June 22, 2023

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Hon. Alejandro N. Mayorkas
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Re: Follow Up Regarding EOIR's Response to Advocates Call to End the Dedicated Docket

Dear Attorney General Garland, Secretary Mayorkas, and Deputy Assistant Lawrence:

Two years ago, the Biden administration launched the "Dedicated Docket," explaining it wanted "to more expeditiously and fairly make decisions" for certain families seeking asylum in the United States who entered between ports of entry.[1] On October 5, 2022, 106 legal service providers, court observers, and allied organizations wrote to express grave concerns about the Dedicated Docket, calling for the administration to end it and otherwise take immediate action to ensure a fair process for families seeking asylum. While we appreciate the response provided by the Executive Office of Immigration Review (EOIR) to our October 5, 2022 letter, it is insufficient.

Two years into its operation, the Dedicated Docket continues to amplify the lack of due process and basic fairness that families experience in our immigration court system.[2] Thousands of families remain without legal representation and immigration judges continue to order children and their families removed in absentia, including when families have faithfully attended DHS check-ins and waited in hours-long lines to enter the courtroom only to arrive too late to their hearings. Below, we lay out our ongoing concerns with the Dedicated Docket and why EOIR's initial response remains insufficient to address them. We again urge the administration to end the Dedicated Docket and otherwise adopt our renewed set of recommendations to make good on its promise of fair proceedings for families seeking protection.

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[1] *See* DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, May 28, 2021.

[2] Indeed, the Dedicated Docket serves as a cautionary tale as the administration presses forward with further initiatives–including its newly-announced "Family Expedited Removal Management" (FERM) program–that even more starkly prioritize expediency rather than fairness in its treatment of families seeking asylum at the southern border. *See* https://www.latimes.com/politics/story/2023-05-10/ice-family-detention-curfew-gps-monitoring. That trade-off has failed on the Docket and, while not the focus of this letter, we firmly believe will result in tragic injustice to families subject to these new border policies, many of whom will now almost certainly be ordered removed in expedited asylum interviews without ever stepping into a courtroom at all.

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I. Ongoing Due Process Failures on the Dedicated Docket

A. Lack of Access to Legal Representation

Lack of access to counsel for families on the Dedicated Docket continues to be a serious concern. Only 43% of all Docket cases have legal representation, with the numbers plummeting to 34% of closed cases.[3] In short, tens of thousands of people continue to face expedited proceedings without counsel. Unsurprisingly, lack of representation has adverse impacts. In Boston, *all* individuals on the Dedicated Docket who were granted relief were represented, whereas 61% of individuals who were ordered removed as of August 2022 were unrepresented.[4]

In its January 23, 2023 letter, EOIR points to funding for various legal orientation and help desk programs as a solution. But the sad reality–as made clear from the data above and our collective on-the-ground experience–is that the existing programs do not resolve concerns about lack of access to counsel for families on the Dedicated Docket.[5] While the Legal Orientation Programs ("LOP") in Dedicated Docket cities are providing commendable support to families, they do not and cannot provide legal representation. LOPs offer Know Your Rights sessions and may at times assist with filling out forms and motions on a pro se basis; however, they do not substantively assist or represent individuals at their hearings; nor do they have the capacity to assist individuals in developing their asylum claims. As a result, pro se families are forced to proceed on the Dedicated Docket without representation.

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[3] *See* https://trac.syr.edu/reports/704/. We note that the information provided in EOIR's adjudication statistics appears inconsistent with TRAC's numbers. For example, while EOIR statistics suggest a 55% representation rate of all Docket cases as of January 6, 2023, TRAC found that the rate was 43% as of September 2022. By either count, tens of thousands of people on the Docket remain unrepresented.

[4] *See* Harvard Immigration and Refugee Clinical Program ("HIRCP"), Denial of Justice: The Biden Administration's Dedicated Docket in the Boston Immigration Court, June 2023, at 14-17, http://harvardimmigrationclinic.org/files/2023/06/Dedicated-Docket-Report_FINAL.pdf.

