

**CONTACT**

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**RECOMMENDATIONS REGARDING  
FEDERAL IMMIGRATION ENFORCEMENT  
IN NEW YORK STATE COURTHOUSES<sup>1</sup>**

Since January 2017, the New York City Bar Association (“City Bar”) has voiced concerns, along with many others, about the increasing number of Immigration and Customs Enforcement (“ICE”) civil arrests being conducted in and around New York State courthouses. If continued, this practice poses a threat to the New York State court system’s ability to ensure access to justice and the state’s overall community-based public safety goals. Further, this practice undermines values of due process and federalism enshrined in the U.S. Constitution as well as the New York Constitution.

The City Bar acknowledges that the Office of Court Administration (“OCA”) has been closely monitoring the dramatic rise in courthouse arrests, has instituted certain protocols in response to ICE enforcement actions, and has continuously engaged in important dialogue with ICE, client advocates and others about the situation. The City Bar further acknowledges that ICE issued a new directive on January 10, 2018, specifically addressing and purporting to limit courthouse arrests (“January 2018 Directive”).<sup>2</sup> Despite these steps, ICE’s courthouse arrests

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<sup>1</sup> This statement reflects the input and endorsement of the following thirteen City Bar committees: **Council on Judicial Administration** (Hon. Carolyn Demarest, Ret., Chair); **Council on Children** (Lauren A. Shapiro, Chair); **Children and the Law** (Sara L. Hiltzik, Chair); **Civil Court** (Shanna Tallarico, Chair); **Criminal Courts** (Ahmed Almodallal, Secretary); **Criminal Justice Operations** (Sarah J. Berger, Chair); **Domestic Violence** (Rebecca Iwerks, Chair); **Family Court and Family Law** (Glenn Metsch-Ampel, Chair); **Immigration and Nationality Law** (Victoria F. Neilson, Chair; Sussan Lee, Subcommittee Chair, with assistance of Victor Y. Cheng, CUNY School of Law Graduate, May 2018); **Juvenile Justice** (Fredda Monn, Chair); **Pro Bono and Legal Services** (Alison McKinnell King and Amy P. Barasch, Co-Chairs); **State Courts of Superior Jurisdiction** (Michael P. Regan, Chair); and **Women in the Courts** (Barbara Graves-Poller, Chair). Committee membership includes prosecutors, criminal defense attorneys, immigration attorneys, judges, law firm pro bono attorneys, and lawyers in private practice, academia, non-profit organizations and public sector positions. The views expressed in this report should not be attributed to any employer or organization with which individual committee members are affiliated. The committees extend their gratitude to Anna McDermott of Debevoise & Plimpton LLP for her invaluable assistance in reviewing and editing this report.

<sup>2</sup> *ICE Directive No. 11072.1 Civil Immigration Enforcement Actions Inside Courthouses*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>. (All websites last visited June 22, 2018.) In sum, the directive provides that (1) civil enforcement actions inside courthouses “include actions against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed”; (2) “family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding, will not be subject to

continue to adversely impact the administration of justice and leave many individuals fearful of going to court. It is undeniable that as this situation intensifies, two things likely will happen: (1) immigrant litigants or witnesses will stop coming to court altogether, which would have the effect of creating a class of state residents who are denied access to the justice system; and (2) the exercise of federal interest in civil immigration enforcement will erode the effectiveness of the state's justice and court system, hampering prosecutions and wasting court resources. Neither outcome is in the interest of public safety, the justice system, or the legal community.

Given the escalation of civil arrests in and around courthouses and the essential rights at issue, the City Bar respectfully recommends that the Chief Judge exercise her authority under the New York State Constitution and Judiciary Law to issue five administrative rules that would better protect access to justice and the due process rights of all New Yorkers: (1) require judicial, not administrative, warrants for civil arrests, including immigration arrests, conducted in and around New York State courthouses; (2) require the presiding judicial officer to notify the targets of civil immigration enforcement actions of the presence of ICE agents who intend to detain them; (3) limit the cooperation and assistance of court personnel in civil immigration enforcement actions to those actions required by law; (4) reduce the frequency with which parties need to appear in court; and (5) make available for public review the information obtained and recorded by court personnel with respect to ICE enforcement activities in courthouses.<sup>3</sup> Moreover, we recommend that OCA convene a working group of stakeholders<sup>4</sup> – including defense lawyers, immigration lawyers, prosecutors, court representatives and others – tasked with considering the competing interests and developing a set of recommendations that monitors developments and builds upon OCA's April 26, 2017 protocols<sup>5</sup> to keep New York State courthouses from becoming the preferred venues for ICE arrests.

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civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions." (footnote omitted); (3) ICE should "generally avoid enforcement actions in courthouses, or areas within courthouses that are dedicated to non-criminal (e.g., family court, small claims court) proceedings . . . [unless] operationally necessary" and with approval of a higher-level director or agent; (4) civil immigration enforcement actions should "to the extent practicable, continue to take place in non-public areas of the courthouse, be conducted in collaboration with court security staff, and utilize the court building's non-public entrances and exits."

<sup>3</sup> Our recommendations are discussed more fully beginning at page 19, *infra*.

<sup>4</sup> Such a working group could build upon or mirror existing advisory groups or access to justice initiatives, such as the Family Court advisory council on immigration issues. *Members Named to New Advisory Council on Immigration Issues in Family Court*, NEW YORK STATE UNIFIED COURT SYSTEM (Oct. 5, 2015), <http://nylawyer.nylj.com/adgifs/decisions15/100615members.pdf>.

<sup>5</sup> Office of the Chief Administrative Judge, *Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies*, NEW YORK STATE UNIFIED COURT SYSTEM (April 26, 2017), [http://www.nycourts.gov/whatsnew/pdf/2017\\_law\\_enforcement\\_activities.pdf](http://www.nycourts.gov/whatsnew/pdf/2017_law_enforcement_activities.pdf) ("OCA April 2017 Protocol"). On or about May 7, 2018, additional instructions were issued to judges and non-judicial supervisors from the administrative judge for the New York City Criminal Court ("OCA May 2018 Instructions"). These protocols are discussed in greater detail below. *See infra pp.* 13-14.

## I. An Alarming Trend: Targeting of Courthouses and Scheduled Court Appearances for Civil Immigration Arrests

From the first week of his presidency, Donald Trump has issued a steady stream of executive orders<sup>6</sup> (“EOs”) in an unstinting and public effort to bring on a promised surge in immigration enforcement, and these EOs have set the tone for ICE’s mandate for the foreseeable future.

In pertinent part, these EOs dispense with the enforcement priorities of prior administrations and make the removal of any deportable noncitizen an indiscriminate priority for ICE enforcement, regardless of whether the individual was ever convicted of a crime (thus, any arrest or any violation of any immigration law may now trigger deportation); significantly increase the number of deportation officers; and threaten to withhold federal funds from so-called “sanctuary cities” – several of which have filed cases against the Administration raising Tenth Amendment, spending clause, Administrative Procedure Act, separation of powers, and due process issues.

The increased enforcement efforts have borne fruit. According to Department of Homeland Security statistics, from January 20, 2017 through the end of the fiscal year, ICE made 110,568 arrests compared to 77,806 in FY2016 - an increase of 40%.<sup>7</sup> Further, the number of immigrants arrested by ICE who had no criminal convictions increased by 146%.<sup>8</sup> These numbers demonstrate that dramatically increased enforcement actions have resulted in the deportation of peaceful community members and cannot be explained or justified as an escalation meant to keep the nation safer.<sup>9</sup>

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<sup>6</sup> *Presidential Actions*, WHITEHOUSE.GOV, [https://www.whitehouse.gov/presidential-actions/?issue\\_filter=immigration](https://www.whitehouse.gov/presidential-actions/?issue_filter=immigration).

<sup>7</sup> *Have Deportations Increased Under Donald Trump? Here’s What the Data Shows*, POLITIFACT (Dec. 19, 2017, 9:00 a.m.) <http://www.politifact.com/truth-o-meter/article/2017/dec/19/have-deportations-increased-under-donald-trump-her/>.

<sup>8</sup> OFFICE OF CIVIL JUSTICE, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, *NYC Office of Civil Justice 2017 Annual Report and Strategic Plan*, p. 56 (2017), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_Annual\\_Report\\_2017.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2017.pdf).

<sup>9</sup> Nick Miroff and Maria Sacchetti, *Trump Takes ‘Shackles’ Off ICE, Which is Slapping Them on Immigrants Who Thought They Were Safe*, THE WASHINGTON POST (Feb. 11, 2018), [https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5\\_story.html?noredirect=on&utm\\_term=.aba614648a01](https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.aba614648a01) (reporting that the number of immigrants with no prior criminal convictions has more than doubled in the government’s 2017 fiscal year); Noah Maskar, *ICE Arrests NYC Immigrant, 27, at Bronx Courthouse*, NEW YORK CITY PATCH (Updated Feb. 9, 2018, 10:32 a.m.), <https://patch.com/new-york/new-york-city/ice-arrests-nyc-immigrant-27-bronx-courthouse> (reporting the arrest of a 27-year old man with no prior criminal record, who has lived in the U.S. since age 3 and has a pending application for a green card through his U.S. citizen wife); Nicole Brown and Lauren Cook, *ICE Detains Immigrant at Queens Courthouse, Attorneys Say*, AM NEW YORK (Apr. 10, 2018), <https://www.amny.com/news/ice-court-arrest-nyc-1.17942936> (reporting the arrest of a father of three children who has a pending green card application through his U.S. citizen wife; he was detained by ICE just minutes after his case was dismissed in Queens criminal court); Christopher Peak, *ICE Blasted for Making Courthouse Arrests*, THE CONNECTICUT MIRROR (Mar. 4, 2018), <https://ctmirror.org/2018/03/04/ice-blasted-making-courthouse-arrests/> (reporting the arrest of a 24 year old man

Emblematic of the unprecedented increase in immigration enforcement has been the alarming rise in ICE civil arrests in and around New York’s state and local courthouses. In 2017, New York City’s area courts saw a 1200% increase in the number of immigrants targeted by ICE.<sup>10</sup> Moreover, according to the Immigrant Defense Project (“IDP”), which has been tracking ICE enforcement activity in and around New York State courthouses, at least one in five of the immigrants who were targeted in New York City courts in 2017 had no prior criminal record.<sup>11</sup>

Although ICE has primarily, and most recently, been targeting defendants in criminal court, over the course of 2017, ICE conducted enforcement in a broad range of non-criminal and special interest courts, including in family court,<sup>12</sup> human trafficking court,<sup>13</sup> and in a domestic violence matter.<sup>14</sup> The increase in ICE courthouse arrests across New York State in 2017 was well documented and well covered in the news media.<sup>15</sup>

The trend shows no signs of abating since the January 2018 Directive issued by ICE. Indeed, the plain language of the January 2018 Directive justifies continued enforcement in state courthouses and offers concrete ways ICE agents can take advantage of courthouse resources to make civil arrests. The January 2018 Directive vaguely states that ICE agents “should generally avoid enforcement actions in courthouses,” but also goes on to argue that “courthouse arrests are often necess[ary]” because jurisdictions like many in New York have sanctuary city policies in place.<sup>16</sup> The January 2018 Directive goes on to explicitly outline how ICE agents can benefit from state and local resources available in courthouses— “[c]ivil immigration enforcement actions inside courthouses should . . . continue to take place in *non-public* areas of the

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outside New Haven Superior Court where he was answering a traffic violation charge); Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, THE DAILY BEAST (Mar. 30, 2017, 1:00 a.m.), <https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice> (reporting that not just undocumented individuals, but lawful permanent residents are being arrested).

