RECOMMENDATIONS REGARDING
FEDERAL IMMIGRATION ENFORCEMENT
IN NEW YORK STATE COURTHOUSES

APPENDIX

CITATION UPDATES (as of July 2024)[*]

Notes 7 & 8 – ICE Civil Administrative Arrest Trends Nationally and in New York City

According to data released by the Department of Homeland Security on December 14, 2018, nationwide, ICE made 158,581 civil administrative arrests in the 2018 fiscal year, which is an 11% increase from FY 2017 and a 39% increase from FY 2016. Of those immigrants apprehended by ICE, 13% had no prior contact with the criminal justice system (32% higher than in FY 2017; 125% higher than in FY 2016), and 21% had pending criminal charges but no prior convictions (48% higher than in FY 2017; 426% higher than in FY 2016). Of those immigrants ICE classified as having "criminal histories"—meaning individuals with convictions as well as those simply facing pending charges—the most common types of offenses involved were DUIs (58%), other traffic offenses (55%), drug offenses (55%), and immigration related offenses (46%). *See* U.S. DEP'T OF HOMELAND SECURITY, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf.

In New York City, specifically, ICE administrative arrests increased by about 35% from FY 2017. Of those New Yorkers apprehended by ICE, 455 had no prior contact with the criminal justice system, and 804 had pending criminal charges, meaning they were apprehended before their charges could be resolved in court. Further, the detention of immigrants without criminal convictions in the New York City area increased 87% from FY 2017. *See* U.S. DEP'T OF HOMELAND SECURITY, LOCAL STATISTICS 2018 (2018), https://www.ice.gov/sites/default/files/documents/Report/2018/ero-fy18-localstatistics.pdf.

See also SAFEGUARDING THE INTEGRITY OF OUR COURTS (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf

In Fiscal Year 2021, ICE Enforcement and Removal Operations made 74,082 administrative arrests of noncitizens, and about 49% of all arrests were of convicted criminals. *See* U.S. DEP'T OF HOMELAND SECURITY, ICE ANNUAL REPORT FISCAL YEAR 2021 (2022),

[*] With appreciation to Simpson Thacher & Bartlett LLP for its 2017-18 daily updates regarding "sanctuary city" litigation across the nation and to Hannah Kautz, J.D. Candidate 2024, and Maddie Nixon, J.D. Candidate 2026, Indiana University Maurer School of Law, for their invaluable assistance with this update.

https://www.ice.gov/doclib/eoy/iceAnnualReportFY2021.pdf. After eight months under President Biden, ICE announced that "total immigration arrests dropped nearly 40% from the previous year while the number of people apprehended who had committed 'aggravated felonies' nearly doubled." Ben Fox, *U.S. immigration arrests drop amid focus on those accused of serious crimes*, PBS (Mar. 11, 2022), https://www.pbs.org/newshour/nation/u-s-immigration-arrests-drop-amid-focus-on-those-accused-of-serious-crimes.

In Fiscal Year 2022, ICE made 142,750 administrative arrests, demonstrating an increase from 2021. 96,354 of the arrests were categorized as "other immigrant violators" due to an increase in encounters with Border Patrol. *See* U.S. DEP'T OF HOMELAND SECURITY, ICE ANNUAL REPORT FISCAL YEAR 2022 (2022), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf.

In 2023, ICE launched a statistical dashboard, updated quarterly, of their arrest and detention statistics. The dashboard shows that in Fiscal Year 2023, ICE arrests increased, following a trend from the last few years. However, detentions decreased in FY 2023, and the detentions focused more on those with criminal convictions. *See ICE Enforcement and Removal Operations Statistics*, U.S. DEP'T OF HOMELAND SECURITY, https://www.ice.gov/spotlight/statistics. ICE's Fiscal Year 2023 Report also shows around 170,000 administrative arrests, representing a 19.5% increase of overall arrests from the previous year. *See* U.S. DEP'T OF HOMELAND SECURITY, ICE ANNUAL REPORT FISCAL YEAR 2023 (2023), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf.