[5] EOIR's reply also points to its newly-launched Counsel for Children Initiative. See EOIR Reply at 2. While laudable, that program is geared towards certain unaccompanied children in a limited number of cities. See, e.g., https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative. It is not available to any of the many thousands of children on the Dedicated Docket who are in consolidated proceedings with their families.

In our October 2022 letter, we recommended that the administration use its authority under 8 C.F.R. 1003.0(b)(1)(ii) to defer adjudication for cases of pro se families on the Docket, rather than forcing them to proceed. That recommendation would allow the Court to manage its docket in a way that prioritizes hearing the cases of represented families, while giving pro se families the time they need to secure assistance. EOIR responded that it would take this recommendation "under advisement." *See* EOIR Reply at 3. Unfortunately, based on our observations, immigration judges are continuing to proceed expeditiously against pro se families. And, at least in some cities, DHS is exacerbating the problem by taking the position that it cannot exercise its prosecutorial discretion to close cases on the Dedicated Docket due to its expedited nature. The result is a fundamental lack of fairness for pro se families.

Moreover, while the National Qualified Representative Program ("NQRP") is an important means to access counsel and protections for those who are eligible, the NQRP in its current form does not cover families on the Dedicated Docket because they are not detained. This is so even though many individuals on the Dedicated Docket are unrepresented and suffer from serious mental disabilities that render them incompetent to represent themselves and their families. As we recommended in our October 2022 letter and others have advocated, the administration should expand the NQRP to include non-detained families on the Dedicated Docket.[6] We continue to await the administration's response to this recommendation.

B. In Absentia Removal Orders

In our October 2022 letter, we laid out grave concerns about the issuance of in absentia removal orders against unrepresented people on the Dedicated Docket, including those complying with orders of supervision and children, among them babies and toddlers. We asked that the administration issue clear guidance to prevent the issuance of these orders, which carry severe consequences, including erecting significant barriers to lawfully returning to the United States in the future and subjecting individuals to potential criminal prosecution upon reentry.[7] Instead, EOIR's January 2023 response letter concedes that children are being ordered removed on the Dedicated Docket if their families fail to appear, and states that "Immigration Judges appreciate that they are dealing with family cases and routinely grant motions to reopen in absentia orders." *See* EOIR Reply at 3. This response is wholly insufficient.

Motions to reopen are a back-end solution: They assume the issuance of an in absentia removal order–no matter how unfair, particularly in the case of children who have no ability to control whether or not they appear in court–and then put the onus on the respondent (in this case,

[6] *See* HIRCP, *Expansion of the National Qualified Representative Program to Dedicated Docket Proceedings* (Nov. 24, 2021).
[7] *See, e.g.*, 8 U.S.C. § 1182(a)(6)(B), (a)(9)(A) (making individuals who fail to attend removal proceedings inadmissible to the United States for five years); 8 U.S.C. § 1229a(b)(7) (rendering people with in absentia removal orders ineligible for certain immigration benefits); see 8 U.S.C. § 1326 (allowing for criminal prosecution for unlawful reentry after removal order).

families with young children) to take action to rescind the order. Unsurprisingly, in almost all cases, the filing of a motion to reopen requires the assistance of counsel. As of August 2022, although 1,177 in absentia removal orders were issued on the Boston Dedicated Docket, only 348 motions to reopen had been filed, most of which were represented.[8] But it is precisely the lack of availability of counsel for families on the Dedicated Docket that often causes confusion leading to the in absentia order being issued in the first instance. As explained above and in our October 2022 letter, many non-profit organizations in Dedicated Docket cities are at capacity, and the wait for pro se respondents to receive merely a consultation, let alone assistance with a time-sensitive motion to reopen, may take several months.[9]

Even where pro se respondents have the opportunity to speak with an immigration attorney regarding in absentia orders, the circumstances under which their cases can be reopened are limited. To seek reopening based on lack of notice, an attorney must review the respondent's A file or, at a minimum, the respondent's Notice to Appear, which often gets lost or misplaced. While respondents can seek a reopening based on exceptional circumstances, few situations qualify as "exceptional."[10] Outside of grave illness or injury to respondents or their immediate relatives, judges are unlikely to grant motions to reopen for any circumstances that are considered less compelling. This includes many of the scenarios we have observed, including tardiness due to hours-long waits to get into immigration court and confusion between appearing for court and ICE supervision. Although immigration judges may, in their own discretion, reopen cases *sua sponte*, our observations suggest that they are not doing so as a matter of course.