<sup>10</sup> IMMIGRANT DEFENSE PROJECT, *IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2018* (Dec. 31, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> See Andrew Denney, *NY Courts Track ICE Encounters with Litigants*, NEW YORK LAW JOURNAL (Mar. 27, 2017, 6:04 p.m.), <https://www.law.com/newyorklawjournal/almID/1202782175943/?sreturn=20171002130714>.

<sup>13</sup> See Beth Fertig, *When ICE Shows Up in Human Trafficking Court*, WNYC NEWS (June 22, 2017), <http://www.wnyc.org/story/when-ice-shows-court/>.

<sup>14</sup> See Jonathan Blitzer, *The Woman Arrested by ICE in a Courthouse Speaks Out*, THE NEW YORKER (Feb. 23, 2017), <http://www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out>.

<sup>15</sup> This past summer, former New York State Attorney General Eric Schneiderman and Brooklyn District Attorney Eric Gonzalez cited a report stating that 53 immigration arrests had been made in courthouses across the state, and another 10 arrests were attempted. Compare these numbers to 11 arrests for all of 2016 and 14 in 2015. See Azi Paybarah, *Law Enforcement, Court Officials Differ on Impact of ICE Courthouse Arrests*, POLITICO (Aug. 3, 2017, 5:39 p.m.), <https://www.politico.com/states/new-york/city-hall/story/2017/08/03/law-enforcement-court-officials-differ-on-impact-of-ice-courthouse-arrests-113781>.

<sup>16</sup> January 2018 Directive, *supra* note 2.

courthouse, *be conducted in collaboration with court security staff*, and utilize the court building's *non-public* entrances and exits.”<sup>17</sup> As for arrests in non-criminal courthouses, the January 2018 Directive now requires approval from an ICE supervisor beforehand.<sup>18</sup>

It is our understanding that since January 2018, ICE has confined its arrests to New York's criminal courts; however, the January 2018 Directive clearly contemplates arrests in other courts, and in many upstate courthouses, criminal and non-criminal parts occupy the same building. Moreover, the concerns we raise in this report apply to all state courthouses, including criminal courts. No individual should be afraid to attend a criminal courthouse, whether to defend against a charge, support a family member or act as a witness. And, focusing on the period between January and April 2018, the numbers demonstrate that the January 2018 Directive does not include as one of its goals a decrease in courthouse arrests overall. Since the beginning of 2018, there have been 48 reported immigration enforcement activities at New York State courthouses.<sup>19</sup> During 2017, according to IDP, there were 144 reports of ICE enforcement activity in New York State courthouses. Despite the January 2018 Directive, as of April 2018, the courthouse enforcement numbers have already reached a third of 2017's annual total, showing no signs of abatement.<sup>20</sup>

Further, the worrying pattern of ICE targeting and arresting individuals with no prior criminal records—has continued. For example, public defenders protested outside of Bronx Criminal Court on February 8, 2018 after ICE agents arrested a young man, who has no prior convictions, has been in the U.S. since he was 3 years old and is married to a U.S. citizen.<sup>21</sup> He was at court to resolve a misdemeanor charge when ICE agents arrested him outside the courthouse.<sup>22</sup> During the week of April 10, 2018, ICE agents conducted three civil arrests at New York City criminal courts.<sup>23</sup> In the most egregious of the three arrests, ICE agents wrongly arrested a young man - who has a U.S. citizen wife, three young children and no criminal record - outside Bronx criminal court moments after his criminal case was dismissed, almost costing him his job.<sup>24</sup> ICE released the young man after officials found that the civil detainer was

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<sup>17</sup> *Id.* at p. 2 (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> IDP Courthouse Arrests 2018 (Apr. 13, 2018). (Information on file with the Immigration and Nationality Law Committee.)

<sup>20</sup> News reports suggest that OCA data regarding ICE enforcement activity in courthouses may vary from these numbers. IDP largely depends on attorney reporting for its numbers. To the extent OCA is collecting information regarding ICE courthouse activity pursuant to court protocol, we respectfully request that such information be shared with the public using a method that protects individual privacy but that provides transparency and important factual information.

<sup>21</sup> Colby Hamilton, *Public Defenders Protest New ICE Arrest at Bronx Criminal Court*, NEW YORK LAW JOURNAL (Feb. 8, 2018, 4:54 p.m.), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/02/08/public-defenders-protest-new-ice-arrest-at-bronx-criminal-court/>.

<sup>22</sup> *See id.*

<sup>23</sup> Nicole Brown and Lauren Cook, *ICE Detains Immigrant at Queens Courthouse, Attorneys Say*, AM NEW YORK (Apr. 10, 2018, 3:13 p.m.), <https://www.amny.com/news/ice-court-arrest-nyc-1.17942936>.

wrongly issued since the young man has a work authorization document while his permanent residency application is pending.<sup>25</sup> Further demonstrating the vague and discretionary qualities of the January 2018 Directive, just a few weeks after its issuance, ICE arrested and detained a previous DACA recipient, who still qualifies for the status, after he appeared in traffic court in Illinois. Only after public outcry and negative press did ICE release this young man who was simply trying to address his traffic ticket.<sup>26</sup>

Unsurprisingly, lawyers continue to report that their non-citizen clients are fearful of going to court and many are opting to stay away altogether.<sup>27</sup> Lawyers further report that, if their non-citizen clients are arrested in the courthouse by ICE, it is becoming more common for the arrestees to be transferred to a detention facility out-of-state where they are not able to access counsel. Detention can last for months.

ICE courthouse arrests raise significant constitutional, common law, and public safety concerns. Access to state courts is intimately tied to individual rights as well as the independence of states to pursue their public safety and justice objectives by ensuring that individuals trust institutions enough to come forward to report crimes, act as witnesses, protect themselves from threatening or criminal behavior, and exercise their due process rights to defend any charges against them. The constitutional and common law rights of all individuals, regardless of immigration status, to have equal access to courts and to be afforded due process of law, are threatened when litigants are given the false choice of exercising their rights or possibly being deported from the country. Further, federalism issues arise when federal civil enforcement activity impedes the state's right and obligation to ensure public safety and to effectively administer its court system.

## **II. Access to Courts and Due Process Concerns Raised by ICE Courthouse Arrests**

Access to courts is a foundational aspect of liberty and due process enshrined in the Constitution. The First Amendment protects the right “to petition the Government for a redress of grievances” and guarantees anyone, regardless of their immigration status, the right to complain to, or seek the assistance of, the government without fear of punishment or reprisal. The Fifth and Fourteenth Amendments guarantee due process of law—the right to sue and defend oneself in courts, including a meaningful opportunity to be heard. Due process is

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<sup>24</sup> Edgar Sandoval and Rocco Parascandola, *ICE Agents Arrest Man Outside Bronx Courthouse, Setting Off Protest*, NEW YORK DAILY NEWS (Apr. 10, 2018, 6:22 p.m.), <http://www.nydailynews.com/new-york/bronx/lawyers-protest-bronx-court-ice-arrests-immigrant-article-1.3924058>.

<sup>25</sup> *See id.*

<sup>26</sup> Robert McCoppin & Brian L. Cox, *ICE Detains Man at Traffic Court After DACA Status Expires, Then Frees Him After Outcry*, CHICAGO TRIBUNE (Feb. 2, 2018, 6:56 a.m.), <http://www.chicagotribune.com/suburbs/skokie/news/ct-met-dreamer-daca-skokie-courthouse-arrest-20180131-story.html>.

<sup>27</sup> *See* IMMIGRANT DEFENSE PROJECT, *Protect Our Courts Act (NYS Assembly Bill 11013) Stories* (May 31, 2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/Protect-Our-Courts-FAQ-061118.pdf> (detailing reports from domestic violence victim advocates to housing attorneys of immigrant clients who are fearful of going to court or even bringing a case to court due to ICE enforcement tactics).

nowhere more important than in criminal court where a defendant must be given the chance to appear in court and confront the witnesses against her.

Equal access to courts requires removing barriers that selectively prevent discrete classes of persons from meaningfully accessing the courts.<sup>28</sup> ICE's courthouse arrests have had a chilling effect that threatens to create an impermissible underclass of potential litigants who are blocked from the courts and denied opportunities to exercise their Constitutional rights.<sup>29</sup>

The Supreme Court has described “the essence of the access claim” as “official action [that] is presently denying an opportunity to litigate for a class of potential [litigants].”<sup>30</sup> ICE's heightened courthouse activity has had a well-documented chilling effect, denying immigrants the opportunity to litigate their legal rights and claims—whether it be a defendant's right to defend herself against accusations or a victim's claim for a restraining order. In June of 2017, the Immigrant Defense Project surveyed<sup>31</sup> advocates and attorneys across New York State and found that 74% have worked with immigrants who have expressed fear of the courts because of ICE, 45% have clients who have either failed to file a petition or have withdrawn a petition because of fears of encountering ICE in the courts, 48% said their clients have expressed fear of calling the police, and 29% have clients who have failed to appear in court because of their fear of ICE. The survey also found that 67% of advocates working with survivors of violence had clients who decided not to seek help from the courts because of their fear of ICE,<sup>32</sup> and that 37% have worked with immigrants who did not seek orders of protection because they feared encountering ICE in court. And 56% of advocates working with tenants in housing court reported that their clients expressed fear about appearing in housing court because of ICE.<sup>33</sup> These numbers demonstrate that a class of litigants, namely non-citizens who may be targeted for immigration enforcement, are being denied equal opportunity to access the court system.

