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COMMISSIONER
OFFICE OF IMMIGRANT AFFAIRS

September 23, 2019

Via electronic submission

**RE: Designating Aliens for Expedited Removal
Docket Number DHS-2019-0036**

The New York City Mayor's Office of Immigrant Affairs ("MOIA") submits the following comment in response to the Department of Homeland Security ("DHS") request for comments on the notice of expansion of expedited removal.

New York City is the ultimate city of immigrants, with immigrants making up almost 40% of its population. In addition, about half a million New Yorkers are undocumented.¹ This immigrant population, including the undocumented population, is deeply tied to the City as a whole. For example, nearly 60% of New Yorkers live in households with at least one immigrant, including over one million New Yorkers who live in mixed-status households (in which at least one person is undocumented).²

MOIA promotes the well-being of immigrant communities by recommending policies and programs that facilitate the successful integration of immigrant New Yorkers into the civic, economic, and cultural life of the City. As such, we are uniquely situated to address the harms of this notice on our immigrant population and on the city as a whole.

The expansion of expedited removal as envisioned by the notice is an affront to the democratic principle of due process and will harm New Yorkers and New York City. This designation could create a pervasive atmosphere of fear that would negatively affect public health, public safety, and the social fabric of our City. Most troublingly, it will create a "show me your papers" regime that will terrorize and ultimately strip due process rights from immigrants.

For these reasons, we call upon DHS to rescind this notice and refrain from utilizing expedited removal against the immigrants they have designated in this notice.

¹ New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018, 11, *available at*

https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

² *Id.* at 23.

The Notice

The notice builds on existing designations of noncitizens for expedited removal to extend the expedited removal scheme to any noncitizens determined to be inadmissible under sections 212(a)(6)(C) or (a)(7) of the Immigration and Nationality Act (INA) who have not been admitted or paroled into the United States, and who cannot show to the satisfaction of an immigration officer that they have been continuously physically present in the United States for two years.³

Troublingly, the notice and the recently issued memorandum⁴ do not provide a clear set of rules for how expedited removal will be adjudicated. Nor does the notice or guidance explain how this expansion of expedited removal comports with the constitutional requirement of due process available to every resident of the United States, regardless of immigration status, or provide sufficient protections for the rights of asylum seekers, permanent residents and U.S. citizens, or immigrant children. Instead, it asserts, without providing any evidence at all, that the expansion of expedited removal will “enhance national security and public safety.”⁵

Pervasive fear and harms to New York City

New York City has invested heavily to make sure that all New Yorkers, regardless of immigration status, feel comfortable interacting with local government and in participating in the civic, social, and economic life of the city. As the ultimate city of immigrants, which is home to over 3 million immigrants and whose population speaks over 200 languages, this approach is necessary in order to ensure that New York City can thrive.

New York City understands that immigrant-friendly policies improve public health,⁶ public safety,⁷ and the economy.⁸ That is part of the reason why New York City has invested in programs like IDNYC, which provides government-issued identification for all, regardless of immigration status, and NYC Care, which ensures that all New Yorkers can access the health care they need.

However, recent developments in immigration law and policy, including this notice, have created widespread fear in the communities we seek to serve, and threaten to undermine the hard-earned trust that the City has built with our immigrant residents. It is clear that this is this administration’s purpose. As Acting Director Thomas Homan said in remarks before Congress,

³ Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35409.

⁴ *Ibid.*; Matthew Albence, *Implementation of July 2019 Designation of Aliens Subject to Expedited Removal* (2019).

⁵ Matthew Albence, *Implementation of July 2019 Designation of Aliens Subject to Expedited Removal* (2019).

⁶ Maria-Elena Young and Steven P. Wallace, *Health Policy Fact Sheet: Latino Immigrants Have Higher Rates of Health Insurance in States with Inclusive Policies* (2018), available at http://healthpolicy.ucla.edu/publications/Documents/PDF/2018/StatePoliciesFINAL_2-20-18.pdf; Krista M. Perreira and Juan M. Pedroza, *Policies of Exclusion: Implications for the Health of Immigrants and Their Children* (2019) (national studies show that state laws restricting immigrants’ rights and stigmatizing undocumented immigrants had chilling effects on utilization of preventive health care services among immigrants), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6494096/>.

⁷ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy* (2017) (finding that crime is statistically significantly lower in “sanctuary” counties compared to other counties), available at <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>.

⁸ *Ibid.* (finding that median income is higher and poverty and unemployment is lower in “sanctuary” counties).

the federal government believes that undocumented immigrants should “look over [their] shoulder, and [they] need to be worried.”⁹ We reject this approach as counterproductive and harmful to the City and the nation as a whole.