We again reiterate the need for the administration to take the proactive step of issuing clear guidance to both EOIR and DHS in order to prevent the issuance of in absentia orders against children and families complying with supervision in the first instance.

C. Hostile Treatment by Immigration Judges

In its response to advocates' disturbing reports of a hostile courtroom atmosphere and aggressive treatment on the part of some immigration judges presiding over the Dedicated Docket, EOIR urges respondents to report judicial misconduct to a generic email address, judicial.conduct@usdoj.gov. *See* EOIR Reply at 1-2. While we appreciate the acknowledgment of our concerns and will encourage advocates to use this mechanism where appropriate, this response is inadequate for three interrelated reasons.

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[8] *See* HIRCP, *supra* note 4, at 21.

[9] For example, in Boston, the nine legal service providers listed on the EOIR pro bono list were taking very few, if any, new cases as of March 2023, and nine out of ten other organizations that provide pro bono representation in Boston were not taking any new cases. *See id.* at 16.

[10] The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances. INA § 240(e)(1).

First, precisely because of the hostile atmosphere, respondents are wary of reporting misconduct without any guarantees of anonymity.[11] Without this safeguard, advocates fear retaliation which could lead to adverse outcomes for their clients (including in future cases). Indeed, many advocates were wary of sharing anonymized facts of pending cases for these purposes. It might behoove the agency to clarify the circumstances under which EOIR is required to disclose complaint information and when and how respondents can request confidentiality. The fear-of-retaliation problem is exacerbated by the hefty standard imposed for pursuing recusal of a judge due to actual or the appearance of bias.

Second, this avenue does not offer meaningful recourse for pro se respondents who are struggling to navigate the complexities of immigration court. As described above, this includes the majority of families on the Dedicated Docket. Unfortunately, our observations reveal that some immigration judges on the Dedicated Docket exacerbate the problem by taking an unnecessarily hostile and inflexible approach to the needs of pro se families. For example, during a Dedicated Docket master calendar hearing on January 24, 2023, an immigration judge in San Francisco reviewed a pro se respondent's letter, in which the Immigration Court Help Desk confirmed that she had two appointments scheduled to complete her asylum application–one for February 6, 2023 and the other for February 13, 2023. Rather than schedule her next master calendar hearing for a date following February 13, the judge scheduled it three days earlier–on February 10–and indicated that she had to file her asylum application on that date or else her claim would be considered abandoned. Other judges presiding over San Francisco and Boston's Dedicated Dockets set arbitrary deadlines for pro se respondents by which they have to submit their asylum applications, which are sometimes nearly six months before their one-year filing deadlines. In doing so, they create a demand that local non-profit organizations cannot meet. This type of hostility and arbitrariness ignores the needs of pro se respondents and the pressures on local NGOs to assist the many families that remain unrepresented.

Finally, misconduct on the part of immigration judges in removal proceedings is not a new phenomenon. Aggressive and unprofessional mistreatment of respondents and their counsel has been repeatedly brought to the attention of the agency over many years not only by advocates, scholars, and the media but also by the federal courts that have called out biased decisionmaking.[12] A systemic problem demands a systemic response on the part of all relevant agencies to ensure the integrity of the system, not only one-off investigations when prompted by an individual respondent who has the knowledge and access to this reporting mechanism. These problems are all the more pronounced on the Dedicated Docket where adjudicators are

[11] *See* Summary of OCIJ Procedure for Handling Complaints Concerning Immigration Judges.

