 of our motions were decided and 44 were granted, for an overall grant rate of 88%. The number of applicable MTRs and grant rates by issue area were:

Issue	MTRs*	Grant Rate**
26 Federal Plaza Guards	6	100%
Faulty Notice/NTA	11	73%
ICE/ERO Misinformation/Confusion	11	100%
ICE/ERO Incorrect Address/Venue	5	80%
Inability to Reschedule Due to Illness	11	82%
Miscellaneous***	6	100%

*number of MTRs containing the particular issue
**number of granted motions divided by number of decided motions
***included motions for older orders of removal, children whose parents failed to update notice and other varied grounds for reopening

Motion to Reopen Trends for *In Absentia* Motions

EOIR Ordered Individuals Removed *In Absentia* Despite Respondents Being Denied Entry to 26 Federal Plaza

About 11% of NYLAG and MRNY's filed MTRs were for asylum seekers who were ordered removed solely because the 26 Federal Plaza security guards refused to allow them to enter the building on the day of their hearing.

In New York City, the immigration court and ICE Enforcement and Removal Operations (ICE/ERO) office are both located at 26 Federal Plaza, on the twelfth and ninth floors, respectively. Because the vast majority of recently arrived immigrants have been subjected to enforcement, including check-ins with ICE/ERO, there have been long lines outside 26 Federal Plaza since last year, with many asylum seekers lining up starting the night before.[5] As a result, ICE/ERO instructed the 26 Federal Plaza security guards to allow the first several hundred individuals in line into the building, and turn away all those remaining outside when that number is reached.

However, not everyone in those lines is there to check in with ICE/ERO, which is merely one of several government agencies that share the building and its entrance. However, even when asylum seekers presented documentation of their mandatory court appearances to the 26 Federal Plaza security guards, some were barred entry from the building and reassured that they could reschedule. These people were subsequently ordered removed *in absentia*.

[5] *See Immigrants line up for hours outside 26 Federal Plaza*, TRIBECA CITIZEN (Apr. 11, 2023), https://tribecacitizen.com/2023/04/11/immigrants-line-up-for-hours-outside-26-federal-plaza/.

The clients for whom NYLAG filed these motions to reopen all had similar experiences. They all arrived at 26 Federal Plaza early in the morning in time for their hearings. The guards refused to let them enter and told them to come back the next day or send an email to reschedule (it turns out the email address was for rescheduling ICE/ERO check-ins). Clients tried to reason with the guards by showing their hearing notices or using Google translate to explain that they had a court hearing that day. The clients were ordered removed *in absentia* while they were just outside the building, pleading with the guards. Despite NYLAG's efforts to notify the immigration court of this issue, the problems with the guards have persisted since last summer and continue to occur. Horrifically, at least one asylum seeker also reported being sexually assaulted by a guard on federal property.[6]

In summary, many asylum seekers were likely ordered removed *in absentia* while they were standing right outside of the courthouse—all because DHS has a policy requiring in-person monitoring of asylum seekers that it does not have the capability to implement. Though all our motions for these clients were granted, there are likely many more asylum seekers who were not able to file these time-bound motions to reopen and have been deprived of their opportunity to present their claims for asylum.[7]

EOIR or DHS Issued Flawed Notices

In about one-fifth of the motions to reopen we filed, asylum seekers did not receive notice of their hearing because EOIR and/or DHS issued flawed notices to appear.

In most of these cases, NYLAG and MRNY clients were never notified of any date and time for their hearing. The Notice to Appear ("NTA") is the document that DHS files with the immigration court to begin removal proceedings against an individual. In addition to listing the reasons that DHS believes the individual is removable, the NTA generally includes identifying information about the individual, the date and place of the proceedings, information about responsibilities and rights of the individual in removal, and a certificate of service.[8] However, because of the administrative burden created by the large number of individuals being placed into removal proceedings, historically few NTAs contain the date and time of individuals' first court hearings. Rather, NTAs often state that the hearing will take place at "a date to be set" and "a time to be set." More recently, NYLAG and MTRNY has seen NTAs with a "ghost" date and time that has not been entered in the immigration court database, meaning that when an immigrant appears on the stated date and time to the hearing, the immigrant it informed that in fact no such hearing will be held. In both cases, the immigrant should then subsequently receive another notice, informing them of when their hearing will occur.

