Field Office Director David W. Jennings
U.S. Immigration and Customs Enforcement
Enforcement and Removal Operations
San Francisco Field Office
Email: David.W.Jennings@ice.dhs.gov

November 2, 2021

Re: *In absentia* orders from San Francisco Immigration Court's new Returned Notice Docket

Dear Field Office Director Jennings:

We write to express our concerns about the emergence of the Returned Notice Docket at the San Francisco Immigration Court (the "Court"), which is issuing a large number of *in absentia* removal orders. While we have addressed our concerns about this docket directly to the Court's leadership, we also write to you to address the way this docket concerns ICE's responsibilities and enforcement options.

Since the Returned Notice Docket began in August of this year for respondents whose mail had been returned to the Court, immigration judges in San Francisco have issued dozens of *in absentia* removal orders. We believe the orders stem primarily from the following factors: respondents not receiving adequate notice about the need to update the Executive Office for Immigration Review ("EOIR") with a new address, respondents' confusion on whether updating EOIR is discharged by reporting an address change to ICE, respondents' inability to access systems to update their addresses with EOIR, and housing insecurity during the COVID-19 pandemic. We believe that ICE has a responsibility to ensure that address information in its possession is being shared with EOIR. We also believe that ICE should abstain from enforcing *in absentia* removal orders from the Returned Notice Docket both as a matter of its civil enforcement priorities and because enforcement could violate due process.

A. Background

Under the Returned Notice Docket, the Court schedules a hearing for respondents whose mail has been returned. The Court then sends an advanced hearing date to an address known to be invalid. Immigration judges then often order removed those who do not appear at the hearing.

The Court may not have current addresses for certain respondents for a variety of reasons. First, some respondents might not have received adequate notice about needing to update both ICE and EOIR with an address change. According to the Detention and Removal

Operations Field Policy Manual, ICE must verify that the noncitizen was provided with an EOIR-33 Form; however, we are aware of no mechanisms to ensure that ICE sufficiently informs noncitizens of their responsibilities regarding EOIR-33. Second, noncitizens under supervision may have reported their address change to an ICE officer or an Intensive Supervision Appearance Program ("ISAP") contractor and might be unaware they must also report their address change to EOIR. Third, respondents may not be able to access the forms and online systems that could be used to update their addresses. Fourth, housing insecurity during the COVID-19 pandemic has increased frequent moves and homelessness.

Although respondents are responsible for updating the Court of an address change, many *pro se* respondents do not understand this responsibility or how to update the Court. We understand that the address form is provided only in English, and not all respondents have access to translation services. Some respondents mistakenly believe that the address updates they submit to ICE will also be submitted to EOIR. Moreover, the COVID pandemic has forced multiple legal service providers and other community service providers to shut down or limit their capacity, meaning that *pro se* respondents are forced to navigate the EOIR system alone. And those respondents without a secure address who rely on the EOIR automated case information system to obtain information on their hearings may also face technological barriers to access EOIR systems. These challenges are compounded by the fact that the pandemic has caused widespread confusion regarding the scheduling of appointments and hearings.

Additionally, the COVID-19 pandemic has increased housing insecurity for undocumented immigrants, meaning that respondents today likely must change addresses more frequently than usual. Before COVID-19, over half of renters in California were paying more than 30% of their income on rent, and 1 in 4 households were paying more than 50% of their income in rent.[1] Undocumented immigrants are more likely than non-immigrant Californians to live in rentals.[2] The burden of house was exacerbated throughout the pandemic and unemployment rates rose nationally and state-wide. In September of 2019, the unemployment rate in California was 4%.[3] At the height of the pandemic, the unemployment rate in California was 12.3%, and although it has decreased to a current 7.6% rate, it is still almost double than its pre-pandemic level.[4] Immigrant Californians have faced greater unemployment rates than nonimmigrants, and undocumented immigrants have been blocked from receiving unemployment benefits.[5] As such, the combination of housing unaffordability and high unemployment in undocumented immigrant communities has increased housing instability, leading to inability to pay rent, frequent moves, and homelessness.

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[1] Monica Davalos, Sara Kimberlin & Aureo Mesquita, *California's 17 Million Renters Face Housing Instability and Inequity Before and After COVID-19*, CALIFORNIA BUDGET AND POLICY CENTER 2 (2021), https://calbudgetcenter.org/wp-content/uploads/2021/01/IB-Renters-Remediated.pdf.

[2] *Id.* at 8.

[3] *California Unemployment Rate Falls to 4.0 Percent in September, Setting New Record*, EMPLOYMENT DEVELOPMENT DEPARTMENT (Oct. 18, 2019), https://edd.ca.gov/newsroom/unemployment-october-2019.htm.

[4] Margot Roosevelt, *California's Job Growth Tripled the Nation's, Even as the Delta Variant Spreads*, L.A. TIMES (Sept. 17, 2021, 4:53 PM), https://www.latimes.com/business/story/2021-09-17/california-jobs-august-2021-unemployment.

[5] Davalos, *supra* note 1, at 8.

B. ICE's Role in Sharing Updated Address Information

We believe that increasing communication from ICE to EOIR regarding updated addresses would likely decrease the number of respondents whose mail is being returned to the Court and eliminate the purported need for the Returned Notice Docket. As explained above, there may be many obstacles to respondents providing notice of changed addresses to the Court, making ICE's role critical.