Note 19 – ICE Civil Administrative Arrests at or near Courthouses

The trend of ICE civil administrative arrests at or near courthouses, especially in New York City, shows no signs of abatement in number or disruptiveness to the justice system. According to a report published by Immigrant Defense Project ("IDP") in January 2019, ICE's reliance on the state's court system as a place to find and detain immigrants has only increased over 2018. *See* IMMIGRANT DEFENSE PROJECT, THE COURTHOUSE TRAP: HOW ICE OPERATIONS IMPACTED NEW YORK'S COURTS IN 2018 (2019), https://bit.ly/2DETDxm. The IDP report shows that ICE courthouse operations in New York State have increased not only in absolute number but have grown in geographic scope, range of courts targeted, and in the intrusiveness of tactics used. *Id.* at 2. In 2018, ICE courthouse operations increased by 17% from 2017 and 1700% from 2016. *Id.* at 3. Particularly troubling were reports that ICE agents had shown an increasing use of force to make their courthouse arrests and that agents had appeared at problem-solving courts such as community justice courts, targeting youth participating in rehabilitative solutions. *Id.* at 8-9, 11.

On April 27, 2021, DHS issued an interim memorandum entitled "Civil Immigration Enforcement Actions in or near Courthouses." The memorandum "supersedes and revokes" the 2018 ICE Directive and outlines the "limited circumstances" when a civil immigration enforcement action may be taken in or near a courthouse. "A civil immigration enforcement action may be taken in or near a courthouse if (1) it involves a national security threat, or (2) there is an imminent risk of death, violence, or physical harm to any person, or (3) it involves hot pursuit of an individual who poses a threat to public safety, or (4) there is an imminent risk of destruction of evidence material to a criminal case." *See* Memorandum from Tae Johnson, U.S.

ICE Acting Director, and Troy Miller, U.S. CBP Acting Commissioner, to U.S. ICE and U.S. CBP (Apr. 27, 2021), https://www.ice.gov/sites/default/files/documents/ciEnforcementActionsCourthouses2.pdf.

Recent cases involving individuals being detained near courthouses reject the various plaintiffs' use of the DHS memorandum. "To the extent [the plaintiff] is relying upon the Department of Homeland Security's April 27, 2021 Memorandum of Civil Enforcement Actions in or near Courthouses, his reliance on this Memorandum is misplaced. Paragraph VI of the Memo, entitled "No Private of Action," specifically states it 'is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.' . . . The Court of Appeals for the Third Circuit has clearly stated that 'agency interpretative guidelines do not give rise to the level of a regulation and do not have the effect of law.'" *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106 at *3 (W.D. Pa. Mar. 12, 2024).

However, The Protect Our Courts Act in New York created a private right of action for a person who is involved in a civil arrest "going to, remaining at, and returning from, the place of such a court proceeding," unless the arrest was supported by a judicial warrant or judicial order. N.Y. Civ. Rights Law § 28 (McKinney 2020). This right of private action has not been used often, or successfully. One petitioner alleged that his civil arrest at a courthouse violated the Protect Our Courts Act and petitioned for a writ of habeas corpus. The district court found that the Protect Our Courts Act did not provide a basis for the petition because the New York state law does not constitute the "laws of the United States." *Raspoutny v. Decker*, No. 23 Civ. 3828 (GWG), 2023 WL 8853739 at *5 (S.D.N.Y. Dec. 22, 2023). The district court recognized that the underlying concern with courthouse arrests is that such arrests may prevent people from voluntarily attending court. In this case, as a constitutional matter, the petitioner was not denied access to the courts, as he was able to attend his proceeding. Furthermore, because the petitioner had been brought to court involuntarily at the time of his arrest, the district court found that his subsequent arrest by ICE "did not interfere with his attendance at court." *Id* at *6.

Note 56 – Judicial Renunciation of ICE Civil Administrative Arrests at Courthouses

Nearly 70 former federal and state judges signed on to a December 12, 2018 letter asking ICE to stop making arrests at courthouses, stating that "[j]udges simply cannot do their jobs—and our justice system cannot function effectively—if victims, defendants, witnesses and family members do not feel secure in accessing the courthouse." The signatories included 25 former state Supreme Court justices, including Chief Judge Lippman of the New York Court of Appeals. The judges pointed out that ICE's January 2018 policy directive about courthouse arrests was inadequate and strongly urged ICE to include courthouses in the list of sensitive locations because as "the Supreme Court has recognized time and again," "obstacles . . . to fully accessing courts are intolerable." Letter from Former Judges to Ronald D. Vitiello, Acting Director, U.S. Immigration and Customs Enforcement (Dec. 12, 2018), https://bit.ly/2BGdbyY.

