



# **Protecting the Administration of Justice in New York State:**

Impact of ICE Arrests on New Yorkers' Access to  
State Courthouses

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## INTRODUCTION<sup>1</sup>

Access to justice for all New Yorkers means that courthouses must be places where noncitizens can feel as safe as citizens. Dramatic changes the Trump administration set in motion have significantly impacted immigrants' lives. After years of prioritizing deportation enforcement against individuals with prior criminal convictions, the current administration has broadened its enforcement goals to encompass anyone in the U.S. who is in violation of U.S. immigration laws. These expanded immigration enforcement practices impact all noncitizens, whether they are documented or not, and may include anyone who enters the courthouses - defendants, victims of human trafficking, targets of domestic violence, witnesses, unaccompanied minors and those suffering from mental health and severe medical disabilities.

In addition to widening the dragnet, U.S. Customs and Immigration Enforcement ("ICE") has started arresting targets in locations which they had previously avoided, for example, near schools or law offices serving immigrants.<sup>2</sup> ICE has also targeted state courthouses as ideal locations for enforcement actions. As a result, arrests in courthouses have skyrocketed nationwide. Following this pattern, in New York, such arrests have increased significantly since the beginning of 2017.

According to New York's Office of Court Administration ("OCA") estimates, approximately 50 people have been arrested by ICE in New York courthouses, with most arrests occurring in New York City.<sup>3</sup> As of October 30, 2017, the Immigrant Defense Project has received reports of 101 incidents statewide (11 attempted arrests and 90 arrests). Seventy of those incidents occurred in NYC (8 attempts and 62 arrests), more than five times the number reported in all of 2016.<sup>4</sup> While the precise number of arrests differs from report to report, the theme is consistent—ICE arrests in New York courthouses have increased considerably.

Even though the number of arrests in courthouses is relatively small in comparison to the total number of court appearances that have taken place during this

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<sup>2</sup> See *infra* note 17 and accompanying text.

<sup>3</sup> Liberatore, Wendy. "ICE Arrests Mexican man outside Saratoga City court," Albany Times Union, November 2, 2017. [http://www.transunion.com/news/article/ICE\\_arrests-Mexican-man-outside-Saratoga-city-1232704 .php](http://www.transunion.com/news/article/ICE_arrests-Mexican-man-outside-Saratoga-city-1232704.php).

<sup>4</sup> Data collected from Lee Wang, attorney at the Immigrant Defense Project on October 30, 2017. Notes of conversation on file with the author.

time period, those increased number of arrests are significant for immigrant communities. There are reports of victims who are afraid to report crimes, witnesses who are unwilling to appear in court, and some of the most vulnerable New Yorkers, including in one case a human trafficking victim, who barely avoided arrest. This concerns the Fund for Modern Courts, which believes that courthouses must provide a safe place for all, whether they are litigants, defendants, victims, witnesses or family members who attend court proceedings. A lack of confidence in the safety of the courthouse undermines justice.

One answer to the problem posed by ICE arrests in state courts is for the Federal government to designate courthouses as “sensitive locations.”<sup>5</sup> ICE does not pursue enforcement actions in sensitive locations except under limited circumstances. It has been reported that New York State’s Chief Judge Janet DiFiore and court administrators have met with Department of Homeland Security and ICE officials to voice concerns and to request that courthouses be designated as sensitive locations.<sup>6</sup>

However, this solution is unlikely to come to fruition in the current climate. Thus, it falls to the New York State judiciary to do what is within their power to protect New Yorkers. We propose several steps to ameliorate this situation:

- (1) require judicial warrants for civil immigration law enforcement actions conducted in New York State courthouses;
- (2) require the presiding judicial officer, once informed of the presence of ICE and the intent to detain, to notify the targets of civil immigration law enforcement actions of the presence of agents who intend to detain them;
- (3) limit the cooperation and assistance of court employees in civil immigration enforcement to those actions required by law—specifically, supplying if asked, citizenship and immigration data;<sup>7</sup> and
- (4) reduce the frequency with which parties need to appear in court.

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<sup>5</sup> ICE will not conduct enforcement actions in sensitive locations unless (1) exigent circumstances exist; (2) other law enforcement actions have led officers to the sensitive location; or (3) prior approval is obtained from a supervisory official. See “FAQ on Sensitive Locations and Courthouse Arrests” US Immigration and Customs Enforcement. Accessed September 20, 2017. [www.ice.gov/ero/enforcement/sensitive.loc](http://www.ice.gov/ero/enforcement/sensitive.loc).

<sup>6</sup> Fertig, Beth. “Outcry After Immigration Agents Seen at Queens Human Trafficking Court.” WNYC, June 16, 2017. Accessed at July 23, 2017, <http://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/>.

<sup>7</sup> Specifically, nothing in this proposal is intended to violate 8 USC §1373.

Although these actions may make it more difficult for ICE to arrest their targets, these limitations are focused only on courthouses and on protecting immigrants during extremely difficult and vulnerable points when they are seeking access to justice. We believe this strikes the appropriate balance between the needs of law enforcement and the necessity to ensure access to the courthouse for all New Yorkers.

In the analysis below we describe developments across the country, but we focus on the impact of the new immigration policy in New York. We then detail our proposals to address these issues.

## I. FACTUAL BACKGROUND

### *A. Developments in Immigration Enforcement – General Overview*

Under the Obama administration, ICE (part of the Department of Homeland Security (“DHS”)) prioritized the deportation of convicted criminals who were threats to national security, public safety, and border security.<sup>8</sup> The agency specified that arrests at courthouses should only occur in “priority cases” and that ICE agents should try to take people into custody outside public areas.<sup>9</sup> Prior to 2017, ICE agents did periodically arrest targets in New York State courthouses, but these arrests did not create systemic disruptions.

The new administration radically changed the prior policy. Five days after his inauguration, President Trump signed an executive order<sup>10</sup> that prioritized the removal of *all* aliens with *any* criminal convictions or charges and ordered the hiring of an additional 10,000 immigration officers,<sup>11</sup> almost tripling the number of DHS’s then 5,800 deportation officers to 15,800.<sup>12</sup> ICE also removed language from its policy that limited

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<sup>8</sup> Secretary Johnson, Charles. “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants.” U.S. Department of Homeland Security, November 20, 2014. [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>9</sup> Planas, Roque. “Chief Justice in Connecticut Asks ICE to Stay out of Courthouses.” Huffington Post, June 08, 2017. Accessed July 23, 2017. [http://www.huffingtonpost.com/entry/judge-courthouse-immigration-arrests\\_us\\_59398006e4b0c5a35c9d3928](http://www.huffingtonpost.com/entry/judge-courthouse-immigration-arrests_us_59398006e4b0c5a35c9d3928).