The expansion of expedited removal is particularly troubling because expedited removal does not provide the kinds of safeguards that are present in other removal proceedings, which could cause immigrant New Yorkers to be particularly fearful. According to our analysis of Census Bureau data, we estimate that about 34,000 New Yorkers would be directly affected by the law.¹⁰ Even more immigrants could be wrongfully and mistakenly subjected to expedited removal based on mistakes and a lack of due process.¹¹

A “show me your papers” regime violates due process

This notice creates an extreme expansion of expedited removal, designed to terrorize and ultimately strip due process rights from immigrants. This is contrary to the requirements of the Constitution, which requires a minimum level of due process within the U.S.¹² Specifically, the expansion of expedited removal will lead to an uneven application of the law in contravention of due process, increase the frequency of mistakes in life-or-death situations, and create more opportunities for racial profiling.

Unequal application and lack of due process

This notice explicitly and unconstitutionally limits access to due process for immigrants subject to expedited removal. Because the interests for the person at risk of expedited removal are so high, there should be adequate opportunities for someone subject to this procedure to contest the finding.¹³ But instead of providing such an opportunity, the notice gives almost boundless discretion to ICE and CBP officers, without clear guidance or safeguards against arbitrary decision-making. Instead, the notice requires that immigrants prove, “to the satisfaction of [ICE or CBP officers]” that they have continuously resided in the country for the past two years, and with vague guidance about what documents/proof would be accepted.¹⁴

It is inevitable that the wide discretion given to immigration officials and the lack of real review will lead to an expedited removal process with wildly disparate results, in violation of the Constitution’s requirements.¹⁵ One official may accept a state driver’s license as proof of

⁹ https://www.huffpost.com/entry/ice-arrests-undocumented_n_594027c0e4b0e84514eebfbe

¹⁰ Based on 2017 1-year American Community Survey data augmented by the New York City Mayor’s Office for Economic Opportunity.

¹¹ American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom* 45 (detailing instances when U.S. citizens were deported through summary procedures), available at https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf; Cf. <https://www.npr.org/2019/07/25/745417268/u-s-citizen-detained-for-weeks-nearly-deported-by-immigration-officials>.

¹² *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

¹³ See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (“[D]eportation . . . may result in poverty, persecution, and even death.”).

¹⁴ Matthew Albence, *Implementation of July 2019 Designation of Aliens Subject to Expedited Removal* (2019). This guidance explicitly does not require that a given immigration officer accept any of the possible forms of proof listed.

¹⁵ Cf. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (noting that risk of erroneous deprivation of an interest is an important factor in determining whether a proceeding violated due process). Lack of clear guidance will lead to arbitrary decision-making, which in turn increases the risk of error.

presence, while another might reject it as insufficient. Both judgments would be immune from collateral attack or meaningful review, except in the limited circumstances where someone is claiming legal status or a fear of persecution. The ICE guidance suggests that ICE will apply “enhanced ICE oversight mechanisms,” but only for “initial implementation.”¹⁶ Putting aside the dubious nature of internal review of these processes, ICE does not even commit to maintaining these internal review processes, and instead suggests that this review would only be necessary for the initial roll out period.¹⁷ The Constitution demands more.

DHS cannot justify the suspension of due process because of convenience: convenient or not, the Constitution requires due process be provided. Individuals who have entered the United States, even unlawfully, are entitled to some due process protections before they can be removed.¹⁸ This usually means a right to a hearing and a meaningful right to be heard,¹⁹ both of which are denied to those placed into expedited removal. Even if expedited removal can pass constitutional muster when applied to a limited subset of individuals who are apprehended at or near the border, expedited removal at the scope envisioned by this notice cannot.

Errors and lack of access to counsel

In addition to the due process concerns, the lack of review and access to counsel will lead to errors in the decision-making process and undermine New York City’s investment in supporting immigrant access to justice.

Errors in judgment are literally a matter of life or death for some immigrants, which is why expedited removal’s procedures are constitutionally deficient.²⁰ At the very least, error in judgment could lead to removal when removal through expedited removal is statutorily prohibited. There have already been concerning reports about how immigration officials are upholding their statutory duties. Reports found “hostility” to asylum claims even before this notice was published.²¹ In other cases, U.S. citizens have been detained and deported.²² Also, those placed in expedited removal may be detained and summarily removed at the whim of an immigration official, without knowledge of how to avail themselves of protection without counsel.

¹⁶ Matthew Albence, *Implementation of July 2019 Designation of Aliens Subject to Expedited Removal* (2019).

¹⁷ *Ibid.*

¹⁸ See e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).

¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

²⁰ See, e.g., *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (noting that risk of erroneous deprivation of an interest is an important factor in determining whether a proceeding violated due process).