Since the letter was published, 8 more judges signed on, bringing the total number to 75. *Id.*

Note 72 – Sanctuary Cities Litigation

On July 25, 2017, the Department of Justice announced three new immigration enforcement related conditions for criminal justice initiatives funding through the Edward Byrne Memorial Justice Assistance Grant program specifically targeting those cities and states with sanctuary laws. Since then, there have been numerous lawsuits filed by sanctuary cities and states across the country arguing that the conditions imposed by DOJ are unconstitutional.

In *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), the Seventh Circuit affirmed the decision of the district court in Northern District of Illinois issuing a nationwide preliminary injunction against two of the three DOJ conditions, but later stayed the nationwide scope of the injunction pending en banc review, *see generally City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268814, at *1 (7th Cir. Aug. 10, 2018). The district court, on summary judgment, then permanently enjoined all three DOJ conditions, citing the Supreme Court's intervening decision in *Murphy v. NCAA*, 584 U.S. 453 (2018), and similarly stayed the injunction's nationwide scope. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018).

City of Chicago v. Sessions was consolidated with *City of Chicago v. Barr* for the purpose of appeal to the Seventh Circuit. *See City of Chicago v. Barr*, 961 F.3d 882, 886 (7th Cir. 2020). The Seventh Circuit affirmed that the Attorney General's imposed conditions "violated the constitutional principle of separation of powers" and instructed the district court to "modify the injunction to require the Attorney General to calculate the City of Chicago's Byrne JAG grant as if the challenged conditions were universally inapplicable to all grantees." *Id.* at 931. The Seventh Circuit concluded that the Attorney General's imposed conditions were "an executive usurpation of the power of the purse." *Id.* On remand from the Seventh Circuit, the district court withdrew its declaration that Sections 1373 and 1644 were unconstitutional, as the Seventh Circuit had indicated that the declaratory judgment was no longer necessary to provide complete relief to Chicago. *City of Chicago v. Barr*, 513 F. Supp. 3d 828, 832-33 (N.D. Ill. 2021). The district court concluded that "the only way to provide complete relief to Chicago was by enjoining the unlawful conditions program-wide," *id.* at 837, and that "a nationwide injunction is necessary and proper to protect Chicago," *id.* at 838.

In a related case also in the Northern District of Illinois, the City of Evanston and the U.S. Conference of Mayors obtained a preliminary injunction against all three conditions, but stayed the injunction's "near-nationwide effect" as to the Conference. *City of Evanston v. Sessions*, No. 18 C 4853, 2018 WL 10228461 (N.D. Ill. Aug. 9, 2018). The Seventh Circuit then lifted the stay as to the Conference given that the injunction applied only to the City of Evanston and those local jurisdictions that are actually members of the U.S. Conference of Mayors. *U.S. Conference of Mayors v. Sessions*, No. 18-2734, slip op. at 2 (7th Cir. Aug. 29, 2018), Doc. 13. The district court granted a permanent injunction barring the proposed conditions on funds on all impacted Conference members for all future years of Byrne JAG grants but declined to issue a nation-wide injunction. *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 887-89 (N.D. Ill. 2019). The district

court concluded that the JAG Grant requirement that applicants certify compliance with "all other applicable Federal laws" could not include Sections 1373 and 1644 because these statutes violate the Tenth Amendment's anti-commandeering principle. *Id.* at 882.

The Attorney General appealed to the Seventh Circuit but ended up voluntarily dismissing the appeal in November 2021, as the district court's final order was amended to "apply the Seventh Circuit's certification ruling in *City of Chicago*." *City of Evanston v. Garland*, No. 18 C 4853, 2021 WL 7161209 at *2 (N.D. Ill. Sept. 22, 2021). In Philadelphia, a district court in the Eastern District of Pennsylvania permanently enjoined all three DOJ conditions. *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018). The Attorney General appealed the decision to the Third Circuit, which affirmed in relevant part. *See City of Philadelphia v. Att'y Gen. of United States*, 916 F.3d 276 (3rd Cir. 2019), https://www2.ca3.uscourts.gov/opinarch/182648p.pdf.