<sup>10</sup> EXEC. ORDER NO. 13,768, 82 C.F.R. 8799 § 7 (2017) (*hereinafter* “Executive Order 13,768”).

<sup>11</sup> Executive Order 13,768.

<sup>12</sup> Valverde, Miriam. “Trump signs executive order to increase ICE deportation officers.” Politifact, January 25, 2017. Accessed July 23, 2017. (...continued)

courthouse arrests to priority cases.<sup>13</sup> On February 21, 2017, DHS Secretary John Kelly issued a memorandum implementing the President’s Executive Order No. 13,768.<sup>14</sup>

As a result of this change in policy, immigration arrests nationwide have increased by 38% in the first three months of the Trump’s administration when compared with the same period last year. More than 40,000 people have been arrested by ICE in the first several months of 2017.<sup>15</sup> This includes twice as many arrests of immigrants with no criminal records as were arrested in 2016.<sup>16</sup> ICE agents have arrested people at school, outside churches and shelters, around hospitals, on their way to their high school prom, at a food pantry, and at a voluntary marriage petition while trying to obtain legal status.<sup>17</sup> ICE’s activity at courthouses has similarly increased in frequency and scope.

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<http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1440/triple-ice-enforcement/>; see also Bowden, John. “ICE Arrests Climb Nearly 40 Percent Under Trump.” *The Hill*, May 17, 2017. Accessed July 23, 2017. <http://thehill.com/latino/333839-ice-immigration-arrests-climb-nearly-40-percent-under-trump>.

<sup>13</sup> Planas, *supra* note 9.

<sup>14</sup> Secretary Kelly, John. “Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States.” U.S. Department of Homeland Security, February 21, 2017. Accessed July 26, 2017. <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states>.

<sup>15</sup> Dickerson, Caitlin. “Immigration Arrests Rise Sharply as a Trump Mandate is Carried Out.” *N.Y. Times*, May 17, 2017. Accessed July 26, 2017. <https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html>.

<sup>16</sup> Sachetti, Maria. “ICE Immigration Arrests of Noncriminals Double Under Trump.” *Washington Post*, April 16, 2017. Accessed July 26, 2017. [https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671\\_story.html?utm\\_term=.d46631d4fa3d](https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html?utm_term=.d46631d4fa3d).

<sup>17</sup> In Pennsylvania, ICE agents are seeking to deport children who received special status for vulnerable migrants and are in the final stages of receiving their green cards. See Yeung, Bernice. “A Judge Said These Kids Get A Green Card. ICE Says They Get Deported.” *Reveal News*, July 6, 2017. Accessed July 27, 2017. <https://www.revealnews.org/article/a-judge-said-these-kids-get-a-green-card-ice-says-they-get-deported/>. Castillo, Andrea. “Immigrant Arrested by ICE After Dropping Daughter off at School, Sending Shockwaves Through Neighborhood.” *L.A. Times*, March 3, 2017. Accessed July 26, 2017. <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html> (ICE arrest of immigrant after dropping his (...continued))

A recent incident in El Paso, Texas illustrates some of the troubling results of this change in policy. On the morning of February 9, 2017, an undocumented transgender woman was driven to a courthouse by a case worker from a local aid agency for victims of domestic abuse.<sup>18</sup> The woman had a hearing scheduled for an order of protection she sought against her abusive partner.<sup>19</sup> The woman reported that she was nervous that she would have to confront her abuser in court but that her caseworker reassured her that he might not be there, and that if he was, he would not be able to get close to her.<sup>20</sup> The

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daughter off at school). Carey, Julie. “ICE Agents Arrest Men Leaving Fairfax County Church Shelter.” NBC Washington, February 15, 2017. Accessed July 26, 2017. <http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html> (ICE arrests man seeking refuge from the February cold in a Church shelter). Bernal, Rafael. “Lawyers: ICE Detainee with Brain Tumor Removed from Hospital.” The Hill, February 22, 2017. Accessed July 26, 2017. <http://thehill.com/latino/ice-immigration-detainee-brain-tumor-taken-from-hospital> (ICE seizes undocumented woman with brain tumor at hospital); see also Kolken, Matthew. “ICE Allegedly Instituting Deportations at Hospitals in Texas.” Latino Rebels, July 13, 2017. Accessed July 26, 2017. <http://www.latinorebels.com/2017/07/13/ice-allegedly-instituting-deportations-at-hospitals-in-texas/>. Bowden, John. “Ice Agents Arrest Teenager Hours Before His Senior Prom.” The Hill, June 14, 2017. Accessed July 26, 2017. <http://thehill.com/latino/337779-ice-agents-arrest-teenager-hours-before-his-senior-prom>. Oregon Food Bank, “Oregon Food Bank Responds to ICE Arrest Of Pantry.” Oregon Food Bank, March 27, 2017. Accessed July 26, 2017. <https://www.oregonfoodbank.org/oregon-food-bank-responds-ice-arrest-pantry-manager/>. Curnutte, Mark. “ICE agents arrest undocumented Honduran man in federal building even as wife, lawyer watch.” Cincinnati!, May 28, 2017. Accessed July 26, 2017. <http://www.cincinnati.com/story/news/2017/05/29/ice-arrests-undocumented-man/351862001/> (a couple voluntarily set up a meeting in a federal building to petition for legal recognition—marriage—of their 12-year relationship; the wife was United States-born, the husband had entered the country illegally in 2005 and was trying to obtain legal status. They had two children together, a 9-year old and a 6-year old. Despite the marriage petition being granted minutes earlier, the voluntary meeting ended with the husband being arrested by ICE).

<sup>18</sup> See Mettler *supra* note 17.

<sup>19</sup> Wachtenheim, Andrew. “Oversight Hearing on ICE Enforcement on Courts and Legal Services.” The New York City Committees on Courts and Legal Services & Immigration. New York, June 29, 2017 (*hereinafter* “Wachtenheim Testimony”).

<sup>20</sup> See Blitzer, Jonathan. “The Woman Arrested By ICE in a Courthouse Speaks Out.” New Yorker, February 23, 2017. Accessed July 23, 2017. <http://www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out>.

woman later said that, at the time, she “felt very safe and protected in the court.”<sup>21</sup> When she arrived at her hearing, however, ICE agents entered the courthouse and arrested her.<sup>22</sup> Reports suggest that ICE received the tip about the time and place of the hearing from the woman’s alleged abuser.<sup>23</sup> Similar incidents have occurred around the country.<sup>24</sup>

Courts have reacted to these incidents. On March 16, 2017, California Supreme Court Chief Justice Tani Cantil-Sakauye wrote to Attorney General Jeff Sessions and Secretary Kelly to express concern that ICE agents “appear to be stalking undocumented immigrants in [California’s] courthouses to make arrests.”<sup>25</sup> The Chief Justices of the courts in Washington,<sup>26</sup> Oregon,<sup>27</sup> New Jersey,<sup>28</sup> and Connecticut<sup>29</sup> have written similar letters. Others, like the Chief Justice of Rhode Island, have publicly expressed concern

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<sup>21</sup> Id.