ICE is likely in a position to provide EOIR with address updates. As a practical matter, anyone who is on supervision would report a change of address to their Deportation Officer or to an ISAP contractor. ICE has systems in place to send information to EOIR. For example, ICE must file a Form I-830 after the noncitizen is released from custody. Form I-830 provides the Court with the noncitizen's address and telephone number. An ICE agent enters the noncitizen's information on the database ENFORCE Alien Removal Module ("EARM"). EARM automatically populates the form, and the form is sent to EOIR. To the extent this is not already happening, we believe that ICE can use EARM to update EOIR when a noncitizen updates their address with their ERO or ISAP officer.

C. ICE Should Not Enforce Removal Orders from the Returned Notice Docket

Beyond the concerns described above, ICE's Enforcement and Removal Operations ("ERO") branch should not seek to execute removal orders entered on the Returned Notice Docket for two reasons. First, ICE's enforcement of those orders, which involve asylees and other vulnerable migrants, would violate its civil enforcement priorities. The current guidelines state that enforcement for apprehension and removal will require assessment of the totality of the facts and circumstances to ensure that resources are directed toward noncitizens who pose a threat to public safety. And, according to the guidelines, DHS components like ICE should not "spend[] resources to remove those who do not pose a threat."[6] As a category, people subject to the Returned Notice Docket do not pose a threat to public safety. ERO should not seek to enforce orders entered on that docket.

Moreover, ICE should not enforce removal orders from the Returned Notice Docket because such enforcement would almost inevitably violate a noncitizen's right to access counsel and right to file a timely motion to reopen ("MTR"). Here, noncitizens are unlikely to have had actual notice of hearing, and as a result, they probably do not know an *in absentia* order has been entered against them. Indeed, noncitizens will probably not know about the *in absentia* order until it is enforced. As such, unless a noncitizen has a meaningful opportunity to seek or speak with counsel or file a timely MTR, they will have unfairly lost their opportunity to contest their expulsion from the United States.[7]

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[6] *Secretary Mayorkas Announces New Immigration Enforcement Priorities*, DEP'T OF HOMELAND SEC. (Sept. 30, 2021), https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities.

[7] *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 381 (C.D. Cal. 1982) ("[I]t is undisputed that a waiver of rights must be knowingly and intelligently made, especially where one's life or liberty is at stake.") (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)).

The INA codifies a right to counsel that is rooted in the Due Process Clause.[8] As the noncitizen may, unknowingly, have an order of deportation against them, they cannot exercise their right to meaningfully obtain counsel. Moreover, the First Amendment guarantees attorneys the right to consult with and advise clients and prospective clients.[9] Once a noncitizen is detained with an unexecuted order of removal, they have limited access to a phone, and in most cases they have no means of communicating with an attorney. Moreover, even if the noncitizen is able to speak with an attorney on the day they are arrested, they cannot meaningfully obtain counsel as their removal from the United States might occur within hours.

Furthermore, noncitizens have a statutory right to file a MTR in certain circumstances involving *in absentia* orders, including when the failure to appear was due to exceptional circumstances or the noncitizen did not receive notice of the hearing. *See* 8 C.F.R. § 1003.23(b)(4)(ii). But a noncitizen who never received a hearing notice might not be aware of a deportation order entered in absentia in time to file a MTR before being deported. Being prevented from pursuing a statutory right to file a MTR violates due process, as multiple courts have recognized in recent years.[10] Access to a statutory right like filing an MTR is a due process right and does not depend on whether the person pursuing that right is likely to prevail or not.[11]

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[8] *See* 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), 1362; *see also Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1061 (C.D. Cal. 2019).
[9] *See generally Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).
[10] *See Choeun v. Marin*, 306 F. Supp. 3d 1147, 1162 (C.D. Cal. 2018) ("The Court has found that Petitioners [Cambodian nationals] are likely to succeed on their claim that removal without an opportunity to file and litigate motions to reopen constitutes a deprivation of Petitioners' due process rights"); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 295 (D. Mass. 2018) ("Petitioners have proven a likelihood of success on their due process claim that they will suffer prejudice through a denial of a meaningful opportunity to have a motion to reopen and motion to stay ruled on by the BIA and Court of Appeals prior to removal to a country [Indonesia] where they have a credible fear of persecution.").
[11] *See Ching v. Mayorkas*, 725 F.3d 1149 (9th Cir. 2013) ("It is process that the procedural due process right protects, not the outcome.").

D. Conclusion

For the reasons provided above, we request that ICE commit to sharing address information with EOIR and to non-enforcement of *in absentia* orders entered on the Returned Notice Docket. We would also appreciate the opportunity to meet with ICE leaders to discuss the agency's position on these issues.

You may contact Sean Riordan via phone or email at sriordan@aclunc.org, (916) 620-9705, if you wish to address the issues in this letter further.

We appreciate your time and consideration in addressing these concerns.

Sincerely,

ACLU of Northern California
AILA Northern California Chapter's Advocacy Liaisons
Justice and Diversity Center of the Bar Association of San Francisco
National Lawyers Guild

cc: Patricia Spaletta, ICE Office of Principal Legal Advisor