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<sup>28</sup> See e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (requiring prison authorities to provide prisoners with adequate law libraries and to assist them in preparing court papers); *Boddie v. Conn.*, 401 U.S. 371, 377 (1971) (court filing fee could not prevent indigent couple from filing for divorce).

<sup>29</sup> See *Plyler v. Doe*, 457 U.S. 202, 218-219 (1982) (“This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”).

<sup>30</sup> *Christopher v. Harbury*, 536 U.S. 403, 413 (2002).

<sup>31</sup> See IMMIGRANT DEFENSE PROJECT, *ICE in New York State Courts Survey*, <https://www.immdefense.org/ice-courts-survey/>.

<sup>32</sup> See, e.g., *Protect Our Courts Act (A.11013) Stories*, *supra* note 27 (the former managing attorney of My Sister's Place, a Rockland County legal services organization, recounts the story of a client who did not report a horrific incident of domestic violence to the police in which she suffered neurological damage and permanent vision loss because she was too afraid any law enforcement or court involvement would lead to ICE arrest.).

<sup>33</sup> See, e.g., *Protect Our Courts Act (A11013) Stories*, *supra* note 27 (an attorney at Brooklyn Legal Services Corp. A, a housing legal services organization, could not continue with the succession rights case of a long-time member of a tenant organization in Brooklyn because her undocumented husband, who was a key witness in the case, was scared to go to court in case of ICE arrest.). Although there has been a significant increase in the number of ICE arrests in courthouses across the state since January 2017, OCA spokesperson Lucian Chalfen has stated that ICE activities have not had a noticeable impact on court appearances. See Paybarah, *supra* note 15.

a. *A Solution: Enforce the Privilege against Civil Arrests*

One responsive action that we respectfully submit OCA should consider is to enforce within the state courts the common-law privilege against civil arrests. The common-law privilege against civil arrests while attending judicial proceedings is long standing.<sup>34</sup> In existence since the 15<sup>th</sup> century,<sup>35</sup> the privilege was deeply entrenched in the common-law tradition by the mid-18<sup>th</sup> century<sup>36</sup> as a right extended not only to parties and witnesses but liberally to all people “necessarily attending” the courts on business, which “includes their necessary coming and returning.”<sup>37</sup> The rule against civil arrests in connection with court proceedings was adopted and has remained a fundamental one within American jurisprudence.<sup>38</sup>

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<sup>34</sup> *Northern Light Tech., Inc. v. Northern Lights Club*, 236 F.3d 57, 62 (1st Cir. 2001) (discussing the “historical pedigree” of the privilege). See also Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. F. 410, 423 (2017). This section of the report draws heavily from Professor Lasch’s article.

<sup>35</sup> 17 Charles Viner, *A General Abridgment of Law and Equity* 510 (1743) (citing a Year Book of Henry IV for this proposition: “If a Man sued in Bank[rruptcy], and he goes to another Place by Leave of the Court to inquire for Evidences concerning this Matter which he has there, he shall have the Privilege if he be arrested there.”). Source can be viewed here:

<https://books.google.com/books?id=2WBGAAAAYAAJ&pg=PA510&lpg=PA510&dq=Court+to+inquire+for+Evidences+concerning+this+Matter+which+he+has+there,+he+shall+have+the+Privilege+if+he+be+arrested+there&source=bl&ots=VxwHCuORSZ&sig=3T1axngDOS7GimENbhdRz2OBP9g&hl=en&sa=X&ved=0ahUKewiL5oCYtPfbAhXG5oMKHfFJBnAQ6AEIQTAC#v=onepage&q=Court%20to%20inquire%20for%20Evidences%20concerning%20this%20Matter%20which%20he%20has%20there%2C%20he%20shall%20have%20the%20Privilege%20if%20he%20be%20arrested%20there&f=false>.

<sup>36</sup> *Meekins v. Smith*, (1791) 126 Eng. Rep. 363 (stating “general rule” that “all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, (in which number bail were included,) were entitled to privilege from arrest eundo et redeundo, provided they came bona fide.”); 3 William Blackstone, *Commentaries on the Laws of England*, 289 (1st ed. 1768). “Eundo et redeundo” means “going and returning.” BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>37</sup> 3 William Blackstone, *Commentaries on the Laws of England*, 289 (1st ed. 1769) (quoting “Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning . . . .”); 6 Matthew Bacon, *A New Abridgment of the Law* 530 (7th ed. 1832) (citing a Year Book of Charles II for the rule that “not only serjeants [sic] at law, but all other persons whatsoever, are freed from arrest so long as they are in view of any of the courts at Westminster, or if near the courts, though out of the view, least any disturbances may be occasioned to the courts or any violence used”). See also *Stewart v. Ramsay*, 242 U.S. 128, 128 (1916) (defendant served with civil process “while he was returning from the courtroom after testifying,” entitled to privilege),

[https://scholar.google.com/scholar\\_case?case=478137838398617659&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=478137838398617659&hl=en&as_sdt=6&as_vis=1&oi=scholar).

Sources can be viewed here:

[https://books.google.com/books?id=AOvKAAAAMA AJ&pg=PA159&lpg=PA159&dq=%22Suitors,+witnesses,+and+other+persons,+necessarily+attending+any+courts+of+record+upon+business,+are+not+to+be+arrested+during+their+actual+attendance,+which+includes+their+necessary+coming+and+returning%22&source=bl&ots=cIrc5QmBtT&sig=Z5yVuD-nO65r8j8Guu49291MLk&hl=en&sa=X&ved=0ahUKewjZneSKwv7bAhUB2IMKHT\\_BBncQ6AEIJzAA#v=onepage&q=%22Suitors%2C%20witnesses%2C%20and%20other%20persons%2C%20necessarily%20attending%20any%20courts%20of%20record%20upon%20business%2C%20are%20not%20to%20be%20arrested%20during%20their%20actual%20attendance%2C%20which%20includes%20their%20necessary%20coming%20and%20returning%22&f=false](https://books.google.com/books?id=AOvKAAAAMA AJ&pg=PA159&lpg=PA159&dq=%22Suitors,+witnesses,+and+other+persons,+necessarily+attending+any+courts+of+record+upon+business,+are+not+to+be+arrested+during+their+actual+attendance,+which+includes+their+necessary+coming+and+returning%22&source=bl&ots=cIrc5QmBtT&sig=Z5yVuD-nO65r8j8Guu49291MLk&hl=en&sa=X&ved=0ahUKewjZneSKwv7bAhUB2IMKHT_BBncQ6AEIJzAA#v=onepage&q=%22Suitors%2C%20witnesses%2C%20and%20other%20persons%2C%20necessarily%20attending%20any%20courts%20of%20record%20upon%20business%2C%20are%20not%20to%20be%20arrested%20during%20their%20actual%20attendance%2C%20which%20includes%20their%20necessary%20coming%20and%20returning%22&f=false); and here:

[https://books.google.com/books?id=LDGAzGdSs\\_EC&pg=PA617&lpg=PA617&dq=but+all+other+persons+whats](https://books.google.com/books?id=LDGAzGdSs_EC&pg=PA617&lpg=PA617&dq=but+all+other+persons+whats)





In *Chase Nat'l Bank of N.Y.C. v. Turner*, the Court of Appeals expanded the notion of the privilege, stating that “[t]he tendency has been not to restrict but to enlarge the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court and for a reasonable time in going and returning . . . [to even the moments of] a suitor returning from an appointment with his solicitor for the purpose of inspecting a paper in his adversary’s possession in preparation for an examination before a master and while attending at the registrar’s office with his solicitor, to settle the terms of a decree and while attending from another state to hear an argument in his own case in the Court of Appeals.”<sup>45</sup>

What the Court of Appeals cautioned against over a century ago as an embarrassment for the courts<sup>46</sup> is being played out today as ICE continues its policy of arresting immigrants in New York courthouses. Courts have historically been more aggressive in asserting the privilege to grant individuals immunity from civil arrests as opposed to mere civil service of process.<sup>47</sup> Immigration arrests are civil in nature and fall within the privilege’s core concern with civil arrests.<sup>48</sup> ICE courthouse arrests are warrantless seizures<sup>49</sup> of individuals – either the ICE agent has no warrant or, possibly, he or she may be in possession of an administrative warrant signed by an ICE official, not a judge. Moreover, it is generally not a crime for an undocumented person to be present in the United States.<sup>50</sup> Thus the administrative removal process is a civil, not a

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<sup>45</sup> *Chase Nat'l Bank of N.Y.C. v. Turner*, 269 N.Y. 397, 400 (1936) (citations omitted).

<sup>46</sup> *Person v. Grier*, 66 N.Y. at 126 (“This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process.”).

<sup>47</sup> *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 382 (1910) (denying, in this case, the privilege of a criminal defendant to be exempt from civil process but leaving open the possibility of the privilege against civil arrest).

<sup>48</sup> Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. F. 410, 414 (2017). The distinction between civil and criminal arrests is important in this context. Criminal arrests conducted by criminal law enforcement personnel such as the New York Police Department are backed up by a statewide criminal justice system, a robust body of case law, and constitutional protections afforded to a criminal defendant, including the use of judicial warrants carried out by trained law enforcement personnel, pre-trial procedures and a right to counsel. Even where a criminal law enforcement agent determines there is a need to effectuate an arrest without a warrant, the full panoply of constitutional rights afforded the arrestee is triggered. Civil arrests carry no such guarantees, which can have dire consequences. See Paige St. John and Joel Rubin, *ICE held an American Man in Custody for 1,273 Days. He’s Not the Only One Who Had to Prove His Citizenship*, LOS ANGELES TIMES (Apr. 27, 2018, 5:00 a.m.), <http://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html> (examining the false arrest and detention consequences of a “digitally driven search for the deportable,” including that since 2012, ICE has released from its custody more than 1,480 people after investigating detainees’ citizenship claims and noting that such claims have a 50% greater success rate if the detainee has counsel).