<sup>22</sup> See Mettler *supra* note 17.

<sup>23</sup> Id.

<sup>24</sup> In Nashville, Tennessee, for example, ICE arrested a man who was in a court for driving without a license. Lathon, Erika. “ICE Arrest in Nashville Courtroom Fuels Debate on Illegal Immigration Policies.” Fox 17 News, June 9, 2017. Accessed July 23, 2017. <http://fox17.com/news/local/ice-arrest-in-nashville-courtroom-fuels-debate-on-illegal-immigration-policies>. In New Jersey, ICE went to a family court-ordered supervised visit between a child and parent in order to take that father into custody. Wachtenheim Testimony, *supra* note 19.

<sup>25</sup> California Courts. “Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses.” News release, March 16, 2017. Accessed July 23, 2017. <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>.

<sup>26</sup> “Concern Regarding Immigration Agents Being in and Around Our Local Courthouses. Washington Chief Justice Mary E. Fairhurst. March 22, 2017. Accessible at: <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf>.

<sup>27</sup> Haas, Ryan, and Conrad Wilson. “Oregon Supreme Court Chief Justice Tells ICE to Stay Out of Courthouses.” OBP, April 7, 2017. Accessed July 23, 2017. <http://www.opb.org/news/article/oregon-supreme-court-justice-ice-courthouse-letter/>.

<sup>28</sup> “Chief Justice Stuart Rabner Objects to ICE Arrests at New Jersey Supreme Court.” New Jersey Chief Justice Stuart Rabner to Honorable John F. Kelly. April 19, 2017. Accessible at: <http://www.aila.org/infonet/chief-justice-stuart-rabner-objects-to-ice-arrests>.

<sup>29</sup> Planas, *supra* note 9.



that arrests of undocumented immigrants inside or near state court buildings could lead to individuals skipping their court appearances and avoiding the judicial process.<sup>30</sup> The American Bar Association House of Delegates urged Congress to add courthouses to the list of sensitive locations.<sup>31</sup>

Chief Judge Tani Cantil-Sakanye of California repeated her concerns in August 2017, noting that “[w]e’re seeing people not coming to Court, not reporting to Court, not coming for services (and) not coming to testify.... This has an effect not only on the immediate case and safety of communities, but people who live in the communities”<sup>32</sup>

Legislatures have responded, as well. Congress introduced H.R. 1815 and S. 845<sup>33</sup> to amend section 287 of the Immigration and Nationality Act in order to limit immigration enforcement actions at sensitive locations and to clarify the powers of immigration officers at sensitive locations. On the state level, California filed a federal records request with ICE seeking documents related to ICE’s implementation of Executive Order 13,768,<sup>34</sup> and has proposed and enacted numerous bills that seek to restrict ICE involvement in the state.<sup>35</sup> The New Jersey Assembly has done the same.<sup>36</sup>

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<sup>30</sup> Mackay, Scott. “RI Chief Justice Suttell Questions ICE Courthouse Arrests.” Rhode Island Public Radio, June 16, 2017. Accessed July 23, 2017. <http://ripr.org/post/ri-chief-justice-suttell-questions-ice-courthouse-arrests#stream/0>.

<sup>31</sup> American Bar Association, “ABA Urges Congress Add Courthouses to ‘Sensitive Locations’ to ICE guidelines”, August 15, 2017, accessed September 12, 2017. <http://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba-house-urges-Cong.html>.

<sup>32</sup> Racke, Will. “California’s Top Judge Tells ICE to Leave Courthouses As State Reaches Sanctuary Law.” The Daily Caller, August 23, 2017. <http://dailycaller.com/2017/8/23/californias-top-judge-tells-ice-to-leave-courthouses-as-state-readies-sanctuary-law>.

<sup>33</sup> Protecting Sensitive Locations Act, H.R. 1815, 115 Cong. (2017); Protecting Sensitive Locations Act, S. 845, 115 Cong. (2017).

<sup>34</sup> Ulloa, Jazmine. “California State Leaders are Officially Asking for Records on Recent Immigration Enforcement Moves.” L.A. Times, February 27, 2017. Accessed July 23, 2017. <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-state-senate-and-assembly-leaders-file-1488225838-htmlstory.html>.

<sup>35</sup> California’s legislature passed SB-54, the California Values Act, which was signed into law by the Governor on October 5, 2017. Gunther, Melody “Gov. Brown Signs bill making California a Sanctuary State.” SFGATE, October 6, 2017. <http://www.sfgate.com/news/article/jerry-brown-signs-bill-making-California-a-12255884.php>

On the municipal level, Denver’s City Council has also taken steps to shield immigrants from ICE.<sup>37</sup>

### ***B. Impact of New ICE Courthouse Policy in New York***

ICE has pursued similar arrest policies in New York State courts. As indicated previously in this report, while the precise number of arrests differs from report to report, there is no doubt that ICE arrests in New York courthouses have increased significantly.

A number of these arrests have been controversial. For example, on June 16, 2017, agents from ICE went to the Queens Human Trafficking Intervention Court, a court dedicated to treating people arrested for low-level prostitution-related offenses with counseling and social services in lieu of jail time.<sup>38</sup> The ICE agents went to this court to arrest a young woman who was appearing there, having been charged with working illegally as a masseuse.<sup>39</sup> The woman was in court to have her charges dismissed after completing her court-mandated program with a community group.<sup>40</sup> ICE intended to detain her for overstaying a tourist visa,<sup>41</sup> but upon learning that ICE agents were in the courthouse waiting to arrest the woman, the woman’s lawyers asked that charges not be dismissed, that bail be set, and that she be sent to Riker’s Island rather than be arrested by ICE.<sup>42</sup> The woman was later released after the agents left. Before leaving, however, ICE

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<sup>36</sup> On June 22, 2017, New Jersey Assembly passed Resolution No. 268, declaring its opposition to arrests by ICE on courthouse premises and requesting that such arrests not take place except for emergency situations, passed unanimously. New Jersey Assembly Resolution No 268, accessible at: <https://legiscan.com/NJ/text/AR268/2016>.