[12] *See, e.g.*, Innovation Law Lab and Southern Poverty Law Center, The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool (2019); Noah Lanard, *Judge Promoted by Trump Administration Threatened a 2-Year-Old With an Attack Dog*, Mother Jones (2019); Hearing before the Inter-American Commission on Human Rights on Asylum Free Zones (2016) Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication (2009).

interacting with vulnerable families who are being pushed through a rushed system and without counsel.

We ask that DOJ take appropriate steps to train immigration judges on creating a safe and fair courtroom for families on the Dedicated Docket, routinely monitor judge conduct, and take action to hold accountable adjudicators who violate applicable ethics norms.

D. Transparency and Public Access to Data

Lack of transparency on the Dedicated Docket also continues to be a significant concern. In our October 2022 letter, we asked DOJ to make publicly available information regarding the demographics of families placed on the Docket, calendaring of merits hearings, and case outcomes, among other data points. In an inter-agency conversation that took place on January 11, 2023, we further requested that DOJ and DHS provide data on the number of families complying with ICE supervision who were nevertheless ordered removed in absentia. Such data is critical to understanding how the Dedicated Docket operates and ensuring fair proceedings. EOIR responded by pointing us to EOIR's FY22 adjudication statistics. *See* EOIR Reply Letter at 3. While a helpful start, this data is limited to information about caseloads and representation rates.[13] It does not include the critical information about demographics, calendaring of hearings, and case outcomes that we specifically requested, and that is needed to evaluate the docket's operation.

For example, the available EOIR data and information does not allow the public to readily assess key components of the Dedicated Docket: timelines for adjudication, the number of children on the docket, the nationalities most impacted by expedited proceedings, asylum grant or denial rates, and the number of in absentia removal orders issued, to name a few. To the extent that information is available on these components of the Dedicated Docket, it has been gathered and analyzed by non-government parties that have far more limited access to whole-of-docket information than EOIR. Nevertheless, those analyses are extremely troubling. They show, for example, an abysmal nationwide asylum grant rate of 7% as of September 2022, see TRAC, 2022; that as of February 2022, 99% of completed Dedicated Docket cases in Los Angeles resulted in removal orders, the majority of which were issued in absentia, see UCLA Report, 2022; and that 40% of those ordered removed in absentia in Boston as of August 2022 were children, see HIRCP Report, 2023. These findings strongly reinforce our grave concerns about fairness on the Dedicated Docket and support the need to have ongoing, complete, and transparent information about its operation.

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[13] We note that the information provided in EOIR's adjudication statistics appears inconsistent with numbers provided by the Transactional Research Access Clearinghouse (TRAC), raising concerns about the reliability of the currently-available data. For example, while EOIR statistics suggest a 55% representation rate of all Docket cases as of January 6, 2023, TRAC found that the rate was 43% as of September 2022.

We ask that the administration commit to increasing transparency on the Dedicated Docket by significantly expanding the data and information readily available to the public about the Dedicated Docket and its operation.

II. Summary of Recommendations

The administration has now had two years to make good on its promise of a Dedicated Docket that delivers both efficient and fair proceedings to families seeking asylum. It has failed to do so. **We therefore strongly urge the administration to terminate the Dedicated Docket**. Families seeking protection should no longer be forced into expedited proceedings that fail to provide meaningful access to counsel and a fair shot at remaining safely in the United States.[14]

In the event that the administration does not terminate the Docket, we strongly urge that the following concrete steps–many of which were first identified in our October 2022 letter–be taken immediately to address the serious due process concerns that we have outlined:

Address the needs of families on the Dedicated Docket who lack legal representation by:

- **Securing funding for government-appointed immigration counsel for asylum seekers on the Dedicated Docket:** As we previously shared, numerous studies have established that legal representation is crucial to families' ability to meaningfully apply for and be granted immigration relief. Yet, many families on the Dedicated Docket are unable to obtain representation for the reasons discussed above. Although providers are committed to helping individuals seeking asylum, the capacity of pro bono and other legal service providers is greatly stretched. While LOP providers offer an important service, they do not provide legal representation. The government should provide funding for and appoint counsel to all families on the dedicated docket who seek representation.