<sup>49</sup> See 8 U.S.C. 1357(a), (a)(2) (“Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]”).

<sup>50</sup> *Arizona v. United States*, 567 U.S. 387, 407 (2012) (“[I]t is not a crime for a removable alien to remain present in the United States.” (citation omitted)).

criminal matter, “even where the alleged basis for removal is the commission of a criminal offense.”<sup>51</sup>

Pursuant to the OCA May 2018 Instructions given to judicial and non-judicial personnel in Criminal Court, court officers are now directed to inquire whether the ICE officials present at courthouses have a warrant and, if so, whether the warrant was issued by a judge. In addition, court officers are required to record this information. These additional instructions do not require a judicial warrant from ICE officials to execute civil arrests. Instead, we respectfully submit that OCA adopt a new policy that recognizes that civil immigration arrests conducted under these circumstances are prohibited by common-law, and that a judicial warrant is required.<sup>52</sup>

The court system is empowered to decide what takes place inside the courthouses, as stated by the Court of Appeals: “This immunity [from arrest and service while attending court] does not depend upon the statutory provisions, but is deemed necessary for the due administration of justice...and is abundantly sustained by authority.”<sup>53</sup> The burden to administrate justice is on the courts as much as the public, who is burdened when this privilege is at risk. Without the privilege, court proceedings “would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify.”<sup>54</sup>

For immigrants who overcome the fear of ICE arrests and continue to enter New York courts, proceedings have been interrupted by ICE arrests. Based on the American Civil Liberties Union (ACLU’s) reporting, “[f]ifty-four percent of judges [polled reported] court cases were interrupted due to an immigrant crime survivor’s fear of coming to court, representing a significant disruption in the justice system compared with 43 percent of judges reporting this effect in 2016.”<sup>55</sup> Also, judges have been embarrassed and upset by ICE disruptions to court

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<sup>51</sup> *Lunn v. Commonwealth*, 477 Mass. 517, 522 (2017).

<sup>52</sup> This approach would follow the approach taken in the Protect Our Courts Act, A.11013 (Solages)/S.8925 (Alcantara), first introduced in the New York State Assembly on May 30, 2018. This bill would make it unlawful for any law enforcement officer to arrest a person, including a party, witness or family member, for a civil violation - such as civil immigration violations - while that person is going to, attending, or leaving court unless a judicial warrant or court order is presented to court staff. The bill has garnered vocal support from law enforcement officials, public defense providers, domestic violence victim advocates, civil rights organizations, labor unions, and many others. The Public Advocate and the Brooklyn DA, for example, have already publicly endorsed the bill citing the values of “[s]afe and universal access to the court of law,” “public safety,” and “community trust in law enforcement” as reasons. See *New York Assembly Introduces Groundbreaking New Bill to Protect Immigrants from Unlawful ICE Arrests at Courthouses*, IMMIGRANT DEFENSE PROJECT (June 1, 2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/Protect-Our-Courts-Act-press-release-6.5.2018-FINAL.pdf>. Although this report takes no position on the legislation, the City Bar does not believe such legislation is necessary in order for OCA to adopt the recommendations made herein.

<sup>53</sup> *Matthews v. Tufts*, 87 N.Y. 568 (1882).

<sup>54</sup> *Stewart v. Ramsay*, 242 U.S. at 130.

<sup>55</sup> *Freezing Out Justice – How Immigration Arrests at Courthouses are Undermining the Justice System*, ACLU (2018), [https://www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf).

proceedings.<sup>56</sup> As remarked by U.S. District Judge Talwani in Boston, “I see no reason for places of redress and justice to become places that people are afraid to show up to...I am upset at the notion that ICE thinks a courtroom is a place to go and pick up people.”<sup>57</sup>

ICE’s civil arrests in courthouses not only disrupt the dignity of the courthouse; once those individuals are placed into immigration detention, these arrests can also interfere with the ability of detained individuals to attend future court dates. For all of these reasons, OCA should enforce the full power of immunity of common-law privilege so that all New Yorkers can freely and equally access the courts.

### III. Federalism Concerns Raised by ICE Courthouse Arrests

The increase in ICE courthouse civil arrests and the resulting fear in litigants of attending and accessing judicial proceedings have not only infringed upon individual rights but also have interfered with the state’s right to ensure public safety and properly administer its laws and court system.<sup>58</sup> The decision as to how to best guarantee public safety is one reserved for localities

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<sup>56</sup> See generally Andrew Denney, *ICE Cannot Hold Criminal Defendant Who Made Bail, Judge Finds*, NEW YORK LAW JOURNAL (Dec. 28, 2017, 5:49 p.m.), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/28/ice-cannot-hold-criminal-defendant-who-made-bail-judge-finds/> (the Chief Judge of the Eastern District of New York, in a court order requiring ICE to release an individual defending against federal criminal charges, criticized ICE arrests of criminal defendants thusly, “The court is gravely concerned by this apparent willingness [of ICE] to prejudice the interests of the people of the United States and the constitutional rights of the accused . . .”). (Judicial order cited below in note 69.) See also Statement of Chief Justice Lloyd A. Krameier of The Supreme Court of Illinois on the chilling effect of ICE arrests on access to Justice, *ICE Arrests Threaten to Chill Access to Justice*, ILLINOIS COURTS CONNECT (Aug. 28, 2017), [http://www.illinoiscourts.gov/Media/enews/2017/082517\\_chief\\_justice.asp](http://www.illinoiscourts.gov/Media/enews/2017/082517_chief_justice.asp) (“Concerns over the negative effects of ICE enforcement actions on access to state judicial services may have particular resonance in Illinois, where our state constitution enshrines the philosophy that every person, not just citizens, ‘shall obtain justice by law, freely, completely, and promptly’ and guarantees to all persons, not just citizens, that they shall not be ‘deprived of life, liberty or property without due process of law nor be denied the equal protection of the law.’” (internal citations omitted)); *Letter from Chief Justice Mary E. Fairhurst of The Supreme Court of the State of Washington to the Secretary of the Department of Homeland Security*, dated Mar.22, 2017, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf> (“When people are afraid to access our courts, it undermines our fundamental mission. I am concerned at the reports that the fear now present in our immigrant communities is impeding their access to justice . . . . Our ability to function relies on individuals who voluntarily appear to participate and cooperate in the process of justice.”); *Letter from Chief Justice Thomas A. Balmer of The Supreme Court of Oregon to the Secretary of the Department of Homeland Security*, dated Apr. 6, 2017, available at: [http://res.cloudinary.com/bdy4ger4/image/upload/v1506703695/CJ\\_ltr\\_to\\_AG\\_Sessions-Secy\\_Kelly\\_re\\_ICE\\_rrubnc.pdf](http://res.cloudinary.com/bdy4ger4/image/upload/v1506703695/CJ_ltr_to_AG_Sessions-Secy_Kelly_re_ICE_rrubnc.pdf) (“I trust that [DHS] understand[s] as well the central role that the Oregon courts play in our state’s criminal justice system, our efforts to protect children and families, and our daily work to ensure the rule of law for all Oregon residents. ICE’s detention or arrest of undocumented residents in and near Oregon’s courthouses seriously impedes those efforts. It deters individuals, some undocumented and some not, from coming to court when they should.”).

<sup>57</sup> Alison Noon, *ICE Agents Crash Court to Detain Student, Upsetting Judge*, LAW360 (Apr. 25, 2018, 9:42 p.m.), <https://www.law360.com/articles/1037332/ice-agents-crash-court-to-detain-student-upsetting-judge>. (Subscription required.) See also Raymond, Nate, *U.S. Judge Criticizes Immigration Arrest of Chinese Woman in Exam Scam*, REUTERS (Apr 25, 2018).

<sup>58</sup> See Statement of Chief Justice Larry A. Krameier of The Supreme Court of Illinois, *supra* note 56 (“Disruption of state court proceedings by ICE agents not only threatens the rights and interests of the participants in state legal

and states in our federalist system.<sup>59</sup> Further, there has long been a “fundamental policy against federal interference” with the functioning and administration of state courts, particularly in the context of state criminal prosecutions.<sup>60</sup> ICE courthouse civil arrests interfere with New York’s ability to ensure public safety as well as its ability to administer a well-functioning court system.

The fear that New York’s immigrant residents have about accessing the state court system due to the drastic spike in ICE courthouse civil arrests has been well-documented.<sup>61</sup> If witnesses are afraid to come to court, defense attorneys will not be able to defend their clients and prosecutors may be forced to drop charges—directly impacting public safety. If ICE’s enforcement of *civil* immigration laws at state courthouses discourages individuals from bringing to light cases concerning public safety and welfare, then these arrests are hampering the state’s ability to ensure public safety.<sup>62</sup>

It is no surprise, then, that many state and local officials elected to enforce our laws and ensure our communities’ safety have condemned ICE civil arrests in and around courthouses.<sup>63</sup>

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proceedings, it also raises fundamental questions regarding the boundaries of state and federal sovereignty. . . . Among the core matters of state and local concern are public safety, health and welfare. To the extent that the encounters or the prospect of such encounters impede the prompt and complete resolution of cases pending in state court by discouraging parties or witnesses (or even counsel) from attending court hearings, it can likewise be argued that they directly threaten the ability of the state to exercise its judicial authority.” (Internal citations omitted).

<sup>59</sup> See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.”); *Hillsborough Cnty. Fla. v. Automated Med. Lab.*, 471 U.S. 707, 715-16 (1985); *Philadelphia v. Sessions*, No. 17-3894, 2018 WL 2725503, at \*20 (E.D. Pa. June 6, 2018), <https://www.documentcloud.org/documents/4496315-6-6-18-Philadelphia-v-Sessions-Opinion.html> (finding that Philadelphia’s sanctuary policies “were adopted in good faith and are a reasonable and lawful exercise of authority by the City.”).

<sup>60</sup> *Younger v. Harris*, 401 U.S. 37, 46 (1971); see also *Page Co. v. MacDonald*, 261 U.S. 446, 447-48 (1923) (the common law privilege against civil arrests while attending court “is founded . . . in the necessities of the judicial administration . . . (citing *Stewart v. Ramsay*, 242 U.S. at 246”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (finding that the decision about qualifications of state judges “is a decision of the most fundamental sort of a sovereign entity.”).

<sup>61</sup> See *supra* notes 31 - 33.