<sup>37</sup> To achieve this end, Denver’s City Council: (a) reduced jail sentences to ensure that immigrants convicted of petty crimes do not get flagged for deportation; (b) permitted immigrants to plea to traffic offenses online to avoid the courthouse altogether; and (c) permitted immigrants without legal status to wait in a private shelter across the street until the scheduled time of their appearance in court, which allows them to avoid spending time in courthouse hallways and in view of federal agents. Sherry, Allison. “Denver Takes Steps to Shield Immigrants from ICE.” NPR, July 13, 2017. Accessed at July 23, 2017. <http://www.npr.org/2017/07/13/536974762/denver-takes-steps-to-shield-immigrants-from-ice?sc=tw> (*hereinafter* “Denver Initiatives”).

<sup>38</sup> Lancman, Rory. “Oversight Hearing on ICE Enforcement on Courts and Legal Services.” The New York City Committees on Courts and Legal Services & Immigration. New York, June 29, 2017. (*hereinafter* “Lancman Testimony”).

<sup>39</sup> Fertig, *supra* note 6.

<sup>40</sup> *Id.*

<sup>41</sup> Lancman Testimony, *supra* note 38.

<sup>42</sup> *Id.*

arrested three other people outside the Queens criminal courthouse,<sup>43</sup> including one woman who appeared in the human trafficking part.<sup>44</sup> (These events will collectively be referred to as the “June 16th Incident.”)

We note that OCA has reported that since this incident ICE has made no arrests in non-criminal courts, including Family Court, and has avoided enforcement activities in human trafficking courts,<sup>45</sup> where those charged with a crime are often victims of human trafficking.

But ICE has been present in at least one City Court outside of New York City. On November 2, 2017, a 21-year old Mexican immigrant with no criminal history was arrested by ICE upon leaving the courthouse in the misdemeanor part of the Saratoga Springs City Court after a DWI charge was reduced by the judge to a traffic violation.<sup>46</sup> ICE had attempted to arrest the man in the courthouse, but was prevented from doing so by the judge who reportedly told the bailiff “you don’t work for them, you work for me” and instructed the bailiff to keep his courtroom clear of ICE officials.<sup>47</sup>

The New York Executive Branch has responded to the negative impact of ICE activities in the courthouses and elsewhere. First, Attorney General Eric T. Schneiderman issued a memorandum offering model language for local laws and policies that seek to limit participation in immigration enforcement activities (“Schneiderman Memo”).<sup>48</sup>

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<sup>43</sup> Durkin, Eric. “Newly Public Guidelines Bar ICE from Making Arrests in Courtrooms.” NY DAILY NEWS, June 30, 2017. Accessed July 27, 2017. <http://www.nydailynews.com/new-york/newly-public-guidelines-bar-ice-making-arrests-courtrooms-article-1.3288566>.

<sup>44</sup> See *supra* note 35.

<sup>45</sup> Interview with Chief Administrative Judge Lawrence Marks, October 30, 2017. Notes on file with authors.

<sup>46</sup> Liberatore, *supra* note 3.

<sup>47</sup> Liberatore, *supra* note 3.

<sup>48</sup> State of New York, Attorney General Eric T. Schneiderman. “Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions.” January 2017, accessible at: [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). Attorney General updated his legal guidance on March 12, 2017. State of New York, Attorney General Eric T. Schneiderman. “Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions.” March 2017, accessible at: [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). The Schneiderman Memo recommends eight basic measures: (1) local law enforcement agencies (“LEAs”) should not engage in certain activities solely for the purpose of (...continued)

More recently, Attorney General Schneiderman and then Acting Brooklyn District Attorney Eric Gonzalez issued a statement criticizing ICE activities in New York State courthouses.<sup>49</sup> They stated that instances of arrests and attempted arrests have spiked five-fold,<sup>50</sup> and, as a result, some immigrants are afraid and unwilling to report crimes, serve as witnesses or cooperate with law enforcement.<sup>51</sup> According to both prosecutors, ICE arrests in New York courthouses has had a “chilling effect felt by victims and witnesses.”<sup>52</sup>

The Office of Children and Family Services offered its support by issuing an Administrative Directive that prevents social services from reporting children with undocumented status to DHS and ensures access to information and referral services, child protective services, and foster care services to children lacking legal status.<sup>53</sup>

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enforcing federal immigration laws; (2) absent a judicial warrant, LEAs should honor ICE or Customs and Border Protection (“CBP”) detainer requests only in limited, specified circumstances; (3) absent a judicial warrant, LEAs should not honor ICE or CBP requests for certain non-public, sensitive information about an individual; (4) LEAs should not provide ICE or CBP with access to individuals in their custody for questioning solely for immigration enforcement purposes; (5) LEAs should protect the due process rights of persons as to whom federal immigration enforcement requests have been made, including providing those persons with appropriate notice; (6) local agency resources should not be used to create a federal registry based on race, gender, sexual orientation, religion, ethnicity, or national origin; (7) local agencies should limit collection of immigration-related information and ensure nondiscriminatory access to benefits and services; and (8) LEAs should collect and report data to the public regarding detainer and notification requests from ICE or CBP in order to monitor their compliance with applicable laws.

<sup>49</sup> <http://ag.ny.gov/press-release/new-york-ag-eric-schneiderman-and-acting-brooklyn-da-eric-gonzalez-call-ice-end> in (August 3, 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 18 NYCCR 403.7 (b), SSL §§ 122 (2) and 398-e; see also 17-OCFS-ADM-06. The New York State Office of Children and Family Services issued the Administrative Directive on June 27, 2017. This Administrative Directive states that no child who is a United States citizen or who is lawfully residing in the United States can be denied any social services for which the child is otherwise eligible because of the residency status of the child’s parent(s). Even a child who is not lawfully residing in the United States is entitled to receive information and referral services, child protective services, and foster care services.

The Legislative Branch has also engaged with the issue. Fourteen members of the New York delegation to the House of Representatives<sup>54</sup> wrote to Secretary Kelly and ICE Acting Director Thomas D. Homan to express that they were “profoundly concerned” about the June 16th Incident.<sup>55</sup> Likewise, New York City’s municipal leaders have issued public statements of support for undocumented immigrants,<sup>56</sup> proposed legislative action,<sup>57</sup> and held public hearings related to OCA policies.<sup>58</sup>

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<sup>54</sup> Those members are Rep. Nydia M. Velázquez, Rep. Hakeem Jeffries, Rep. Joseph Crowley, Rep. Gregory Meeks, Rep. Jerrold Nadler, Rep. Yvette D. Clarke, Rep. Thomas R. Suozzi, Rep. Adriano Espaillat, Rep. Grace Meng, Rep. José E. Serrano, Rep. Carolyn B. Maloney, and Rep. Elliot Engel. In the letter, the Representatives wrote to Secretary Kelly and ICE Acting Director Thomas D. Homan expressing profound concern over the June 16th Incident; they requested responses to the following questions in 30 days: (1) Has ICE taken any steps to raise awareness of the T visa program under the Trump Administration?; (2) Will the agency revise existing policy and deprioritize enforcement at courthouses that review human trafficking cases?; (3) How are ICE and DHS officers trained to identify potential sex trafficking victims? How are officers trained to handle such victims whose native language is not English?; (4) Please provide an annual breakdown for the past five years of the number of people seeking assistance through ICE’s [Victim Assistance Program (“VAP”)], including immigration status and nationality; (5) Please describe how services are coordinated with the VAP and other entities; and (6) Some victim identification materials on the DHS and ICE websites are not equally translated and made available as others. How will you ensure this in the future? As of September 18, 2017, Secretary Kelly and Acting Director Homan had not responded.

