Testimony before the
New York City Council
Committee on Immigration
Chair, Carlos Menchaca
And
Committee on Criminal Justice
Chair, Keith Powers

By
Kenneth Stukes
Bureau Chief of Security

June 9, 2021

Good morning Chair Menchaca, Chair Powers, and members of the Immigration Committee and Criminal Justice Committee. My name is Kenneth Stukes and I am the Bureau Chief of Security for the New York City Department of Correction. I am joined today by First Deputy Commissioner Lynelle Maginley-Liddie and Deputy Commissioner of Legal Matters Heidi Grossman. I am also pleased to be joined by colleagues at the Mayor's Office for Immigrant Affairs, an important partner in matters concerning incarcerated members of the immigrant community. I thank you for the opportunity to testify on the Department's practices with respect to detainer laws and to comment on the three bills being considered at today's hearing.

The Department recognizes the City's efforts to promote policies that support immigrant communities while simultaneously maintaining public safety and confidence in our jails and local government. In accordance with New York City's laws, the Department does not subject its officers or employees to the direction of federal immigration enforcement authorities. Our policies make clear that DOC's role is not to conduct immigration enforcement; this helps give all New Yorkers, irrespective of immigration status, assurance in their local government's integrity. As a matter of policy, the Department does not comply with ICE detainers absent a judicial warrant.

Absent a judicial warrant, generally, the only circumstances under which the Department of Correction is permitted to cooperate with requests to notify ICE of the time of release and transfer custody of an incarcerated individual are when 1) the individual has been convicted of a qualifying conviction or is identified as a possible match in the terrorist screening database and 2) federal immigration authorities provide documentation of their probable cause of removability.

As indicated in the Department's latest public report regarding ICE detainers, of the 270 civil immigration detainers lodged with DOC between July of 2019 and June of 2020, only 20 individuals were transferred to federal immigration authorities. In fact, of the 1,925 detainers lodged between October of 2016 and June of 2020, the Department has only transferred 5% of the requested individuals to federal immigration authorities, which equates to 90 people over a period of four years.

Cooperation happens very infrequently. The Department thoroughly reviews an incarcerated individual's case to determine whether they meet the criteria for being transferred upon release. Upon admission to custody, the Department may receive a notification from federal authorities that an incarcerated individual has an immigration detainer. If the federal authorities have provided all the necessary paperwork, we then assess the individual to determine if they meet the criteria for being transferred upon release, as outlined earlier. In most cases, individuals do not meet the criteria and we notify the federal authorities, in essence, that we will not cooperate.

Occasionally, we encounter an individual who has a qualifying conviction as outlined in Administrative Code §9-131. Once aware of the qualifying conviction, the ICE Unit of the Custody Management Division confers with the Legal Division to confirm that the individual meets the criteria. Federal immigration authorities will be notified of an individual's impending release only once the ICE Unit has confirmed that the individual meets the criteria. However, it is important to note that even in the limited scenarios in which the Department shares information with federal authorities as permitted under the City's detainer law, the Department still proceeds with existing discharge procedures; it is not DOC policy to detain individuals due to immigration detainers beyond the time authorized under New York State and local law.

With respect to the proposed legislation:

Preconsidered Introduction 7657

With regards to Intro 7657, this bill pertains to NYPD's detainment of an individual beyond the time when said individual would otherwise be released from custody. Although this does not concern DOC's practices, we would note that, as mentioned earlier, even when cooperating with immigration detainers, it is not consistent with DOC policy to detain individuals beyond the time authorized under New York State and local law.

Preconsidered Introduction 7658

With regards to Intro 7658, the Department has concerns regarding the broad circumstances that may give rise to a claim, as it will be difficult to differentiate cases in which an individual is held for an extended period due to an immigration detainer versus when an individual is held for an extended period due to other factors. We look forward to continuing discussions with Council.

Preconsidered Introduction 7659

With regards to Intro 7659, New York City is committed to protecting the rights of undocumented individuals and has worked to narrow the circumstances under which the Department communicates with ICE. The Department does have concerns that this legislation would remove the City's flexibility that only allows the City to cooperate with ICE in very limited circumstances. We are continuing to review the legislation and look forward to further discussions with the Council on the procedures in place to prevent unnecessary cooperation with ICE.