<sup>62</sup> See, e.g., *Philadelphia v. Sessions*, 2018 WL 2725503, at \*4, \*8 (referring to testimony about the way in which most residents see government functions and services as intertwined and a fear of accessing one arm of government can lead to fear of accessing other arms and functions of government; citing to need for local and state governments to build trust with its residents, especially those who are most vulnerable).

<sup>63</sup> This is a national phenomenon which has caused many law enforcement officials across the country to speak out about the detrimental effects ICE arrests have had on public safety. See Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, THE NEW YORK TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> (Houston’s police chief Art Acevedo cites fear of ICE enforcement, especially at courthouses, as the reason for the 16% drop in domestic violence reports from the Hispanic community in Houston—“Undocumented immigrants and even lawful immigrants are afraid to report crime . . . They’re seeing the headlines from across the country, where immigration agents are showing up at courthouses, trying to deport people.”); Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, THE NEW YORK TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html> (reporting that law enforcement officials in several large cities, including Los Angeles, Houston, and Denver say that the federal government’s harsh immigration enforcement tactics are to be blamed for decline in crime reporting from Hispanic community members).

In 2017, the Office of the Attorney General of New York, the chief law enforcement office for the state, called on the administration to stop the civil arrests of those “in the heart of our justice system” because immigrants will be less likely to report crimes or serve as witnesses, “leav[ing] us all at risk.”<sup>64</sup> The District Attorneys of Brooklyn, Bronx, and Manhattan recently held a joint press conference with the Public Advocate of New York City to appeal to ICE as fellow law enforcement officers to stop making these arrests that “do[] not keep us safe” and “jeopardize[] public safety.”<sup>65</sup> All three DAs pointed to the chilling effect the arrests were having on victims and witnesses. Manhattan DA Cy Vance observed that due to these civil arrests, “important prosecutions” cannot proceed and “New Yorkers are less safe.”<sup>66</sup> The Brooklyn DA Eric Gonzalez stated, “It is outrageous that ICE is using courts to round up immigrants, a tactic that sends a chilling effect, undermines public safety and subverts due process.”<sup>67</sup>

In the January 2018 Directive, ICE states that “[w]hen practicable, ICE officers and agents will conduct enforcement actions discreetly to minimize their impact on court proceedings.”<sup>68</sup> However, in actuality, ICE courthouse arrests routinely interfere with court proceedings because ICE often arrests immigrants prior to the resolution of their criminal cases. ICE detention can have serious detrimental effects on a criminal proceeding beyond effects on the accused’s ability to mount a defense, such as probation violations and other adverse consequences. ICE interference with the criminal process does not just infringe on the interests of defendants. It infringes on the victims’ interest in seeing their cases prosecuted when defendants are not available to stand trial; it frustrates the interests of the prosecution which may have to dismiss cases based on speedy trial rules when the defendant cannot be produced; and it wastes valuable court resources on cases that will not be properly resolved.

A recent case in federal criminal court encapsulates the multi-faceted detrimental effects of ICE courthouse arrests. ICE agents arrested, in the court room, a criminal defendant who had just been ordered released by the district court judge after bail was granted. The Chief Judge of the District Court for the Eastern District of New York, in an order to release the defendant from immigration detention or dismiss the criminal case with prejudice, expressed grave concern over the “apparent willingness [of ICE] to prejudice the interests of the people of the United States” by “jeopardize[ing] the ability of DOJ to protect the interests of the government and of the people . . . in prosecuting [] crimes” while simultaneously trampling on “the constitutional rights

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<sup>64</sup> See Christina Carrega, *Brooklyn DA, New York AG Demand a Halt to ICE Raids Following Murder Case Witness’ Detainment*, NEW YORK DAILY NEWS (Aug. 3, 2017, 7:30 p.m.), <http://www.nydailynews.com/new-york/brooklyn-da-new-york-ag-demand-halt-ice-raids-article-1.3381092>.

<sup>65</sup> See Erin Durkin, *City DAs Plead With ICE to Stop Arresting Immigrants at NYC Courthouses: It Jeopardizes Public Safety*, NEW YORK DAILY NEWS (Feb. 14, 2018, 7:08 p.m.), <http://www.nydailynews.com/new-york/city-das-press-ice-stop-arresting-immigrants-courthouses-article-1.3820798> (“The Manhattan, Brooklyn and Bronx DAs joined Public Advocate Letitia James Wednesday to push the feds to stop the arrests, which they say are interfering with the justice system. . . . DAs and public defenders alike say the arrests are making defendants, witnesses and victims afraid to come to court.”).

<sup>66</sup> *Id.*

<sup>67</sup> Lily Sanders, *Federal Immigration Officials Will Continue Nabbing Suspects at New York Courthouses to Subvert Sanctuary City Status*, NEWSWEEK (Sep. 15, 2017, 2:09 p.m.), <http://www.newsweek.com/new-york-immigration-courthouse-arrests-continue-sanctuary-city-665797>.

<sup>68</sup> *Supra* note 2.

of the accused” and wasting court resources.<sup>69</sup> This was a federal case in which the agencies of the same Executive Branch were in conflict with one another. In cases where the federal government’s interests interfere with the state’s sovereign right to ensure public safety and administer its court system, the federalism concerns become even more significant.<sup>70</sup>

These concerns are exacerbated by the fact that the Trump Administration has purposefully targeted sanctuary cities and states for cuts in federal funding, more frequent courthouse arrests, and even a lawsuit by the Department of Justice.<sup>71</sup> Specifically, Executive Order 13768 seeks to cut federal funding from sanctuary cities—localities with legislation that, to varying degrees, prohibit the use of local resources to carry out federal civil immigration enforcement. In response, lawsuits have been filed across the country, including by Chicago, Philadelphia, San Francisco and Santa Clara. These lawsuits challenge the federal government on multiple constitutional grounds—including that EO 13768 violates the separation of powers doctrine (by attempting to usurp congressional spending powers) and the Tenth Amendment’s anti-commandeering doctrine (which prohibits the federal government from commandeering the resources of local jurisdictions).<sup>72</sup> At the center of these cases is 8 U.S.C. § 1373, a federal law that prohibits state and local governments from restricting government entities or officials from sending to, or receiving from, federal immigration authorities information regarding the citizenship or immigration status of any individual.<sup>73</sup> In the recent case, *Murphy v. NCAA*, the Supreme Court held that the anti-commandeering rule did not support any substantive distinction

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<sup>69</sup> *U.S. v. Benzadon Boutin*, No. 17-cr-590, Memorandum and Order at 7-8 (E.D.N.Y. Dec. 20, 2017), <https://images.law.com/contrib/content/uploads/documents/389/15760/U.S.-v.-Benzadon-Boutin.pdf>.

<sup>70</sup> *Younger*, 401 U.S. at 44 (“Our Federalism” dictates that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”).

<sup>71</sup> See *U.S. v. California*, No. 18-cv-264, Complaint (Mar. 6, 2018), <https://www.justice.gov/opa/press-release/file/1041431/download>.

<sup>72</sup> See, e.g., *Chelsea, Lawrence v. Trump*, No. 17-10214 (D. Mass. Feb. 8, 2017); *Philadelphia v. Sessions*, No. 17-03894 (E.D. Pa. Aug. 30, 2017); *Chicago v. Sessions*, No. 17-05720 (N.D. Ill. Aug. 7, 2017); *San Francisco v. Trump*, No. 17-00485 (N.D. Cal. Jan 31, 2017); *Santa Clara v. Trump*, No. 17-00574 (N.D. Cal. Feb. 3, 2017); *San Francisco v. Sessions*, No. 17-04642 (N.D. Cal. Aug. 11, 2017); *California v. Sessions*, No. 17-04701 (N.D. Cal. Aug. 14, 2017); *Seattle v. Trump*, No. 17-00497 (W.D. Wash. Mar. 29, 2017); *Los Angeles v. Sessions*, No. 17-07215 (C.D. Cal. Dec. 20, 2017); *El Cenizo v. Texas*, No. 17-00404 (W.D. Tex. May 8, 2017) (combined with *El Paso v. Texas*, No. 17-00459 (W.D. Tex. May 22, 2017)); and *San Antonio v. Texas*, No. 17-00489 (W.D. Tex. June 1, 2017) (challenging, on preemption grounds, a state law requiring local law enforcement to cooperate with federal immigration officials). These cases are at various stages in the litigation process, including a few decisions on appeal to federal circuit courts.

<sup>73</sup> 8 U.S.C. § 1373, <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12-subchapII-partIX-sec1373.pdf>. The constitutionality of §1373 is very much at issue in the “sanctuary city” cases. Courts so far have explored whether the provision implicates anti-commandeering principles because it interferes with the ability of state and local governments to control employee on-the-clock activities, as well as the extent to which the federal government needs to affirmatively commandeer state/local resources in order to give rise to a constitutional violation. See, e.g., *Philadelphia v. Sessions*, *supra* note 72; *Chicago v. Sessions*, *supra* note 72. Both cases cite to *Printz v. United States*, 521 U.S. 898 (1997) (holding that certain provisions of the Brady Handgun Violence Prevention Act violated the Tenth Amendment); *Reno v. Condon*, 528 U.S. 141 (2000) (upholding the Driver's Privacy Protection Act of 1994 against a Tenth Amendment challenge); *New York City v. United States*, 179 F.3d 29 (2d Cir. 1999) (rejecting facial Tenth Amendment challenge to two laws similar to §1373, but suggesting holding might be different if level of federal intrusion on city policies were demonstrated).

between a federal law that directly orders affirmative action as opposed to directly ordering a prohibition.<sup>74</sup> One federal district judge has already ruled that under *Murphy v. NCAA*, 8 U.S.C. § 1373 is unconstitutional.<sup>75</sup>

ICE also specifically targets the courthouses of sanctuary cities for more frequent enforcement<sup>76</sup>—justifying such arrests as a reasonable response to the “sanctuary” policies. In August, a spokesperson for ICE cited New York City’s refusal to assist in deportation actions against people whom the city did not view as a threat as a main driver in the increase of ICE courthouse arrests<sup>77</sup>. The January 2018 Directive explicitly reinforces this notion.