<sup>55</sup> “Final Letter Regarding ICE and Trafficking.” New York Representatives to Secretary John F. Kelly and Acting Director Thomas D. Homan. July 14, 2017, accessible at: <https://assets.documentcloud.org/documents/3894570/Final-Letter-Regarding-ICE-and-Trafficking.pdf>.

<sup>56</sup> In February, Councilman Rory Lancman (D-24<sup>th</sup> District) held a press conference on the steps of City Hall to draw attention to the issue of ICE in NY’s courtrooms. Durkin, Erin. “Council Speaker, Legal Aid Groups Slam Top Judge for Not Blocking ICE arrests of immigrants at NYC courthouses.” *New York Daily News*, June 22, 2017. Accessed July 23, 2017. <http://www.nydailynews.com/new-york/council-speaker-lawyers-slam-ice-arrests-immigrants-court-article-1.3269986>; Herman, Stan. “Oversight Hearing on ICE Enforcement on Courts and Legal Services,” *The New York City Committees on Courts and Legal Services & Immigration*. New York, June 29, 2017 (*hereinafter* “Herman Testimony”). After the June 16th Incident, City Council Speaker Melissa Mark-Viverito (D-8th District) publicly said that immigration agents had “sunk to new lows of moral depravity” by seeking a woman in human trafficking court. Fertig, *supra* note 6.

<sup>57</sup> The most relevant proposed bills are Int 1558-2017 and Int 1579-2017. Int 1558-2017 seeks to amend the administrative code of NYC regarding detainees. Int 1558- (...continued)

New York Court of Appeals Chief Judge Janet DiFiore stated that she was “greatly concerned” by the June 16th Incident and “committed to the safety and security of all New Yorkers who use the courthouses.”<sup>59</sup> Chief Judge DiFiore reportedly met with Homeland Security officials to voice her concerns and to request that courthouses be designated as sensitive locations.<sup>60</sup> It is also reported that court administrators continue to meet with federal officials and ask that courts be designated as sensitive locations and that, at a minimum, enforcement activities be limited to criminal courts.

In addition to expressing concern, OCA has issued a Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies. The protocol applies to “representatives of law enforcement agencies who enter a New York State courthouse to take a person into custody but do not have a warrant issued by a judge of the Unified Court System authorizing them to do so.” (“April Memorandum”).<sup>61</sup> The new policies in the April Memorandum include:

- Law enforcement officials shall identify themselves and state their proposed enforcement action upon entry into the courthouse. The court officer shall immediately transmit this information to her supervisor;
- The supervisor shall inform the judge if a law enforcement agent is present in the courthouse with the intent to arrest a participant;

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(continued...)

2017. Int 1579-2017 seeks to amend Chapter 2 of title 12 of the New York City Administrative Code by adding a new section 12-208, which restricts access to non-public areas of city property by personnel of non-local law enforcement unless (1) such personnel present a judicial warrant or court order; (2) access is otherwise required by law; (3) such personnel are participating under the invitation of local law enforcement; or (4) there are exigent circumstances. Int 1579-2017 (NYC 2017). In addition to the two bills mentioned below, the City Council has introduced Int 1568-2017, Int 1557-2017, Int 1565-2017, Int 1566-2017, and Int 1588-2017.

<sup>58</sup> On June 29, 2017, the Committee on Immigration of the City Council held joint public hearings with the Committee on Courts and Legal Services in the Council Chambers on ICE Enforcement in New York City courts. A video recording of the hearing is accessible with the Author or at: <https://councilnyc.viebit.com/player.php?hash=bheTYtkA710J>.

<sup>59</sup> Fertig, *supra* note 6.

<sup>60</sup> *Id.*

<sup>61</sup> New York State Unified Court System. Office of the Chief Administrative Judge. “Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies.” Memorandum, April 26, 2017 (*hereinafter* “April Memorandum”).

- No law enforcement action may be taken in a courtroom (except under extraordinary circumstances, such as an extradition order); and
- An Unusual Occurrence Report must be filed for each enforcement action in a courthouse.
- Personnel remain responsible for ensuring public safety and decorum in the courthouse at all times.<sup>62</sup>

Unfortunately, these positive steps have not been enough to ameliorate the situation nor has ICE designated NY Courthouses as sensitive locations. ICE’s courthouse arrests continue to have a “chilling effect” on the administration of justice in New York, as is supported by the empirical evidence. On June 29, 2017, the Immigrant Defense Project (“IDP”) released the results of a statewide survey detailing the impact of ICE raids at courthouses.<sup>63</sup> This survey represents the responses of 225 attorneys and statewide advocates in 31 counties who work with immigrants and their families in criminal, family, and civil courts.<sup>64</sup> The results of the survey indicate that ICE not only has an increased physical presence in courthouses, but also in the minds of those whom it targets. For example, one-third of the 225 respondents reported seeing ICE agents or vehicles in and around the courts, and three of out four reported that clients have expressed fear of going to court because of ICE.<sup>65</sup> According to the survey, fear of ICE kept 29% of the respondent’s clients from appearing in court, 67% of their clients who were survivors of violence from seeking help from courts, 37% from pursuing an order of protection, and 48% from seeking custody or visitation.<sup>66</sup> In addition, 74% expressed fear of the courts themselves because of ICE, 46% expressed fear of serving as a complaining witness, and 56% expressed fear of filing a housing court complaint due to fear of ICE.<sup>67</sup>

A recent nationwide survey conducted by a coalition of national organizations completed by advocates and attorneys from 46 states and the District of Columbia demonstrated similar chilling effects.<sup>68</sup> Three out of four advocates who completed the

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<sup>62</sup> Id.

<sup>63</sup> Immigration Defense Project. “ICE in New York State Court Survey.” June 29, 2017, accessible at: [www.immdefense.org/ice-courts-survey](http://www.immdefense.org/ice-courts-survey) (*hereinafter* “IDP Survey”).