In California, the State and the City and County of San Francisco sued over the conditions in the Northern District of California, and the district court permanently enjoined all three DOJ conditions but stayed the injunction's nationwide scope. *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924(N.D. Cal. 2018). On appeal, the Ninth Circuit upheld the district court's "permanent injunction barring DOJ from withholding, terminating, or clawing back Byrne funding based on the Challenged Conditions and statutes at issue," *City & County of San Francisco v. Barr*, 965 F.3d 753, 766 (9th Cir. 2020), but vacated the nationwide injunction and limited the permanent injunction to California, *id.* at 758.

In April 2019, the Ninth Circuit upheld California's "sanctuary" law, SB 54. *See United States v. California* 921 F.3d 865 (9th Cir. 2019), https://blogs.findlaw.com/ninth_circuit/2019/04/9th-circuit-upholds-californias-sanctuary-law.html; http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/18/18-16496.pdf.

In a separate decision, the Ninth Circuit held that the federal government can permissibly consider immigration enforcement cooperation when awarding "COPS" grants. *See City of Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019), https://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/12/18-55599.pdf.

A district court in the Southern District of New York, in a lawsuit brought by seven states—New York, Connecticut, New Jersey, Rhode Island, Washington, Massachusetts, and Virginia—and the City of New York, struck down all three conditions as unauthorized by statute, unconstitutional, and arbitrary and capricious. The court described the case as "fundamentally about the separation of powers among the branches of our government and the interplay of dual sovereign authorities in our federalist system." *States of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, (S.D.N.Y. 2018). It then found that the DOJ conditions violate the separation of powers since the Executive Branch does not have the power of the purse and lacks the inherent authority to condition the payment of federal funds on adherence to its political priorities. *Id.* at 238 (citing *Chicago*, 888 F.3d at 283 and *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) ("Absent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.")). The court further found that the three DOJ conditions were arbitrary and capricious

because the DOJ entirely failed to "recognize how the conditions would harm local populations, undermine relationships between local communities and law enforcement and interfere with local policies that promote public health and safety." *Id*. at 2412 (citing *City of Philadelphia v. Sessions*, 280 F.Supp.3d 579, 625 (E.D. Pa. 2017)).

On appeal, the Second Circuit disagreed with the Seventh Circuit's opinion in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) that "the federal government must be enjoined from imposing the challenged conditions on the federal grants." *State v. Dep't of Justice*, 951 F.3d 84, 90 (2d Cir. 2020). The Second Circuit concluded "that the plain language of the relevant statutes authorizes the Attorney General to impose the challenged conditions." *Id.* at 90. It held that "the challenged conditions do not violate either the APA or the Constitution" and reversed the judgment in favor of the plaintiffs. *Id*. at 92.

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. Complaint, *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, 2018), http://queenspublicmedia.com/nyc-sues-trump-doj-over-unlawful-conditions-on-public-safety-grants/.

The district court granted the plaintiffs' motion for partial summary judgment and concluded that the notice, access, and compliance conditions violate the constitutional separation of powers, are not in accordance with law under the APA, and are arbitrary and capricious under the APA. Opinion and Order, *City of New York v. Whitaker*, 18 Civ. 6474 (ER) (S.D.N.Y. 2018), https://storage.courtlistener.com/recap/gov.uscourts.nysd.497634/gov.uscourts.nysd.497634.81.0.pdf. On appeal, the Second Circuit reversed the district court's decision and held that the AG was statutorily authorized to impose the challenged conditions on Byrne grant applications. The case was dismissed on May 3, 2021, after the defendants issued a written determination that they would no longer enforce or apply the challenged conditions. Stipulation of Dismissal, *City of New York v. Garland*, No. 18-CV-6474 (ER), https://storage.courtlistener.com/recap/gov.uscourts.nysd.497634/gov.uscourts.nysd.497634.140.0.pdf .