²¹ U.S. Commission on International Religious Freedom, *Barriers to Protections: The Treatment of Asylum Seekers in Expedited Removal 2* (2016), available at

<https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>

²² American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom* 45 (detailing instances when U.S. citizens were deported through summary procedures), available at

https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf. Similar stories have been publicly reported, including one case where a U.S. citizen was nearly deported in a non-expedited proceeding.

<https://www.npr.org/2019/07/25/745417268/u-s-citizen-detained-for-weeks-nearly-deported-by-immigration-officials>.

One crucial protection against error is the provision of legal services. We know from our legal services programs that without representation, even valid claims are dismissed, because decision-makers do not have all the facts that come with research and informed advice.²³ Without this protection, the rate of erroneous decisions is likely to be much higher in expedited removal proceedings.

This notice, however, undermines the City's investment in supporting immigrant access to justice. The City is strongly committed to access to justice for all New Yorkers. The City has invested over \$30 million in immigration legal services. This includes investments in general immigration legal services, deportation defense, and emergency funding for rapid response legal services. This investment has led to increased representation, which we know from experience leads to higher rates of granted relief,²⁴ and has benefited the economy, promoted family unity, and supported the public welfare.

But this notice threatens to undermine both the resources we have invested and the benefits we have reaped through this investment. Specifically, it will increase attorney costs, both because the notice does not provide clear and easy to follow rules about applicability and adjudication, which will make it harder for attorneys to provide advice, and because attorneys will have to adjust their guidance as this rule is litigated. Because expedited removal proceedings move quickly and because those impacted do not have the right to an attorney, this notice will also make it harder and more costly for lawyers to connect to potential or even existing clients. In particular, attorneys will be challenged by restricted access to clients who are swept up in this overbroad system, who may be physically moved quickly before they can make contact with counsel.

This effectively funnels a class of noncitizens away from the resources we have invested to ensure New Yorkers can realize the immigration status to which they are entitled, despite arbitrary and unlawful barriers to that realization.

Racial profiling

Without strictly delineated rules for when expedited removal is appropriate, this notice expanding the scope of expedited removal could lead to racial profiling. That is because immigration agents who are not given robust guidance will rely instead on arbitrary factors, like race or national origin. As is, multiple lawsuits have alleged and reports have noted that immigration agents engage in racial profiling, even in non-expedited removal contexts.²⁵

²³ Jennifer Stave et. al, Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 24 (2017), available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf.

²⁴ Jennifer Stave et. al, Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 24 (2017), available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf.

²⁵ <https://www.nilc.org/2019/02/21/lawsuit-ice-violated-tennessee-workers-rights/>;
http://phparivaca.org/?page_id=1174

The notice does not articulate what circumstances would lead an ICE or CBP officer to identify a person as someone who would be subject to expedited removal.²⁶ Instead, the assumption is that anyone who is identified as part of ICE’s Criminal Alien Program or during worksite enforcement could be subject to expedited removal.²⁷ One would be hard-pressed to imagine what criteria could justify the assumption that someone arrested in New York City could be subject to expedited removal, especially given the distance from the northern and southern borders.

The guidance issued by ICE does not alleviate this concern. Instead of providing detailed instructions about how to identify those likely to be subject to expedited removal, it instead puts the burden on the immigrant and then reiterates that discretion remains with the immigration agent to make the decision.²⁸ Given the explicitly stated goal of increasing the speed at which removal proceedings occur,²⁹ this rule will incentivize immigration agents (specifically ICE or CBP agents) to make broad assumptions about presence and removability instead of carefully evaluating an individual’s case.

Racial profiling does not increase public safety: it undermines faith in public institutions and leads to erroneous results. Expanding expedited removal will merely expand errors and unconstitutional behavior, even in the situations outlined in the ICE guidance. Our experience as a City has been that practices that disproportionately target communities of color make us less safe. Instead, we have advanced public safety in the City by establishing community-friendly policies, which have led to a drop in crime, which has stayed at historic lows.

Recommendations

For the reasons articulated above, we call upon DHS to rescind this notice and refrain from utilizing expedited removal against the immigrants they have designated in this notice.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Mostofi', written over a horizontal line.

Bitta Mostofi
Commissioner
NYC Mayor’s Office of Immigrant Affairs

²⁶ Guidance issued by ICE highlights two situations in which expedited removal will primarily be used, but suggests that all individuals in those situations would be subject to expedited removal. Moreover, even when outlining factors that would be weighed in determining whether expedited removal should be applied, the language is still couched in terms of deference to the immigration agents who will make those decisions. Matthew Albence, *Implementation of July 2019 Designation of Aliens Subject to Expedited Removal* (2019).

²⁷ *Ibid.*

²⁸ *Ibid.* (providing a list of documents that “may demonstrate” presence, noting that ICE officers have “broad discretion” to apply expedited removal or not).

²⁹ Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35411.