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> “Key Findings: 2017 Advocate and Legal Service Survey Regarding Immigrant Survivors.” Accessed September 12, 2017. <http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf>.

survey reported that immigrant survivors of domestic violence were afraid to go to court for a matter relating to their abuser.<sup>69</sup> Likewise, 43% of advocates have worked with immigrant survivors who dropped civil or criminal cases because they were fearful that they could be targeted by ICE.<sup>70</sup>

Anecdotal stories bear out the empirical evidence,<sup>71</sup> as seen in affidavits that IDP gathered from 24 defense attorneys who represent undocumented immigrants as tenants, domestic violence survivors, human trafficking victims, and other disputes. These attorneys have stated that ICE activities in New York State courthouses are transforming how they advise their clients about their options and their rights.<sup>72</sup>

For example, an attorney at My Sisters' Place, a non-profit that represents survivors of domestic violence, sexual assault, and human trafficking who live in the Hudson River Valley, reported that they were contacted by a client with her head bandaged.<sup>73</sup> Andrea Panjwani, the Managing Attorney in the Immigration Practice at My Sister's Place asked the client what happened, the client reported that the father of her children raped her in a parking lot and then severely beat her with his fists and "metal things."<sup>74</sup> She reportedly has neurological damage and may have permanent vision loss as a result.<sup>75</sup> The client did not, however, report the rape and assault and did not ask for a restraining order from Family Court out of fear of getting picked up by ICE.<sup>76</sup> Moreover, the client is the defendant in a case initiated by her attacker based on what she says are false allegations, which is a common scenario according to Ms. Panjwani.<sup>77</sup> The client is reportedly terrified of appearing in that case because she does not want to risk being

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<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Olderman, Justine. "Oversight Hearing on ICE Enforcement on Courts and Legal Services." The New York City Committees on Courts and Legal Services & Immigration. New York, June 29, 2017 (*hereinafter* "Olderman Testimony"); Bajuk Declaration, *supra* note 88; Wachtenheim Testimony, *supra* note 19.

<sup>72</sup> IDP has gathered twenty-four (24) affidavits from attorneys that represent undocumented immigrants as tenants, domestic violence survivors, human trafficking victims, and other disputes. All affidavits are available with the Author.

<sup>73</sup> Panjwani, Andrea. Declaration of Andrea Panjwani re: "Effect of Federal Immigration Enforcement in New York State Courthouses." May 26, 2017.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.



separated from her children, one of whom, she says, is being treated for cancer and needs constant care.<sup>78</sup>

A client at the Immigration Intervention Project at Sanctuary for Families reported a similar story. Per the Rey Declaration, the client was born in Mexico where she was raped and impregnated when she was 13 years old.<sup>79</sup> When the client was unable to receive any support from her family per her declaration, she crossed the border into the U.S. to search for work to support her daughter.<sup>80</sup> The client was apprehended and detained,<sup>81</sup> but, she later explained, she was desperate to work and to support her daughter, and so she escaped and never appeared for her removal hearing.<sup>82</sup> After her escape, the declaration states that employers and intimate partners repeatedly took advantage of the client, but she continued working to support her daughter.<sup>83</sup> During this time, she recounted, she also started seeing a partner who became the father of her second child and who brutally beat her for over a decade.<sup>84</sup> This partner has now taken possession of their daughter and, according to the declaration, the partner refuses to allow the client to have any contact with the child.<sup>85</sup> The client says that she is too afraid to seek the one remedy that would be available to her—suing for custody and visitation in Family Court—because she is afraid to come to the attention of immigration authorities for fear that she would be deported immediately and might never see her daughter again.<sup>86</sup>

In another case, ICE reportedly refused the voluntary surrender and demanded the arrest of an individual with cognitive and mental health issues.<sup>87</sup> This individual was reported to have had a history of suicide attempts, to be a rape and sexual assault victim,

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<sup>78</sup> Id.

<sup>79</sup> Rey, Carmen Maria. Declaration of Carmen Maria Rey re: “Effect of Federal Immigration Enforcement in New York State Courthouses.” May 30, 2017. (*hereinafter* the “Rey Declaration”).

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Bajuk, Katherine LeGeros. Declaration of Katherine LeGeros Bajuk re: “Effect of Federal Immigration Enforcement in New York State Courthouses.” May 31, 2017 (*hereinafter* “Bajuk Declaration”).

and to be under the care of a psychiatrist and prescribed medication as part of her mental health treatment.<sup>88</sup> When the individual was approached by ICE, her attorneys attempted to escort the client from the courtroom, given what they said was the vulnerable state of their client, but they said that the ICE agents and a court officer assisting the agents barred the attorneys from leaving the courtroom while their client was isolated with the ICE officers in a vestibule off of the courtroom.<sup>89</sup> The client was arrested in the vestibule, and her counsel were not permitted to witness her arrest.<sup>90</sup>

As demonstrated by the empirical evidence and the affidavits, ICE presence in the courthouse is a serious problem. We propose the measures below to protect courthouses and the New Yorkers who use them.

## II. SOLUTIONS AND RECOMMENDATIONS

As previously discussed, there are efforts at the federal level to amend the Immigration and Nationality Act to add federal, state, and local courthouses to the list of sensitive locations.<sup>91</sup> Modern Courts fully supports these efforts. Likewise, there have been appeals to ICE from Chief Judges in a number of states, including Chief Judge DiFiore, to designate courthouses as sensitive locations. Adding courthouses to the list of sensitive locations would allow ICE to carry out its mission while protecting the judicial process and the integrity of courthouses. These bills may not succeed, or may not succeed quickly enough to address the issues presented now by ICE activity in New York courthouses.

This report proposes actions that the Chief Judge can and should take to address the negative impact on individuals and the courts resulting from ICE's actions in courthouses. To that end, we recommend that the Office of Court Administration enact at least four policy changes:

1. require judicial warrants for civil immigration law enforcement actions conducted in New York State courthouses;<sup>92</sup>

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Protecting Sensitive Locations Act, H.R. 1815, 115 Cong. (2017); Protecting Sensitive Locations Act, S. 845, 115 Cong. (2017); Immigration and Nationality Act, § 9-287; See also Section I.A Developments in Immigration Enforcement – General Overview.