In May 2024, Louisiana passed SB 208, banning sanctuary cities within the state. *See SB 208*, FASTDEMOCRACY, https://fastdemocracy.com/bill-search/la/2024/bills/LAB00022585/. The legislation particularly targets New Orleans, as it was the only city with sanctuary policies in place. *See* Bobbi-Jean Misick, *Immigrant advocates worry 'sanctuary city' bill will create mistrust, violate federal mandates*, LOUISIANA ILLUMINATOR,

https://lailluminator.com/2024/04/12/sanctuary-city/#:~:text=The%20bill%20would%20ban%20parishes,on%20behalf%20of%20federal%20agencies (Apr. 12, 2024).

New York City Mayor Eric Adams also called for a rollback of the city's sanctuary city policies in February 2024. *See* Emily Ngo, *Adams calls for change to New York City's sanctuary city laws in harshest statement yet*, POLITICO, https://www.politico.com/news/2024/02/27/adams-sanctuary-city-laws-new-york-00143705 (Feb. 27, 2024).

Notes 73, 75 & 104 – Constitutionality of 8 U.S.C. § 1373

Since the Supreme Court's decision in *Murphy v. NCAA*, 584 U.S. 453 (2018), there has been a growing judicial consensus that 8 U.S.C. § 1373 is unconstitutional because it violates the Tenth Amendment anti-commandeering principle. *See San Francisco v. Sessions*, 349 F. Supp. 3d at 953 (finding Section 1373 unconstitutional in part because "[t]he statute takes control over the State's ability to command its own law enforcement," and this imposition "inevitably reaches the state's relationship with its own citizens and undocumented immigrant communities in ways that no doubt will affect their perceptions of the state and trust in its law enforcement agencies"); *Chicago*, 321 F. Supp. 3d at 872 (finding Section 1373 unconstitutional because it "is more than just an information-sharing provision" and "impermissibly directs the functioning of local government in contravention of Tenth Amendment principles"); *Philadelphia*, 309 F. Supp. 3d at 330 ("Because Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment.").
In *States of New York*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018), the Southern District of New York also relied on *Murphy* to find Section 1373 unconstitutional under the anti-commandeering principles of the Tenth Amendment. Part of the court's reasoning was that Section 1373 forces states to use their resources—employees' time and corresponding costs—for federal initiatives and away from state priorities.

In July 2019, Erie County Clerk Michael Kearns filed a lawsuit seeking to invalidate New York's newly enacted "Green Light Law" which permits the State to issue drivers licenses without regard to immigration status. Complaint, *Kearns v. Cuomo, et al.*, No. 19-CV-902-EAW (W.D.N.Y. 2019), https://www.courtlistener.com/recap/gov.uscourts.nywd.124551/gov.uscourts.nywd.124551.1.0.pdf. Mr. Kearns contends that the new law conflicts with 8 U.S.C. §§ 1373 and 1644. Although the Attorney General argues that the Court need not reach the question of whether Section 1373 is constitutional (because there is no conflict), in an amicus brief submitted by the New York Civil Liberties Union, the organization argues, primarily relying on *Murphy*, that Section 1373 is unconstitutional since it violates the Tenth Amendment's anti-commandeering provision. *See* Brief of Amicus Curiae, *Kearns v. Cuomo, et al.*, No. 19-CV-902-EAW (W.D.N.Y. 2019), https://bit.ly/amicusbriefNYCLU (Lexis subscription required). The district court dismissed the suit because Kearns lacked standing to challenge the Green Light Law, and the Second Circuit affirmed the district court's decision. *Kearns v. Cuomo*, 981 F.3d 200, 204 (2d Cir. 2020). Neither court reached the merits of Kearns' claims. *Id.*

In some more recent decisions, the declaration that 8 U.S.C. § 1373 is unconstitutional has been reversed. In *Chicago*, the district court withdrew its declaration that Sections 1373 and 1644 are unconstitutional, as the Seventh Circuit had explained that the declaratory judgment was "no longer necessary to award complete relief to Chicago." *City of Chicago v. Barr*, 513 F. Supp. 3d 828, 833 (N.D. Ill. 2021). The district court's decision in *States of New York* was also reversed when defendants appealed to the Second Circuit, which concluded that all of the challenged conditions were authorized, and that Section 1373 was not in violation of the Tenth Amendment's anticommandeering principle. *See State v. Dep't of Justice*, 951 F.3d 84, 123 (2d Cir. 2020).