#### IV. State, Local and Federal Responses So Far

ICE’s enforcement tactics, especially in and around courthouses, have raised concern at local, state, and federal levels. In New York State, OCA exercised its state constitutional authority<sup>78</sup> to issue guidelines with respect to law enforcement activities in state courthouses in the April 2017 Protocol and the May 2018 Instructions.<sup>79</sup> Balancing concerns raised by ICE’s heightened courthouse activity with the court system’s policy to “permit law enforcement agencies to act in pursuit of their official legal duties in New York state courthouses” as long as such activities do not disrupt court business or pose a public safety risk, the April 2017 Protocol provides that, without a judicial warrant, a law enforcement officer is prohibited from making arrests inside courtrooms, and a judge must be notified if an agent plans to arrest someone involved in a case before him or her. Law enforcement officers must identify themselves to court officers and disclose information regarding planned enforcement actions while in the building, and the court officer must relay this information to a supervisor who will then relay it to the judge.<sup>80</sup>

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<sup>74</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1467 (2018) (“The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one.”).

<sup>75</sup> *Philadelphia v. Sessions*, 2018 WL 2725503.

<sup>76</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *FAQ on Sensitive Locations and Courthouse Arrests* <https://www.ice.gov/ero/enforcement/sensitive-loc>; Session and Kelly, *Letter to Chief Justice Cantil-Sakauye* dated Mar. 29, 2017, <https://www.politico.com/f/?id=0000015b-23c8-d874-addf-33e83a8c0001>.

<sup>77</sup> See Paybarah, *supra* note 15.

<sup>78</sup> N.Y. Const., art. VI, § 28(b)-(c) provides that the chief administrator of the Unified Court System, appointed by the Chief Judge of the Court of Appeals (who also serves as the Chief Judicial Officer of the court system), “shall supervise the administration and operation of the unified court system” on behalf of the chief judge. The Constitution further provides that the chief judge “shall establish standards and administrative policies for general application throughout the state,” and sets forth a procedure for doing so. A comprehensive set of rules governing the court system is published in title 22 of the New York Compilation of Codes, Rules, and Regulations. Like the New York Constitution, Section 212 of the New York Judiciary Law gives the chief administrator of the courts the power to “supervise the administration and operation of the unified court system.” This authority includes both courtrooms and public areas of the courthouse. See, e.g., *N.Y. State Licensed Bail Agent’s Ass’n v. Murtagh*, 107 N.Y.S.2d 380, 382 (1951), *aff’d*, 279 A.D. 851, 110 N.Y.S.2d 154 (App. Div. 1952) (upholding rule issued by the Board of City Magistrates prohibiting bail bondsmen from appearing in any New York State courthouse except in certain narrow circumstances).

<sup>79</sup> See *supra* note 4.

<sup>80</sup> The May 2018 Instructions were issued to judges and non-judicial supervisors by the administrative judge for the New York City Criminal Court. In pertinent part, court officers are directed to inquire whether the ICE officials



In response to the steady increase of ICE courthouse arrests in New York, Chief Judge Janet DiFiore has pledged her commitment to ensure “the safety and security of all New Yorkers who use our courthouses throughout the state.”<sup>81</sup> To that end, she has been in a “continuing dialogue” with federal officials and has requested that they amend their existing policy to add courthouses to the list of “sensitive locations, similar to schools, hospitals and places of worship.”<sup>82</sup> ICE has defined “sensitive locations” as inclusive of, but not limited to, schools (including daycare facilities, preschools, and bus stops), medical treatment facilities (including hospitals, doctor’s offices and urgent care facilities), places of worship, religious and civil ceremonies (including weddings and funerals), and public demonstrations (including marches, rallies and parades).<sup>83</sup> While ICE enforcement actions may occur at sensitive locations “in limited circumstances,” such activities “will generally be avoided.”<sup>84</sup>

New York is not alone in urging ICE to designate courthouses as sensitive locations: officials in states around the country—including California, New Jersey, Connecticut, Massachusetts, Maine, Oregon, Washington, and Colorado—have made similar calls<sup>85</sup> In fact, on March 15, 2018, Massachusetts Committee for Public Counsel Services filed a lawsuit in state court seeking the issuance of a writ of protection from civil arrest, including civil immigration arrest, for the named petitioners and all similarly situated individuals.<sup>86</sup>

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present at courthouses have a warrant and, if so, whether the warrant was issued by a judge. Then, the court officers should scan a copy of the warrant (either administrative or judicial) and attach it to the required notifications, including the Unusual Occurrence Report. Should the judge decide that she will inform the parties before the court appearance of ICE presence, she should also state whether the ICE officials have a judicial warrant or not. The instructions also inform judges that they need not issue a bench warrant if they are aware that ICE has taken a defendant with an open New York City case into custody. The instructions imply that judges should ask the prosecutor to file an order to have the defendant produced from ICE custody for future court dates. However, it does not require that judges ask ADAs for such writs and since ICE is not bound by state court orders, it does not need to honor such writs. Further, while many individuals arrested by ICE around the New York City area are detained in facilities in New Jersey, some are detained in facilities farther away, where the possibility of having the defendant produced becomes slimmer, especially when the requesting local law enforcement agency must arrange for the defendant’s transportation.

<sup>81</sup> See Beth Fertig, *Outcry After Immigration Agents Seen at Queens Human Trafficking Court*, WNYC (Jun. 16, 2017), <https://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/>.

<sup>82</sup> *Id.*

<sup>83</sup> See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

<sup>84</sup> *Id.*

<sup>85</sup> See Tory Johnson, *Immigration Arrests at Courthouses Are Under Fire From State Officials*, IMMIGRATION IMPACT, (Sep. 28, 2017), <http://immigrationimpact.com/2017/09/28/immigration-arrests-at-courthouses-fire-state-officials/>; see also *supra* note 45.

<sup>86</sup> See COMMITTEE FOR PUBLIC COUNSEL SERVICES, *Civil Rights, Indigent Defense Groups Ask Supreme Judicial Court to Block Immigration Arrests at Massachusetts Courthouses* (Mar. 16, 2018), <https://www.publiccounsel.net/wp-content/uploads/2018/03/Writ-of-Protection-Press-Release.pdf>.

However, given that ICE has been clear that it does not view courthouses as a sensitive location and that ICE arrests have continued to rise despite the OCA guidelines and ICE's own directive, New York State elected officials have taken further steps to protect the rights of all New Yorkers, regardless of immigration status. As discussed earlier, the New York State Legislature has introduced a bill, the Protect Our Courts Act, which would make it unlawful for any law enforcement officer to arrest a person, including a party, witness or family member, for a civil violation, such as civil immigration violations, while that person is going to, attending, or leaving court unless a judicial warrant or court order is presented to court staff. The bill is supported by law enforcement officials, public defense providers, domestic violence victim advocates, civil rights organizations, labor unions, the Public Advocate and District Attorneys.<sup>87</sup>

Elsewhere on the state level, on April 5, 2018 Governor Andrew Cuomo issued Executive Order 170<sup>88</sup> which requires from ICE a judicial order or warrant in order to execute civil arrests within state facilities. Although this Order does not extend to state courthouses, Governor Cuomo's Order and accompanying cease and desist letter to ICE articulates the same access to justice and federalism concerns created by ICE's enforcement tactics. The Governor clearly states New York's right and obligation "to protect its residents from threats to their safety and well-being and ensure the proper functioning of its institutions"<sup>89</sup> as well as its interest in "ensur[ing] that all residents have equal access to State programs, benefits, and services . . . ."<sup>90</sup> The Order and accompanying letter also note how ICE's enforcement tactics, particularly in "sensitive spaces" have "unnecessarily stok[ed] terror" among New York's immigrant residents, creating a class of residents that are prevented from "fully participating in the State."

On the City level, the New York City Council recently passed bills to limit various city agencies, including the Department of Probation, from entering into partnerships with ICE to enforce federal immigration laws.<sup>91</sup> The legislation also limits the use of City property, employees and resources in federal immigration enforcement efforts.<sup>92</sup>

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<sup>87</sup> *Supra* note 52.

<sup>88</sup> *Amendment to Executive Order 170 – State Policy Concerning Immigrant Access to State Services and Buildings*, Executive Order 170.1, New York State Governor Andrew M. Cuomo (Apr. 25, 2018), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_170.1.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_170.1.pdf).

<sup>89</sup> *Cease & Desist Letter*, New York State Governor Andrew M. Cuomo (Apr. 25, 2018), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Ltr\\_from\\_GAMC\\_to\\_ICE.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Ltr_from_GAMC_to_ICE.pdf).

<sup>90</sup> *Supra* note 88.

<sup>91</sup> Int. 1558-2017 limits the Department of Probation from honoring civil immigration detainees under the same restrictions that apply to the Department of Correction. Additionally, the bill would require the department to report annually on the number of detainee requests received and whether or not they were honored, as well as requests for information and any responses. *See* B. Int. 1558-2017 (N.Y.C. Council, Dec. 1, 2017), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3023525&GUID=BFF9989E-DDEA-40C1-8AD5-194763140E5D&Options=&Search>. Int. 1568-2017 prohibits City agencies from partnering with the U.S. Department of Homeland Security to enforce federal immigration law, including through 287(g) agreements. Additionally, this bill would prohibit the use of City resources, property, and information obtained on behalf of the City in furtherance of federal immigration enforcement. *Id.*

<sup>92</sup> *See* Rich Calder, *Bill Would Ban NYPD From Partnering With Immigration Agents*, NEW YORK POST (Oct. 30, 2017, Oct. 30, 2017), <http://nypost.com/2017/10/30/bill-would-ban-nypd-from-partnering-with-immigration-agents/>. We note, however, that courthouses are not city agencies.

On the federal level, in March 2017, a bill was introduced in the House to expand the definition of “sensitive locations” to include courthouses, among other state and local public safety implicated locations. If successful, the Protecting Sensitive Locations Act (H.R. 1815) would require ICE to prove “exigent circumstances” for conducting civil arrests at state courthouses. The Senate version (S. 845) was introduced in April 2017.<sup>93</sup> Both bills would amend Section 287 of the Immigration and Nationality Act (8 U.S.C. 1357) to codify what locations are “sensitive” and expand Department of Homeland Security’s definitions of “sensitive locations” to include, *inter alia*, domestic violence shelters, rape crisis centers, family justice centers, Congressional district offices, public assistance offices, Social Security offices and Department of Motor Vehicles offices. The bills specifically designate federal, state and local courthouses as sensitive locations, along with probation offices and the office of an individual’s legal counsel, and any physical space within 1,000 feet of all sensitive locations.