<sup>92</sup>Wachtenheim, Andrew, and Lee Wang. *ICE Enforcement Operations Inside State Courthouses*. Issue brief. April 12, 2017. Accessed July 20, 2017. <http://www.defensenet.org/immigration-project/immigration-resources/IDP%20courthouse%20arrest%20memo%20-> (...continued)

2. once informed of the presence of ICE and the intent to detain, require the presiding judicial officer to notify the targets of civil immigration law enforcement actions of the presence of agents who intend to detain them;<sup>93</sup>
3. the cooperation and assistance of court employees in civil immigration enforcement shall be limited to those actions required by law—specifically, supplying if asked, citizenship and immigration data;<sup>94</sup> and
4. reduce the frequency with which parties need to appear in court.<sup>95</sup>

New York State’s Constitution and the New York Judiciary Law give the Chief Judge the power to “supervise the administration and operation of the Unified Court System.”<sup>96</sup> The New York Judiciary Law also authorizes the Chief Judge to establish “administrative policies relating to the dispatch of judicial business.”<sup>97</sup>

The Chief Judge and the Chief Administrative Judge have the power to issue administrative rules to insure the proper administration of justice.<sup>98</sup> The Chief Judge and the Chief Administrative Judge, through OCA, use these powers to issue administrative rules that govern the administration of justice in the courts.<sup>99</sup> As described in the IDP Memo, New York State courts regulate employee behavior through ethics rules and court

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%20April%202017.pdf/view?searchterm=IDP (*hereinafter* “IDP Memo”); Wachtenheim Testimony, *supra* note 19; Luongo, Tina. “Oversight Hearing on ICE Enforcement on Courts and Legal Services.” The New York City Committees on Courts and Legal Services & Immigration. New York, June 29, 2017 (*hereinafter* “Luongo Testimony”).

<sup>93</sup> Luongo Testimony, *supra* note 93.

<sup>94</sup> Specifically, nothing in this proposal is intended to violate 8 USC §1373.

<sup>95</sup> Mogulescu, Kate. “Oversight Hearing on ICE Enforcement on Courts and Legal Services.” The New York City Committees on Courts and Legal Services & Immigration. New York, June 29, 2017 (*hereinafter* “Mogulescu Testimony”); Denver Initiatives, *supra* note 37.

<sup>96</sup> N.Y. Const. Art. VI. § 28; N. Y. Judiciary Law § 212.

<sup>97</sup> N.Y. Judiciary Law § 211; IDP Memo, *supra* note **93**.

<sup>98</sup> *People v. Correa*, 15 N.Y. 3d 213, 223 (2010) (stating that court administrators have broad express and implied powers to take the necessary actions for the proper discharging of their responsibilities); *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 6 (1986) (stating that in the absence of legislation to the contrary, courts may use their rulemaking power to prohibit conduct that result in serious problems to the proper administration of justice); IDP Memo, *supra* note.

<sup>99</sup> IDP Memo, *supra* note 92.

behavior by establishing decorum standards that affect the public and the press,<sup>100</sup> as well as promulgate rules that govern public access to court records and to proceedings.<sup>101</sup> Indeed, OCA exercises tremendous authority over courthouses to ensure access to justice.

Under the current system, it would be difficult for OCA to bar all ICE enforcement actions in New York State courts, nor would OCA seek to do that. As stated in the April Memorandum, it is the policy of the Unified Court System (“UCS”) to permit law enforcement actions in New York State courthouses, “provided that the conduct in no way disrupts or delays court operations, or compromises public safety or court decorum.”<sup>102</sup> OCA does, however, have the power to enact rules for state courthouses to ensure greater protection from ICE conduct that may compromise the effective functioning of or access to the courts. The April Memorandum demonstrates that type of rules that are within OCA’s power. OCA has the power and, we believe, the responsibility to enact and enforce further rules to ensure the proper administration of justice in New York State Courts.

***A. Require judicial warrants for civil immigration law enforcement actions conducted in New York State courthouses***

In order to ensure the fair administration of justice, OCA should establish a policy and protocol in addition to the April Memorandum to govern the activities in courthouses of civil immigration law enforcement agencies. The policy and protocol of OCA should reflect the differences in rights afforded in criminal and civil immigration law enforcement actions. As Ms. Luongo testified, criminal law enforcement actions and civil immigration law enforcement actions are “apples and oranges” and should be treated as such.<sup>103</sup>

While enforcement actions executed by criminal and civil immigration law enforcement agencies may look the same, civil immigration law enforcement actions have starkly different due process implications for the people subject to them. For

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<sup>100</sup> IDP Memo, *supra* note 92; N.Y. Ct. Rules § 50.1(II)(D) (McKinney) (Ethics rules prohibit disclosure of confidential information by employees); N.Y. Ct. Rules § 50.1(II)(C), NY R. Chief § 50.1(II)(C) (Ethics rules prohibit discrimination on the basis of race, color, sex, sexual orientation, religion, creed, national origin, marital status, age or disability); N.Y. Ct. R. § 131.1, NY R. Chief Admin. § 131.1 (Judges can take steps to ensure press does not interfere with decorum of court); N. Y. Ct. R. §131.6, NY R. Chief Admin § 131.6 (Restriction on press coverage, including restrictions on insignia on clothing and equipment that may be used).

<sup>101</sup> IDP Memo, *supra* note 92; N. Y. Ct. Rules §§ 124.1-124.9, NY R. Chief Admin. §§ 124.1-124 (Rule governing access to court records).

<sup>102</sup> April Memorandum, *supra* note 61.

<sup>103</sup> Luongo Testimony, *supra* note 92.

example, as Tina Luongo, Attorney in Charge of the Criminal Practice at the Legal Aid Society, testified in hearings before the City Council, when a New York Police officer arrests a person in a New York courthouse, it happens as a result of a warrant being issued for that person's arrest or the police having reasonable suspicion of criminal conduct. The person arrested is protected under the Federal and State Constitutions, will be provided with a lawyer and have the opportunity to contest the arrest and any later indictment in a court of law.<sup>104</sup> In contrast, ICE agents do not need probable cause or reasonable suspicion to initiate a civil detainer. In many cases, the information they use to decide whether to detain a person is outdated, and the detainer order only requires a signature from a supervisor, not a judicial officer.<sup>105</sup>

By requiring ICE to have a warrant issued by a federal judge to engage in law enforcement actions inside New York State courthouses, OCA can ensure that a judge has inspected the information leading to that detainer. This would significantly decrease the likelihood of mistakes by ensuring that the request has been carefully vetted. While not the equivalent of the due process protections afforded to a criminal suspect, such a requirement would provide supervision and exercise of independent judgment. Once this rule is in place, counsel will be able to confirm that there are no outstanding warrants for their clients before they appear in court.<sup>106</sup>

***B. Require the presiding judicial officer to notify the targets of civil immigration law enforcement actions of the presence of agents who intend to detain them***

The April Memorandum protocol requires law enforcement representatives present in New York State courthouses for the purpose of taking into custody a person without a warrant to notify UCS uniformed personnel of their presence and to identify their "specific law enforcement purpose" as well as the law enforcement action they intend to carry out.<sup>107</sup> The UCS officers are then tasked with informing a supervisor who in turn must inform the particular judge that a law enforcement agent is in the courthouse with the purpose of taking into custody a party or participant in a case before him or her.