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[6] *See*, *e.g.*, Maria Cramer, *Armed Guard Is Charged With Raping a Migrant at a Federal Building*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/nyregion/migrant-rape-security-guard-charged-nyc.html.

[7] Motions to reopen and rescind *in absentia* orders based on "exceptional circumstances" must be filed within 180 days of the issuance of the removal order; motions based on no notice can be filed at any time. *See,* INA § 240(e)(1)(A), (B).

[8] *See* INA § 239; 8 CFR § § 1229, 1239.1.

However, in many of these cases, the immigration court failed to follow up with mailed hearing notices with the actual hearing date and time and sent to the correct address. In some instances, the United States Postal Service returned the mailed hearing notices to the court as undeliverable, yet the court ordered the respondent removed regardless. In other instances, the court's records indicated that the hearing notice was mailed, but the respondent did not receive anything in the mail. In other cases, clients were notified of the wrong date and time for their hearing. In one notable case, a fifteen-year-old child who entered the United States alone received two hearing notices with the wrong hearing date and time, both of which were after the actual hearing date.

In some cases, the use of an incorrect or outdated address is attributable to ICE, which failed to update the respondent's address before filing the NTA with the court.

Of those adjudicated, approximately 73% of motions raising notice errors were granted. In their denials, immigration judges (IJs) improperly blamed asylum seekers unable to successfully change their address or whose notices got lost in the mail. Indeed, individuals who cited not receiving notice in the mail required another strong countervailing circumstance to prevail in their motion. This is particularly concerning given that many asylum seekers are in transitional housing and subject to the recent change in New York City housing policy.[9]

ICE Officers Providing Incorrect Information and Creating Confusion

In another 23% of the motions to reopen NYLAG and MTRNY filed, asylum seekers were ordered removed *in absentia* because of ICE/ERO misinformation.

Many recent arrivals are being asked to check in on a regular basis with ICE/ERO, while separately required to attend immigration court hearings. In many cases, ICE/ERO officers gave asylum seekers incorrect information about their hearings at their check-ins. For example, one client was told at an ICE/ERO check-in not to return to 26 Federal Plaza for a scheduled court hearing the next month because ICE/ERO was "flooded." It is clear that the ICE/ERO officers at her check-in mistook her court hearing for a subsequent ICE/ERO check-in and told her not to come. As a result, the client was ordered removed *in absentia* for failing to appear at her hearing. Another client was told at an ICE/ERO check-in that her immigration court hearing would take place in several weeks. When she went to court on the day they indicated, she learned that her hearing had already taken place several days prior, and that she had been ordered removed *in absentia*. ICE/ERO officers likely confuse ICE/ERO check-ins for immigration court hearing dates or provide asylum seekers the wrong hearing date due to overenforcement and incompetence. Moreover, check-ins—where ICE/ERO officers risk providing misleading information leading to an *in absentia*

[9] "What Ending 'Right to Shelter' Could Mean for New York City's Homeless," Bloomberg News, June 2, 2023, https://www.bloomberg.com/news/articles/2023-06-02/new-york-city-s-right-to-shelter-mandate-for-homelessness-faces-new-test.

order—could be avoided altogether if ICE/ERO would simply grant longer periods of parole rather than requiring check-ins.

In addition to providing incorrect information about removal proceedings, ICE/ERO officers also create confusion among asylum seekers. ICE/ERO officers (at worst) mislead asylum seekers about the distinct roles that ICE/ERO and EOIR play in removal proceedings, or (at best) fail to clarify the difference. Many asylum seekers believe, understandably, that ICE/ERO and the immigration courts are the same entity—a particular risk in New York City where the two are located in the same building. Moreover, due to the immigration court backlog, individuals now deal exclusively with ICE/ERO for longer periods of time, adding to the misunderstanding that ICE/ERO and the immigration court are the same entity.