The bills also provide consequences for violating the requirements: if an immigration enforcement action is conducted in a designated sensitive location without exigent circumstances and prior approval, then “no information resulting from the enforcement action may be entered into the record or received into evidence in a removal proceeding resulting from the enforcement action,” and an individual “who is the subject of such removal proceeding may file a motion for the immediate termination of the removal proceeding.”

In August 2017, the American Bar Association’s House of Delegates passed a resolution in support of the bills, describing this as an important “access to justice” issue.<sup>94</sup>

Achieving change on the federal level, however, appears unlikely in the current environment. Meanwhile, the residents of New York City and State—as well as the prosecutors and defense attorneys who work on their behalf—continue to suffer from the chilling effect that keeps them from accessing the legal protections of the courts.

## V. Recommendations

The City Bar—as an organization whose diverse members include prosecutors, defense attorneys, judges, legal service providers, court attorneys, immigration lawyers, civil rights attorneys, and others—has been following the detrimental effects of ICE courthouse arrests on the administration of justice and the legal community in New York. A number of our committees have been actively engaged on this issue over the past year and we hosted a well-

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<sup>93</sup> See H.R. Rep. 115-1815 (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/1815?q=%7B%22search%22%3A%5B%22HR+1815%22%5D%7D&r=1> and S. Rep. 115-845 (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/845?q=%7B%22search%22%3A%5B%22S+845%22%5D%7D&r=1>.

<sup>94</sup> See H.D. Res. No. 10C (2017), [https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2017/house-of-delegates-resolutions/10c.html](https://www.americanbar.org/news/reporter_resources/annual-meeting-2017/house-of-delegates-resolutions/10c.html). The New York City Bar Association fully supports the treatment of courthouses as “sensitive locations” but urges that “exigent circumstances” have a rigorous definition and require a transparent process in order to ensure it is an effective policy. See *Committee on Immigration Representation Resolution Adopted by House of Delegates*, NEW YORK STATE BAR ASSOCIATION (Jan. 28, 2018), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=80429>.

attended roundtable discussion in December at which over 50 organizations were represented. Many of our members have been part of ongoing public awareness and advocacy efforts and are associated with the multiple organizations that have spoken out – and continue to speak out – against ICE’s courthouse arrests.<sup>95</sup>

The City Bar respectfully recommends that the Chief Judge adopt the following administrative rules to address the harmful effects of ICE enforcement actions in and around courthouses:<sup>96</sup>

1. require judicial, not administrative, warrants for civil arrests, including civil immigration arrests, conducted in New York State courthouses;<sup>97</sup>

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<sup>95</sup> *E.g.*, see letters, reports and statements of the Legal Aid Society, various Defender Services, New York City District Attorneys, Immigrant Defense Project, the Association of Pro Bono Counsel, and the Fund for Modern Courts. See *Immigrant Defense Project Letter to Chief Judge Janet DiFiore* (June 22, 2017), <http://www.nydailynews.com/new-york/give-ice-cold-shoulder-courts-dozens-groups-urge-top-judge-article-1.3710553>; <https://www.apbco.org/wp-content/uploads/2017/07/2017-07-06-Ltr-to-Judge-DiFiore-fr-APBCo-re-ICE-INcursions-in-NYS-Courthouses.pdf>; <https://www.immigrantdefenseproject.org/wp-content/uploads/Open-Letter-to-Judge-DiFiore-06222017.pdf>; <http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf>.

<sup>96</sup> The Chief Judge has the authority to issue the suggested administrative rules pursuant to her power over administrative policies vested by the New York State Constitution and Judiciary Law. The State Constitution grants the Chief Judge primary rule-making authority to “establish standards and administrative policies for general application throughout the state.” N.Y. Const., art. VI § 28(c). This constitutional authority is codified in Judiciary Law § 211(1)-(1)(a), which specifically authorizes the Chief Judge to establish “administrative policies relating to the dispatch of judicial business . . . .” In addition to the Chief Judge’s constitutional and statutory authority, the judiciary itself retains “inherent” authority to issue rules concerning the “proper administration of justice.” *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 6 (1986). When the Chief Judge’s administrative authority is exercised according to the constitutional implementation review process involving the Administrative Board and the Court of Appeals, she “possess[es] broad express and implied powers to take whatever actions are necessary for the proper discharge of [her] responsibilities.” *People v. Correa*, 15 N.Y.3d 213, 223 (2010) (citation omitted).

<sup>97</sup> Administrative rules promulgated by the Chief Judge and, by delegation, the Chief Administrative Judge, have regulated public access issues such as access to court records and grounds for limiting public access to proceedings. N.Y. Ct. Rules, §§ 124.1-124.9; N.Y. R. Chief Admin., §§ 124.1-124.9. The right of public access to judicial proceedings is not absolute. In fact, the necessity of “protect[ing] the rights of parties and witnesses” and “further[ing] the administration of justice,” can override the right of public access. *People v. Hinton*, 31 N.Y.2d 71, 74 (1972). The Supreme Court has long recognized that there is no constitutional right of the public to attend a trial, and that the constitutional rights associated with a trial exist for the benefit of litigants. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 391 (1979); *Estes v. Texas*, 381 U.S. 532, 583 (1965). Thus, if public access threatens the constitutional rights of the litigants, exclusion is justified. See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (holding that “the unhindered and untrammelled functioning of our courts is part of the very foundation of our constitutional democracy” and supporting the permissibility of measures necessary and appropriate to safeguard the administration of justice in the state courts.); *U.S. v. Grace*, 461 U.S. 171, 178 (1983) (acknowledging that a state has “the power to preserve the property under its control for the use to which it is lawfully dedicated” and that “[t]here is little doubt that in some circumstances the Government may ban the entry on to the public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”); *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (“[T]he courtroom and courthouse premises are subject to the control of the court.”). The current trend of ICE arrests of litigants in ongoing judicial proceedings is a serious infringement of the litigants’ constitutional rights as stated above and disrupts the orderly operation of justice in New York State courts.

2. require the presiding judicial officer to notify the targets of civil immigration enforcement actions of the presence of ICE agents who intend to detain them (which would give the individual an opportunity to consult with counsel in the sanctity of the courtroom);
3. limit the cooperation and assistance of court personnel in civil immigration enforcement actions to those actions required by law and provide training to court personnel as to how ICE arrests differ from criminal arrests (and why that matters) and, second, what court personnel can and cannot do vis-à-vis ICE encounters;<sup>98</sup>
4. reduce the frequency with which parties need to appear in court;<sup>99</sup> and
5. make available for public review the information obtained and recorded by court personnel, pursuant to the April 2017 Protocol and the May 2018 Instructions, with respect to ICE enforcement activities in courthouses.

Paramount among these recommendations is to require ICE to show judicial warrants for civil immigration enforcement actions in courthouses. ICE arrests may appear similar to state or federal criminal arrests and they have similarly dire consequences of detention and deprivation of liberties, but in contrast to state or federal criminal arrests, ICE agents do not need probable cause to initiate civil enforcement actions. Further, ICE administrative warrants are often based on outdated information and require only internal, supervisory review. A requirement for judicial warrants will ensure that the civil detainer contains accurate information and has a legal basis that has been independently reviewed.<sup>100</sup>

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<sup>98</sup> Administrative rules promulgated by the Chief Judge and, by delegation, the Chief Administrative Judge, have also regulated employee conduct. These rules include ethics rules prohibiting the disclosure of confidential information and discrimination based on race and national origin. N.Y. Ct. Rules § 50.1(II)(D) (“Court employees shall not disclose any confidential information received in the course of their official duties, except as required in the performance of such duties . . . .”); N.Y. Ct. Rules § 50.1(II)(C) (“Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color . . . national origin . . .”).

<sup>99</sup> THE FUND FOR MODERN COURTS, *Protecting the Administration of Justice in New York State: Impact of ICE Arrests on New Yorkers’ Access to State Courthouses* (Dec. 5, 2017), <http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf>. (recommended that “OCA should enact rules that reduce the frequency with which parties must appear physically in court . . . . OCA could waive the requirement for the defendant to appear physically for status conferences or other conferences where the defendant does not need to make decisions or provide testimony. OCA could utilize technology to permit remote appearances. For example, OCA could allow parties to appear via phone or video conference.”)

<sup>100</sup> The Attorney General of New York has issued similar guidelines for local law enforcement agencies (“LEAs”) in the state, recommending that absent a judicial warrant, LEAs should honor ICE detainers only in very limited, specified circumstances. See State of New York, Former Attorney General Eric T. Schneiderman, *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions*, New York State Office of the Attorney General (Jan. 19, 2017), [https://ag.ny.gov/sites/default/files/guidance.concerning.local\\_authority.participation.in\\_immigration.enforcement.1.19.17.pdf](https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf); State of New York, Former Attorney General Eric T. Schneiderman, *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions*, (Mar. 12, 2017), [https://ag.ny.gov/sites/default/files/guidance\\_and\\_supplement\\_final3.12.17.pdf](https://ag.ny.gov/sites/default/files/guidance_and_supplement_final3.12.17.pdf); see also Statement of Chief Justice Larry A. Krameier of The Supreme Court of Illinois, *supra* note 56 (Clarifying that ICE warrant are “merely civil administrative documents” that “are issued without review by a neutral magistrate, do not meet the requirements

Our second recommendation is a natural extension of established protocols outlined in OCA's April 2017 Protocol. Under established protocols, ICE agents must notify court officers of their specific law enforcement purpose, and the court officer supervisors must in turn inform the judges that an ICE agent is in the courthouse to take a party in a case before a given judge into custody. We recommend that the presiding judge then inform the target, the target's counsel, and the opposing counsel in the case about the presence of ICE agents and their intent to take the target into federal custody. This rule will afford the targeted individual with due notice of enforcement,<sup>101</sup> which would allow the individual and her counsel to pursue the immediate actions necessary in court that day to protect that individual's best interests in the case. For example, currently, when a defendant in a criminal proceeding is apprehended by ICE before her case is called, if her counsel is not notified, her counsel cannot know to ask that the bench warrant be stayed and to put the District Attorney's office on notice that it has the duty to produce the defendant from federal custody at the next court date. Both of these actions are crucial to preserve the basic ability (indeed, requirement) that defendants appear in their criminal proceedings as well as upholding speedy trial laws.<sup>102</sup>

Our third recommendation mirrors the guidelines for state agencies outlined in Governor Cuomo's Executive Order 170.<sup>103</sup> Court personnel should be prohibited from divulging identifying information beyond an individual's citizenship and immigration status, unless required by law.<sup>104</sup> Many instances have been documented in which court personnel have physically pointed out individuals for ICE agents, called out individuals' name for the ICE agents' benefit, delayed calling specific cases for the ICE agents' benefit, or even escorted individuals through non-public areas of the courthouse to where ICE agents were waiting.<sup>105</sup> In

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necessary to support issuance of warrants in criminal cases, and do not confer authorization for entry into locations where persons have a reasonable expectation of privacy.”).