Note 76 – Questioning ICE's Stated Reason for Civil Administrative Arrests at or near Courthouses

There is also growing judicial consensus that, contrary to what ICE has argued in support of their continued civil enforcement actions at or near courthouses, sanctuary city policies do not actually interfere with civil immigration enforcement. *See States of New York*, 343 F. Supp. 3d 213at note 2 (Noting that the label of sanctuary cities or states is commonly misunderstood since "many so-called sanctuary jurisdictions do not interfere in any way with the federal government's lawful pursuit of its civil immigration activities . . ." since "many such jurisdictions will cooperate with immigration enforcement authorities for persons most likely to present a threat to the community, and refuse such coordination where the threat posed by the individual is lesser, reflecting the decision by the state and local authorities as how best to further the law enforcement objectives of their communities with the resources at their disposal") (citing *Chicago*, 888 F.3d at 281); *see also 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 . . . ."); *United States v. California*, 314 F. Supp. 3d 1077, 1105 (E.D. Cal. 2018) ("Standing aside does not equate to standing in the way.").

Note 80 – ICE Detention Impedes Defendant's Ability to Respond to Criminal Charges

In Massachusetts - as in New York - one problem that has emerged is that of immigrants failing to appear for their state court hearings because they are not being transported from ICE detention. A recent agreement in Massachusetts may address this problem. As reported by WGBH, an agreement was reached between the state's court system, the American Civil Liberties Union, public defenders, some sheriffs, and ICE, providing that immigrants in federal custody will now be allowed to go before Massachusetts courts to face state charges. Barbara Howard, *Ice Detainees Can Now Answer State Charges*, GBH (updated Aug. 1, 2023), https://www.wgbh.org/news/local-news/2019/01/30/ice-detainees-can-now-answer-state-charges.

See SAFEGUARDING THE INTEGRITY OF OUR COURTS, (March 2019),

https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf.

In April 2019, the New York State Office of Court Administration released this directive, requiring, among other things, a judicial warrant for ICE arrests in state courthouses. *See* STATE OF NEW YORK UNIFIED COURT SYSTEM OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE, PROTOCOL GOVERNING ACTIVITIES IN COURTHOUSES BY LAW ENFORCEMENT AGENCIES (2017), https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf.

Note 86 – Massachusetts Lawsuit Seeking Writ of Protection from Civil Arrest

On September 18, 2018, Justice Cypher of the Supreme Judicial Court denied the request of seven immigrant petitioners, who were seeking a writ of protection for themselves and similarly situated individuals from civil arrests, including civil immigration arrests, while they are in a Massachusetts courthouse and coming and leaving from court proceedings. *See Matter of C. Doe, et al. (Supreme Judicial Court, Suffolk Co., No. SJ-2018-119*), https://www.masslegalservices.org/system/files/library/Doe-single%20justice%20decision.pdf. The Justice denied relief because 1) the remedy sought—a generic writ applying to all similarly situated individuals—would be too broad and unwieldy in scope to implement; 2) she had heard only one side of the argument, as a petition seeking a writ is procedurally not adversarial; and 3) she questioned whether such a writ, even if granted, would be an effective deterrent against courthouse arrests by ICE. *Id.* at 5-9.

However, in her opinion, Justice Cypher recognized that ICE civil administrative arrests at courthouses "is an issue of systemic concern" as these incidents have been "fairly well-documented" and ICE, rather than designating courthouses as a sensitive location, has issued a directive which "regards courthouses as appropriate locations for the routine enforcement of civil immigration matters." *Id.* at 4-5. The Justice further stated that she "agree[s] with [the petitioners] that the administration of justice in the Commonwealth suffers when litigants, witnesses, and others with business before the courts are afraid to come near a Massachusetts courthouse because they fear being arrested by immigration authorities." *Id.* at 5. Moreover, the Justice stated that it is "well-settled" that "there is a privilege against civil arrest," and went on to note that "a writ of protection is not necessary in order to assert the common law privilege," as "even without the writ, individuals are entitled to the protection afforded by the privilege." *Id.* at 11.