- **Expanding the National Qualified Representative Program ("NQRP") to non-detained individuals on the Dedicated Docket:** Under the NQRP, the federal government provides government-appointed immigration counsel to detained noncitizens who have been found not competent to represent themselves in their removal proceedings. The administration should expand the NQRP so that it encompasses non-detained asylum seekers on the Dedicated Docket.

- **Deferring adjudication of cases for pro se families on the dedicated docket to allow them time to find counsel:** Many families on the Dedicated Docket who have been unable to obtain representation have nonetheless been forced to prepare and submit asylum

[14] While the focus of this letter is the Dedicated Docket, we reiterate that the administration's newly-announced border policies—including its Family Expedited Removal Management ("FERM") program–that force people into expedited asylum screenings before even being able to reach a courtroom on the Dedicated Docket or otherwise, suffer from the same–if not worse–due process flaws we identify here arising from prioritizing expediency over fundamental fairness.

applications pro se and proceed with individual merits hearings without counsel. This is so even though families, who seek stability and desire to have their cases resolved, have diligently sought representation. If the administration does not provide government-appointed immigration counsel, it should use its authority under 8 C.F.R. 1003.0(b)(1)(ii) to defer adjudication of cases against families who have been unable to obtain representation to allow them time to find counsel.

- **Issuing guidance that makes clear that DHS counsel can and should exercise prosecutorial discretion to dismiss or administratively close cases, where appropriate:** At least in some cities, DHS is taking the position that it cannot exercise its prosecutorial discretion to agree to close cases due to the prioritization of expediency on the Dedicated Docket. The administration should immediately issue clear guidance to DHS counsel to clarify that they can and should exercise prosecutorial discretion to dismiss or close cases on the Dedicated Docket where appropriate.

Prevent the issuance of unfair <u>in absentia removal orders</u> by:

- **Stopping the issuance of removal orders in absentia against families without first confirming their address and assessing whether they are complying with ICE supervision:** Many families on the Dedicated Docket have been ordered removed in absentia even though their failure to appear was through no fault of their own. As described in detail in our October 2022 letter, rampant notice problems, including immigration officials putting incorrect addresses on the NTA, have made it impossible for many families to know the date and time of their hearing. Moreover, families are often forced to decide between, or face confusion about, competing obligations to comply with ICE supervision and appear at their removal hearing—failure to do either of which can result in removal. Immigration judges should accordingly stop their practice of issuing in absentia removal orders without holding DHS counsel to its heavy burden under 8 U.S.C. 1229a(b)(5)(A) of proving notice and alienage by "clear, unequivocal, and convincing evidence." That includes, but is not limited to, requiring DHS counsel to provide evidence of proper notice and information about whether a family is complying with ICE supervision (a fact that strongly weighs against issuance of an in absentia order) in every case, and requiring immigration judges to consider that information before issuing an in absentia order.

- **Stopping the issuance of removal orders in absentia against children:** Children placed on the Docket have no control over their ability to appear at a hearing, much less a well-informed understanding of the proceedings. Ordering children removed in absentia when they do not appear in court thus frustrates basic fairness norms. The agency should immediately halt this unfair practice.

Address <u>hostile courtroom atmospheres</u> by:

- **Taking all appropriate steps to train immigration judges, routinely monitor their conduct, create anonymous mechanisms for reporting judicial misconduct, and take action to**

hold accountable adjudicators who violate applicable ethics norm: DOJ should take extra measures to ensure that judges assigned to hear cases involving families–which include tender-age children–are trained to be sensitized to their special needs. In addition, the agency could improve its independent monitoring of immigration judge conduct on the Dedicated Docket by, for example, creating a mechanism for court monitoring programs–including Immigration Court Helpdesks and others led by civil society–to share collective observations, putting large signs in each courtroom with an email address and anonymous phone hotline for reporting abuse or unprofessional behavior, as well as informing the public of these efforts and how complaints have been addressed.