<sup>101</sup> The Attorney General has also urged in his guidelines that LEAs should protect the due process rights of individuals who are the subjects of civil immigration enforcement requests and provide them with adequate notice. *Supra* note 100.

<sup>102</sup> As it currently stands, nothing requires presiding judges to inform the parties, including the defendant, before the court appearance about ICE presence even if the judges are aware. The decision to inform the defendant and her counsel is entirely up to the judges' discretion. It is only when the Court is made aware that ICE has taken a defendant with an active, open case into custody, that judges can make their decisions on bench warrants and on whether to ask the prosecutor to file an order to have the defendant produced from ICE custody for a future court date.

<sup>103</sup> *See supra* note 88.

<sup>104</sup> Nothing in these proposals is intended to violate 8 U.S.C. § 1373. The plain language of § 1373 only prohibits restrictions on the sharing of information regarding “citizenship or immigration status” of an individual. Moreover, following the June 6 decision in *Philadelphia v. Sessions*, the constitutionality of §1373 is very much an open question. *See supra* note 75. And, even if §1373 is ultimately found to be constitutional, it is important to note that certain localities within New York, including New York City, generally do not have citizenship or immigration status information on any given individual because agencies do not inquire about such information.

<sup>105</sup> Felipe De La Hoz and Emma Whitford, *Court Officers are Aiding in Immigration Arrests, Say Lawyers*, VILLAGE VOICE (Nov. 6, 2017), <https://www.villagevoice.com/2017/11/16/court-officers-are-aiding-in-immigration-arrests-say-lawyers/>; *See also* IMMIGRANT DEFENSE PROJECT, *IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017* (Dec. 31, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf>.

fact, ICE openly encourages agents to request that court personnel restrict individuals' movements and potentially isolate them from their counsel in non-public areas of the courthouse to effectuate their civil arrests.<sup>106</sup> These instances of “collaboration” not only impede the courts' administration of justice, but also appear to raise the commandeering concerns described above. Indeed, by its very terms, the January 2018 Directive puts court personnel in the untenable position of being asked to assist in detaining an individual, without a warrant or probable cause, in a non-public area of the courthouse.

Our fourth recommendation seeks to curb the sudden, exponential increase in courthouse ICE arrests. In the January 2018 Directive, ICE claims that “courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.” This claim is misleading because the sanctuary city policies that ICE points to as the reason necessitating courthouse arrests have existed for several years. New York City's laws against honoring civil immigration detainer requests have been in place since 2014. Yet, compared to 2016, courthouse arrests increased more than 1200% in 2017,<sup>107</sup> expanding to target individuals with no prior criminal history who have never been in the custody of local or state prisons that refused to turn them over to ICE. The more likely reason, as confirmed by ICE, is that courthouses are the easiest places to find the individuals the agents are looking for.<sup>108</sup> Because information about when and where a litigant must appear in court is publicly available, ICE agents are able to surveil individuals as they attend their mandated court appearances. Facilitating the ease of civil enforcement actions should not be permitted to undermine state court administration and individual rights. By reducing the frequency with which litigants must appear in court,<sup>109</sup> OCA can help to disincentivize ICE agents from using courthouses as their preferred venue for enforcement.

Our final recommendation—that OCA publicize its data-gathering regarding ICE activities in courthouses—is meant to provide a mechanism for sharing and comparing information among the bar, bench and court officials so that a full complement of solutions can be implemented and then monitored based on a common understanding of the facts.

All of these proposed solutions merit attention and deliberation. We acknowledge that some of the recommendations may raise concerns on the part of those who think they improperly interfere with enforcement of federal law and may involve further consultation to work out the best solutions and mechanisms for implementation. To that end, we recommend that OCA convene a working group of stakeholders – including defense lawyers, immigration lawyers,

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<sup>106</sup> In the January 2018 Directive, ICE states that its agents should rely on the collaboration of court security staff so that “[c]ivil immigration enforcement actions inside courthouses . . . continue to take place in non-public areas of the courthouse” and “utilize the court building's non-public entrances and exits.”

<sup>107</sup> IMMIGRANT DEFENSE PROJECT, *ICE Out of Courts* (Dec. 31, 2017), <https://www.immigrantdefenseproject.org/ice-courts/>.

<sup>108</sup> Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, THE DAILY BEAST (Mar. 30, 2017, 1:00 a.m.), <https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice> (“ICE spokesperson Rachel Yong Yow told [the New York Law Journal] that ICE agents show up at courthouses because they are often the easiest places to find people they are looking for.”).

<sup>109</sup> This could be accomplished in a variety of ways, including the use of remote access technology such as video or phone conferencing or by waiving the physical appearance requirement for court dates meant for status conferences.

prosecutors, court representatives and others – tasked with considering how to best address the concerns and implement the recommendations raised herein.<sup>110</sup> The working group could develop a mechanism to (1) ensure that the April 2017 Protocol - as well as any enhancements - are fully understood and being adhered to, and (2) consider enforcement mechanisms to address instances when they are not.

Ultimately, the bar and bench have shared goals when it comes to preserving safety and decorum in the courthouse, providing unfettered access to justice, and protecting due process for *all* individuals regardless of immigration status. To that end, the New York City Bar Association urges the due consideration of these recommendations and stands ready to assist the Office of Court Administration as it continues to tackle these difficult issues.

July 2018

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<sup>110</sup> Such a working group could build upon or mirror existing advisory groups or access to justice initiatives, such as the Advisory Council on Immigration Issues in Family Court. *See Members Named to New Advisory Council on Immigration Issues in Family Court*, NEW YORK STATE UNIFIED COURT SYSTEM (Oct. 5, 2015), <http://nylawyer.nylj.com/adgifs/decisions15/100615members.pdf>.





NEW YORK  
CITY BAR

**RECOMMENDATIONS REGARDING  
FEDERAL IMMIGRATION ENFORCEMENT  
IN NEW YORK STATE COURTHOUSES**

**APPENDIX**

**CITATION UPDATES (as of August 2, 2018)\***

**Note 72**

On July 18, 2018, New York, Connecticut, New Jersey, Washington, Massachusetts, and Virginia filed a complaint in the Southern District of New York challenging the notice, access and Section 1373 conditions imposed upon Byrne JAG applicants by the Department of Justice. *States of New York, et al., v. U.S. Dept. of Justice*, Case No. 1:18-cv-06471 (S.D.N.Y.), [https://nj.gov/oag/newsreleases18/Byrne-JAG\\_Complaint.pdf](https://nj.gov/oag/newsreleases18/Byrne-JAG_Complaint.pdf).

On July 18, 2018, the City of New York filed a complaint in the Southern District of New York challenging the same three Byrne JAG conditions. *City of New York v. Sessions*, Case No. 1:18-cv-06474 (S.D.N.Y.), <https://www.courtlistener.com/recap/gov.uscourts.nysd.497634/gov.uscourts.nysd.497634.1.0.pdf>. The City also argues that the conditions violate the Spending Clause, Tenth Amendment, and Separation of Powers. Remarking on the importance of cooperation between law enforcement and immigrant communities, Corporation Counsel Zachary Carter stated, “The conditions DOJ seeks to impose are an unprecedented and unconstitutional intrusion on the City’s policy prerogatives, are inconsistent with the intent of Congress and diminish the City’s safety. As detailed in our complaint, DOJ’s efforts would cause immigrant communities to disengage from public services and retreat into the shadows, to the detriment of their own safety and that of the public.” David Brand, *NYC Sues Trump, DOJ Over “Unlawful Conditions” on Public Safety Grants*, Queens Daily Eagle, July 18, 2010, <http://queenspublicmedia.com/nyc-sues-trump-doj-over-unlawful-conditions-on-public-safety-grants/>.

**Note 75**

Also citing *Murphy v. NCAA*, on July 27, 2018, the Northern District of Illinois in *City of Chicago v. Sessions*, Case No. 17 C 5720 (N.D. Ill., Eastern Div.), <https://www.courtlistener.com/recap/gov.uscourts.nysd.497634/gov.uscourts.nysd.497634.1.0.pdf> granted Chicago’s motion for summary judgment on its claims that the DOJ conditions on Byrne JAG grants were unauthorized by statute, violated the separation of powers, and were

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\* With appreciation to Simpson Thacher & Bartlett LLP for its daily updates regarding “sanctuary city” litigation across the nation.

## APPENDIX - CITATION UPDATES

unconstitutional commandeering. The Court explained the four ways that §1373 violates the anti-commandeering doctrine, by (1) supplanting local control of local officers: “the statute precludes Chicago, and localities like it, from limiting the amount of paid time its employees use to communicate with INS”; (2) indirectly constraining “local rule-making by precluding city lawmakers from passing laws...that institute locally-preferred policies which run counter to Section 1373”; (3) redistributing “local decision-making power by stripping it from local policymakers and installing it instead in line-level employees who may decide whether or not to communicate with INS”, thereby effectuating “a federally-imposed restructuring of power within state government”; and (4) eliminating “the City’s ability to control its employees’ communications with INS” thereby preventing Chicago from “extricating itself from federal immigration enforcement”). *Id.*, pp. 22-26.

### **Note 76**

Although ICE has argued that, especially in sanctuary cities, these courthouse arrests are necessary to carry out its civil immigration enforcement mandate, federal courts have called into question this logic. *See City of Chicago v. Sessions*, 888 F.3d at 282 (“[N]othing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities. The only conduct at issue here is the refusal of the local law enforcement to aid in civil immigration enforcement . . . .”); *see also United States v. California*, No. 2:18 CV 490, 2018 WL 3301414, at \*18 (E.D. Cal. July 5, 2018) (“Standing aside does not equate to standing in the way.”).

### **Note 104**

The Northern District of Illinois’s decision in *Chicago v. Sessions* on July 27, 2018 further calls into question the constitutionality of § 1373.