Secondly, ICE/ERO officers also misled asylum seekers about the extent to which ICE/ERO communicates with the immigration court about the asylum seeker's proceedings, sometimes inducing reliance and, in cases where no NTA was yet filed, failed to update the asylum seekers' information before filing the NTA. NYLAG's clients reported that in some cases ICE/ERO officers represented that they would relay change of address information to the immigration court or assist them with proceedings, but then did not. An MRNY client from Staten Island went to ICE to report that he had moved in April 2022, several months before his case was docketed with the immigration court. Yet ICE failed to provide his updated information to the court, instead using the now-outdated address he provided at the border. He did not receive notice of his court date and was ordered removed in absentia.

Finally and relatedly, ICE/ERO officers failed to properly explain the asylum seeker's distinct responsibilities in removal proceedings. For example, one NYLAG client went to an ICE/ERO check-in at 26 Federal Plaza shortly after arriving to New York City from a different state. He thought that he had notified the immigration court of his change in address and successfully changed venue by attending this check-in. This was understandable, since he provided his new address to ICE/ERO, and both ICE/ERO and the immigration court are located in 26 Federal Plaza. Another client was told by her ICE/ERO officer that he could help her with any issues regarding her immigration court hearing. When she contracted COVID several days before her hearing, the client thought that she could simply notify the ICE/ERO officer and get a new court date from him. She attempted to contact the ICE/ERO officer repeatedly to no avail and received an *in absentia* order of removal.

These are not isolated cases and indicate a pattern of asylum seekers being ordered removed *in absentia* because ICE/ERO officers provide misleading or plainly incorrect information about removal proceedings. This issue, again, stems from the government's insistence on placing recently-arrived asylum seekers in removal proceedings. All of NYLAG's motions relating to these errors were granted, which indicates that there are likely many more unrepresented individuals with removal orders that could be reopened with the right assistance.

ICE/ERO Officers Noting the Wrong Address or Venue

In about 9% of motions filed, ICE/ERO officers made errors that led to *in absentia* orders.

There were several cases where asylum seekers were venued for proceedings far away from where they lived. For example, NYLAG filed an MTR on behalf of a family of asylum seekers whom the government mistakenly venued in Atlanta instead of New York City. Although the client explicitly stated that she and her family were on their way to New York City from the Texas border, the ICE/ERO officer thought that they were going to Alabama. Because of the misunderstanding, the ICE/ERO officer gave the client and her family a check-in date in Birmingham, Alabama, and the immigration court subsequently set their immigration court hearing in Atlanta, Georgia. And even though the client's immigration paperwork attested that she had been informed of all of this in her native language of Spanish, the client told NYLAG that no one had explained anything to her, and that no one she encountered actually spoke Spanish. This client tried to submit a *pro se* motion to change venue, but a shelter employee assisting her accidentally sent the motion to the wrong immigration court. Indeed, asylum seekers are (usually) told to update their addresses, but they are never told how to, or more importantly how to move to change venue. Another client tried for months to change venue from San Diego to New York by calling the San Diego Immigration Court, but no one answered the main court line. Yet another was baffled to learn that although ICE had told him to report in New York when releasing him, it had in fact docketed his proceedings in Texas.

In other instances, ICE/ERO officers made administrative errors that ultimately prevented asylum seekers from being able to attend their hearings. In one case, an ICE/ERO officer wrote down a client's address incorrectly when releasing him from Office of Refugee Resettlement (ORR) custody—writing "34th Street" rather than "54th Street." As a result, the client, an unaccompanied minor, never received notice of his hearing and was ordered removed *in absentia*.

In other cases, ICE/ERO officers deliberately recorded incorrect addresses for asylum seekers, listing addresses of organizations that had no affiliation with the individuals. For example, RRLC's peer organizations in New York City received hundreds of hearing notices for random individuals. Since many newly-arrived immigrants were bussed to cities all over the United States, and therefore had no addresses to report, ICE/ERO officers wrote down nonprofit organizations' addresses in lieu of actual addresses. MRNY assisted one individual (now residing in New York) who informed border officials he was going to Washington D.C., only to learn later they had recorded a shelter address there where he never stayed.

The vast majority of NYLAG and MRNY's MTRs in this posture were granted (80%). Though most judges were sympathetic to victims of government oversight, some still blamed asylum seekers for not knowing how to change venue and assumed they could easily reach and receive assistance from court personnel. Again, this does not account for the many

more asylum seekers that were likely ordered removed in this posture and were unable to obtain assistance reopening their cases in a timely manner.