In March 2018, the Boston Bar Association had urged that the petition be given full-bench review. *BBA Supports Full-Bench Review of Petition for Court to Ban ICE Arrests in Courthouses*, BOSTON BAR ASSOCIATION (Mar. 30, 2018), https://bostonbar.org/news/bba-supports-full-bench-review-of-petition-for-court-to-ban-ice-arrests-in-courthouses.

In April 2019, Massachusetts prosecutors and defenders brought suit seeking a declaratory judgment that ICE's Directive authorizing the civil arrest of parties, victims, witnesses, and others attending court on official business, and ICE's policy of conducting such arrests, are unlawful, and to enjoin ICE from such activity. They argue that the Directive violates the

common law privilege against civil arrests in courthouses, the Tenth Amendment and the constitutional right to access the courts. *See Ryan et al. v. U.S. Immigration and Customs Enforcement*, 382 F. Supp. 3d 142 (D. Mass. 2019), https://www.courthousenews.com/wp-content/uploads/2019/04/ma-das-ice.pdf.

The district court issued a preliminary injunction enjoining Defendants from implementing ICE Directive No. 11072.1, "Civil Immigration Actions Inside Courthouses," dated January 10, 2018, in Massachusetts and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse. *Id.*

On appeal, the First Circuit vacated the district court's preliminary injunction because it held that the plaintiffs failed to demonstrate that they were "likely to succeed in showing that the common law privilege against courthouse arrests clearly applied to civil immigration arrests." *Ryan v. U.S. ICE*, 974 F.3d 9, 24 (1st Cir. 2020). The court concluded that "[a]lthough the privilege protected against arrests in private civil suits, it did not apply to criminal arrests--and the fact that civil immigration arrests aim to vindicate uniquely sovereign interests supplies a strong reason to think that the common law would have treated them like criminal arrests for purposes of this privilege." *Id.* at 28. The court also concluded that "without additional factfinding, the lack of clarity in the record about Massachusetts's policy on courthouse arrests," *id.* at 33, prevented it from determining whether the plaintiffs were likely to succeed on the merits of their argument that "construing the INA to authorize civil courthouse arrests would clash with a sovereign state decision," *id.* at 30.

However, the District Court for the Southern District of California's opinion in *Velazques-Hernandez v. U.S. Immigration and Customs Enforcement* sharply disagreed with the *Ryan* court's decision. *See* 500 F. Supp. 3d 1132 (S.D. Cal. 2020). The district court granted the plaintiff's motion for a temporary restraining order to enjoin DHS' courthouse arrests and held that the "common-law rule against civil courthouse arrest is incorporated in the INA and ensures that courts everywhere are open, accessible, free from interruption, and able to protect the rights of all who come before the court." *Id.* at 1137.

Note 87 – State Responses to ICE Civil Administrative Arrests at Courthouses

On February 5, 2019, 30 members of the New York State Assembly wrote to DHS Secretary Kirstjen Nielsen decrying the "increasingly aggressive actions of ICE" agents at courthouses and calling for courthouses to be designated as "sensitive locations" where such arrests would be limited to "exigent circumstances." Letter from New York State Assembly to Kirstjen Nielsen, (Feb. 5, 2019), https://www.scribd.com/document/399491138/DHS-Secretary-Nielsen-Letter.

In September, 2019, the New York State Attorney General and the Brooklyn District Attorney filed a lawsuit against ICE in the Southern District of New York, claiming that federal officials are unlawfully permitting ICE agents to arrest undocumented immigrants in and around New York state courthouses in violation of the Administrative Procedure Act, the common law privilege against civil arrests at or near courthouses, and the Tenth Amendment. *See* Complaint, *New York v. U.S. Immigration and Customs Enforcement*, 466 F. Supp. 3d 439 (S.D.N.Y. 2020), https://ag.ny.gov/sites/default/files/ny_v_ice_complaint.pdf. On June 10, 2020, the district court

declared "ICE's policy of courthouse arrests, as now embodied in the Directive, to be illegal" and enjoined the agency "from conducting any civil arrests on the premises or grounds of New York State courthouses, as well as such arrests of anyone required to travel to a New York State courthouse as a party or witness to a lawsuit." *New York v. U.S. Immigration and Customs Enforcement* 466 F. Supp. 3d 439, 449-50 (S.D.N.Y. 2020), https://www.courthousenews.com/wp-content/uploads/2020/06/ice-courthouses.pdf. The opinion also acknowledges evidence indicating that ICE's courthouse arrest activity caused non-citizen litigants to fear participation in the legal system and also "undermined the orderly functioning of New York courts themselves." I*d.* at 444. The government appealed, and the Second Circuit has not yet ruled.