Increase transparency by:

- **Making information and data regarding the Dedicated Docket and its operation publicly available:** As noted above, the data and information that EOIR makes available on the docket is extremely limited. Most information regarding the Docket can only be obtained through a Freedom of Information Act request, which is often a lengthy process. Yet information regarding the demographics of families placed on the Dedicated Docket, calendaring of merits hearings, case outcomes, and the number of in absentia removal orders issued against children and those complying with ICE supervision, among other data points, is critical to understanding how the Docket operates and ensuring just and fair proceedings. EOIR should increase transparency by greatly expanding the data and information regarding the Dedicated Docket that is publicly available.

As organizations committed to ensuring a fair and just immigration system, we stand united in our ask that the administration end the Dedicated Docket because, two years in, it has failed to live up to its promise of fair proceedings for families seeking asylum. We request a follow up meeting to discuss our ongoing concerns and recommendations. As before, we welcome the opportunity to engage with the administration to explore procedures that are in fact sensitive to the needs of families facing removal proceedings. For any questions regarding this letter, or to schedule a follow up meeting, please contact Blaine Bookey (bookeybl@uchastings.edu), Talia Inlender (inlender@law.ucla.edu), Monica Howell (mhowell@sfbar.org), Tiffany Lieu (tlieu@law.harvard.edu) and/or Sabi Ardalan (sardalan@law.harvard.edu).

Thank you for your consideration.

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American Gateways
Americans for Immigrant Justice
American Immigration Council
Aoki Center on Critical Race and Nation Studies
Asian Americans Advancing Justice | AAJC
Asian Pacific Islander Legal Outreach
Asylum and Human Rights Clinic at the University of Connecticut School of Law

Boston University School of Law Immigrants' Rights and Human Trafficking Program
Burma Refugee Families and Newcomers (BRFN)
Center for Gender and Refugee Studies, UC College of the Law, San Francisco
Center for Immigration Law and Policy, UCLA School of Law
Central American Legal Assistance
Central American Refugee Center (CARECEN-NY)
Central American Resource Center- CARECEN- of California
Centro Legal de la Raza
Chacón Center for Immigrant Justice at MD Carey Law
Children's Law Center of Massachusetts
Coalition for Humane Immigrant Rights
Coalition for Immigrant Mental Health
Columbia Law School's Immigrants' Rights Clinic
Community Action Board of Santa Cruz County, Inc.
Community Lawyering Clinic, Southwestern Law School
Community Legal Services in East Palo Alto
De Novo Center for Justice and Healing
Dolores Street Community Services
East Bay Refugee and Immigrant Forum
Esperanza Community Housing Corporation
Esperanza Immigrant Rights Project, CCLA Inc.
Family Violence Appellate Project
First Focus on Children
Florence Immigrant & Refugee Rights Project
Haitian American Lawyers Association of NY
Haitian Legal Network
Harvard Immigration and Refugee Clinical Program, Harvard Law School
HELLO Community Services
Human Rights First
Immigrant & Refugee Services, Catholic Charities Community Services, New York
Immigrant Defenders Law Center
Immigrant Legal Advocacy Project
Immigrant Legal Center
Immigrant Legal Defense (ILD)
Immigrant Legal Resource Center
Immigration Clinic, University of North Carolina School of Law
Institute for Justice & Democracy in Haiti
Justice & Diversity Center of the Bar Association of San Francisco
Justice Center of Southeast Massachusetts
La Raza Community Resource Center
Latin Advocacy Network - LATINAN
Law Office of Martinez, Nguyen and Magana
Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF)
Los Angeles Center for Law and Justice

Lutheran Social Services of the National Capital Area (LSSNCA)
Massachusetts Law Reform Institute
Morris Law Group, PC
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIPNLG)
National Partnership for New Americans
Neighbors Link
New York Legal Assistance Group
Northwest Immigrant Rights Project
OneJustice
Public Counsel
Public Law Center
Rocky Mountain Immigrant Advocacy Network
Sanctuary for Families
Santa Cruz County Office of the Public Defender
Tahirih Justice Center
The Legal Aid Society (NYC)
The Legal Project
UCLA Immigrant Family Legal Clinic
University of Tulsa College of Law Legal Clinic
Witness at the Border
Young Center for Immigrant Children's Rights