We propose OCA enact an additional protocol or rule for civil immigration law enforcement actions, which would require judges to inform the target or the target's legal counsel about the presence of civil immigration enforcement agents and their intent to

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<sup>104</sup> Luongo Testimony, *supra* note 92.

<sup>105</sup> Luongo Testimony, *supra* note 92; Olderman Testimony, *supra* note 72.

<sup>106</sup> The Attorney General has made similar recommendations. For example, local law enforcement agencies in New York should not honor ICE requests for certain non-public, sensitive information about individuals or comply with detainer requests unless a judicial warrant has been presented. See *supra* note 48.

<sup>107</sup> April Memorandum, *supra* note 61.

detain the individual. This rule will allow the persons targeted in these civil immigration enforcement actions to make the necessary decisions in their proceedings before the court to best protect their interests.<sup>108</sup> Additionally, this rule will allow for non-citizens who are not the targets of civil immigration enforcement actions to continue through the New York judicial process with much less concern and disruption.

***C. Limit the cooperation or assistance from court employees with civil immigration law enforcement to those actions required by law.***

OCA should prohibit court personnel from aiding civil immigration law enforcement agencies in ways that go beyond the requirements in federal and state law. State employees are required to provide information regarding persons' citizenship and immigration status if requested by immigration enforcement officials.<sup>109</sup> This should be the full extent of the cooperation between court personnel and immigration enforcement officials.

OCA should bar court personnel from assisting civil immigration agencies in identifying their targets. Advocates in New York State have stated that ICE agents ask court personnel to point out targets of enforcement actions or to call out the name of a target to help agents identify the person they are looking to detain.<sup>110</sup> Advocates claim that ICE agents sometimes only have their targets' names and do not know what their targets look like.<sup>111</sup> By prohibiting court personnel from cooperating with civil immigration enforcement agents in the identification of targets, New York State courthouses will become less attractive places for ICE to engage in enforcement actions.

OCA should also prohibit court personnel from using their power over the entry and exit of courtrooms, hallways, and other areas to restrict the movement of persons for the purpose of aiding in their apprehension by civil immigration enforcement agents. Advocates have reported that court personnel, at the request of ICE agents, have used their control over entry and exit of courtrooms to separate targets of enforcement actions from their attorneys and restrict their movement, in order to assist in their apprehension.<sup>112</sup> By prohibiting court personnel from cooperating with immigration agents in this way, ICE will be less likely to engage in enforcement actions in New York State courthouses.<sup>113</sup>

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<sup>108</sup> Luongo Testimony, *supra* note 92; Mogulescu Testimony, *supra* note 95.

<sup>109</sup> 8 U.S.C. § 1373 (1996).

<sup>110</sup> Mogulescu Testimony, *supra* note 95.

<sup>111</sup> *Id.*

<sup>112</sup> Herman Testimony, *supra* note 56.

<sup>113</sup> In a matter in Massachusetts, a state court decided that Massachusetts court officers do not have the authority to arrest someone at the request of federal immigration (...continued)

OCA should prohibit court personnel from delaying court proceedings or making alterations to court calendars in order to aid in civil immigration enforcement actions. ICE has repeatedly asked court staff to delay arraignment and change court calendars to facilitate arrest.<sup>114</sup> Court officers should not cooperate with civil immigration enforcement agencies to interfere with the administration of the court's calendar. By prohibiting court personnel from altering court proceedings for the purpose of facilitating ICE arrests, New York State courthouses will become less useful as locations for ICE to engage in enforcement actions.

#### ***D. Reduce frequency with which parties need to appear in court***

OCA should enact rules that reduce the frequency with which parties must appear physically in court. Because information about court proceedings is publicly available, ICE has access to the date and location where persons are expected to appear. By reducing the number of times that parties to a case must appear, OCA can limit the risk that an immigrant will be picked up by ICE in a New York State courthouse. And by helping to limit this risk, immigrants will be more willing to engage in the judicial process.

There are a number of ways that OCA can diminish the frequency with which parties need to appear physically in court.<sup>115</sup> 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.<sup>116</sup> For example, OCA could allow parties to appear via phone or video conference.<sup>117</sup>

### **III. CONCLUSION**

OCA has the power and responsibility to issue rules to ensure the proper administration of justice and to protect access to courts for all New York residents. As detailed in Part I, changes in immigration policy in 2017 have been detrimental to many New York residents, and ICE activity in courthouses is impacting both the administration

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authorities pursuant to a civil immigration detainer if that arrest would be based solely on the federal authorities' belief that the person is subject to civil removal. *Sreyuon Lunn v. Commonwealth & another*, No.17-SJC-12276 (Mass. July 24, 2017) (slip op.).

<sup>114</sup> Impact of New ICE Courthouse Policy in New York, *supra* section I.B.

<sup>115</sup> Mogulescu Testimony, *supra* note 95; Luongo Testimony, *supra* note 92; Herman Testimony, *supra* note 56; Denver Initiatives, *supra* note 37.

<sup>116</sup> Mogulescu Testimony, *supra* note 95; Luongo Testimony, *supra* note 92; Denver Initiatives, *supra* note 37.

<sup>117</sup> Mogulescu Testimony, *supra* note 95; Denver Initiatives, *supra* note 37.

of justice and access to courts in New York State. OCA has taken positive steps to remedy the situation. With the additions of the recommendations contained in this report, we believe that OCA will be better able to protect against what many consider to be overreach by ICE in New York's courthouses.

We recommend that OCA enact the policy changes proposed in Part II to protect against ICE interference with the proper administration of justice in New York State courts. The solutions we proposed include (a) requiring judicial warrants for civil immigration law enforcement actions conducted in New York State courthouses; (b) requiring the presiding judicial officer, once informed of the presence of ICE and the intent to detain, to notify the targets of civil immigration law enforcement actions of the presence of agents who intend to detain them; (c) the cooperation and assistance of court employees in civil immigration enforcement shall be limited to those actions required by law—specifically, supplying if asked, citizenship and immigration data;<sup>118</sup> and (d) reducing the frequency with which parties need to appear in court. By enacting and enforcing these policy changes, OCA will strike the appropriate balance between protecting New York residents' access to justice and allowing ICE to carry out its mission.

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<sup>118</sup> Specifically, nothing in this proposal is intended to violate 8 USC §1373.