Also in September 2019, the Legal Aid Society filed a lawsuit in the Southern District of New York claiming that ICE's courthouse arrests violate the 1st, 5th and 6th Amendments, as well as the Administrative Procedure Act. *See* Complaint, *Doe v. U.S. ICE*, 490 F. Supp. 3d 672 (S.D.N.Y. 2020), https://www.legalaidnyc.org/wp-content/uploads/2019/09/19cv8892-ICE-Complaint.pdf. The district court held that the plaintiffs had adequately alleged a violation of the right of access to the courts in violation of the First and Fifth Amendments but dismissed the plaintiffs' Sixth Amendment claim. *Doe v. U.S. ICE*, 490 F. Supp. 3d 672 (S.D.N.Y. 2020). On Sept. 9, 2021, the court ordered that the matter be held in abeyance pending the Second Circuit's decision in the *New York v. U.S. ICE* appeal. Order granting 141 Letter Motion for Extension of Time at 1, *Doe v. U.S. ICE*, (No. 19-cv08892) ECF No.142. The parties agreed to the terms of a stipulation of dismissal of this case without prejudice, "which they will upon the Court of Appeals' grant of the motion to vacate and the filing of a stipulation of dismissal without prejudice of the complaint in the State of New York Action." *Id.* at 2. The matter was stayed on Dec. 2, 2021, and as of June 1, 2022, the Second Circuit still has not ruled on the Motion to Vacate in the *New York v. U.S. ICE* appeal. Status Report. ECF No. 147.

In December 2020, Cuomo signed the Protect Our Courts Act, a law that protects individuals "from civil arrest while going to, remaining at, and returning from" a court proceeding, unless there is a judicial warrant or order from a judge. The privilege extends to parties of the proceeding, potential witnesses, and family or household members of a party or potential witness. *See* N.Y. Civ. Rights Law § 28 (McKinney 2020).

Note 106 – ICE Arrests Are Civil in Nature and Warrantless Seizures

A recent Appellate Division decision highlights the civil nature of ICE arrests and how administrative warrants differ from judicial warrants. In *People ex rel. Wells v. DeMarco*, the Appellate Division Second Department held that 1) New York state law does not authorize state and local law enforcement to effectuate warrantless arrests for civil immigration law violations; 2) New York state and local officers do not have inherent police power authority to make civil arrests, including civil immigration arrests; and 3) an administrative warrant, such as those issued by ICE, is not issued by a judge or a court, and thus does not give state and local officers the authority to arrest, seize, or detain someone for civil immigration purposes. 88 N.Y.S.3d 518 (2018). This ruling underscores the importance of court officers not participating in ICE's civil arrest, seizure or detention of individuals in or around the courthouse.

Local news outlets have recently reported on the issue of local court officer participation in federal civil enforcement. Documented, a non-profit news site covering New York City's immigrants, published a report summarizing the 66 Unusual Occurrence Reports filed by court officers reporting ICE courthouse civil arrests from February 2017 to August 2018. *See* Mazin Sidahmed & Felipe De La Hoz, *Documents Show New York Court Officers Alerted ICE about Immigrants in Court*, DOCUMENTED (Jan. 26, 2019), https://bit.ly/2WqbEqo. According to this report, these Unusual Occurrence Reports showed that New York State Court Officers had assisted ICE agents in carrying out civil administrative arrests on several occasions. The level of cooperation has ranged from physically assisting arrests to providing information to ICE agents about individuals. *See* The Courthouse Trap at 12-13, *supra* Note 19. In one highly publicized case, on November 1, 2018, a bystander outside the Queens County Criminal Court filmed several plainclothes ICE officers, apparently working with New York State court officers, forcing a man into an unmarked vehicle as he attempted to enter the court. *See* Ryan Devereaux, *ICE Arrests at New York City Courthouses Are Increasing – This Video Captures One*, THE INTERCEPT (Nov. 2, 2018), https://bit.ly/2ThQPv5.