Inability to Reschedule Hearings in the Event of Illness

Approximately 25% of motions we filed involved clients who were seriously ill on the day of their hearing. The majority of them sought to notify the court of their absence via the main phone line or the SmartLink application but were unsuccessful and subsequently received an *in absentia* order. NYLAG and MRNY clients dealt with pregnancy, complications from birth control devices, HIV, COVID-19, other flu-like illnesses (high fever, body pain, sore throat, vomiting, nausea, diarrhea), tonsilitis, gastritis, other gastrointestinal illnesses, foreign substances in their eyes from a work accident, mental illness, and their child's or parent's serious illness.

We noticed two trends with motions involving serious illness. First, notwithstanding the fact that both "serious illness of the [noncitizen]" and "serious illness . . . of the spouse, child, or parent of the [noncitizen]" are exceptional circumstances expressly contemplated by the statute,[10] IJs were more likely to grant motions citing illness of the respondent (86%) than illness of the respondent's immediate family member (40%). Second, IJs only granted motions citing trauma as an exceptional circumstance where the respondent received a psychological diagnosis and provided documentation of that diagnosis. This is particularly concerning as many asylum seekers do not have health insurance and are unable to access treatment and evaluation for serious medical issues.

Though 82% of these MTRs were successful, some were not. The fact that IJs failed to recognize trauma and its debilitating symptoms as grounds for reopening (short of a formal diagnosis) was troubling, considering many asylum seekers are managing trauma and mental health issues with little to no treatment.

Conclusion

NYLAG and MTRNY's post-order practice this past year exposed the impact that overenforcement has had on the basic due process rights of asylum seekers. Whether it be because of the 26 Federal Plaza security guards, problems with notice, or issues with ICE/ERO, countless asylum seekers were ordered removed without their day in court. Because of the government's insistence on enforcement, they now face detention and deportation back to countries where they face life-threatening persecution.

[10] *See* INA 240(e)(1).

Recommendations:

- The practice of indiscriminately placing asylum seekers in proceedings must end.
- ICE/ERO and EOIR should train its personnel—officers, IJs, and court administrators—to minimize administrative errors.
- Both ICE/ERO and EOIR need to provide better and clearer information to individuals appearing at New York-area courthouses, and do so in all available languages.
- ICE/ERO and EOIR need to make the motion-to-change venue process much more accessible—for instance, by treating a change of address form from a pro se individual as a de facto motion—and to disseminate information in multiple languages to all individuals reporting or seeking information at New York-area courts on how to file such a motion.
- EOIR should develop an accessible mechanism for asylum-seekers to notify the court of their inability to appear, whether because they are denied entry to the building or because they are ill, and share information conveyed via that mechanism to the Immigration Judge deciding whether to order them removed *in absentia*.
- EOIR should train IJs to conduct *in absentia* hearings differently. IJs should take judicial notice of relevant issues that contribute to the respondent's absence, carefully review the record and question DHS counsel as to ICE's latest available information to confirm notice was properly sent, request information from DHS counsel on whether the individual is reporting and if he or she is in compliance and reporting take that into account in considering whether to continue the case, and save *in absentia* proceedings for the end of the day when it is more likely that a person who has been delayed entry to the Court could appear.
- EOIR should offer internet-based hearings to *pro se* respondents as well as represented respondents and ensure that internet-based hearings are accessible, with clear instructions on how to log in and guidance for what to do in the event of technological problems.
- Dedicated, sustained funding for legal representation for individuals with final orders of removal is critical, particularly given the ongoing and systemic deprivation of due process for asylum seekers. NYLAG and MTRNY's high rate of success – nearly 90% grant rate -- in these cases is due to long-term investment in the legal expertise necessary to respond quickly and effectively.

The U.S. government has an obligation to provide due process to asylum seekers and justice mandates that our Courts give everyone an opportunity to present their claim and be heard. The current reality deprives many migrants of these rights and results in dangerous deportation orders based on administrative failures of our institutions. With the sheer number of asylum seekers in proceedings, it is now more important than ever that the government reconsider its policies on enforcement for asylum-seekers and rectify the egregious due process failures.