Conclusion

The Department of Correction is committed to carrying out its goals in protecting the safety and security of all the individuals within our facilities. Those goals do not include enforcement of immigration laws. We appreciate the Council's interest in protecting the immigrant community and my colleagues and I are happy to answer your questions.

New York City Council – Immigration and Criminal Justice Committees

Testimony from the New York Immigration Coalition
June 9, 2021

Good Morning. My name is Anu Joshi and I'm the Vice President of Policy at the New York Immigration Coalition, an umbrella policy and advocacy organization that works statewide with over 200 immigrant-serving member organizations. Thank you to Chair Menchaca and the members of the City Council Immigration Committee and Chair Powers and the members of the City Council Criminal Justice Committee for convening this important hearing and allowing us the opportunity to submit testimony in support of the New York for All Act (A.2328 / S.3076), which would prohibit and regulate the discovery and disclosure of immigration status by New York state and local government entities.

The New York for All act ensures our state and local law enforcement and other resources are not used to support Immigrations and Customs Enforcement (ICE) or Border Patrol deportation agenda: targeting and separating New York immigrant families, and sowing fear in our communities. This is common sense legislation that protects the rights of immigrant New Yorkers and enhances public safety for everyone by ensuring state and local government employees across New York, including law enforcement officers, do not divert local resources to enable immigration enforcement.

The events of the last year have laid bare the long way our cities and New York State have to go in addressing systemic racism in our law enforcement agencies. Twenty percent of all Black immigrants in the United States live in New York State. These families live under the dual threat of a racist police system and a racist immigrant enforcement system. When, as a State, we allow local law enforcement to collude with federal immigration enforcement agencies we are only exacerbating the pain inflicted on our Black immigrant community members and other immigrant communities of color targeted by law enforcement.

All New Yorkers benefit when state and local governments use their limited resources to serve their communities, rather than carrying out a federal immigration deportation agenda. Broadly speaking, this legislation prohibits state and local officers from enforcing federal immigration laws and sharing sensitive information with ICE, and prohibits ICE from entering non-public areas of state and local property without a judicial warrant. The legislation will also ensure that people in custody are given notice of their rights before being interviewed by ICE, and starts the process of limiting ICE access to state information databases.

Importantly, this legislation covers all police officers and peace officers in New York, as well as most state employees and employees of county, city, town, and village government. This includes sheriff's deputies and corrections officers, as well uniformed court officers. It goes farther than prior executive orders issued by the Governor's office, which applied only to state employees.

Several other states and cities have enacted laws or policies to limit their participation in immigration enforcement. This legislation builds on what other places have put in place – including New York City, New Jersey, Washington, and California – in broadly limiting how officers and government employees across New York can cooperate with immigration enforcement.

For all of the above reasons, the New York Immigration Coalition urges the City Council to call for the swift passage of the New York for All Act.

Testimony of

Casey Dalporto

Policy Attorney

New York County Defender Services

Before the

City Council Committee on Immigration and Committee on Criminal Justice

Oversight Hearing on NYC Detainer Laws

Res. 1648-2021, T2021-7658, T2021-7657, T2021-7659

June 9, 2021

My name is Casey Dalporto and I am a Policy Attorney at New York County Defender Services (NYCDS). We are a public defense office that represents New Yorkers in thousands of cases in Manhattan's Criminal Court and Supreme Court every year. Thank you to Chair Menchaca and Chair Powers for holding today's oversight hearing. We support the bills and resolution on today's agenda and applaud the Council for invoking its oversight authority to shine a light on fundamental problems of the NYC Detainer Laws.

Background:
Operating at the immigrant crossroads of the world, NYCDS represents over one thousand noncitizen New Yorkers every year. To serve this client population, NYCDS maintains a dedicated Immigration Unit, which is staffed by highly experienced attorneys with expertise in the intersection of criminal and immigration law. These specialized attorneys provide case-specific consultations to our noncitizen clients on the immigration consequences of criminal legal system-involvement.

The relative risk of ICE apprehension is a critical aspect of this advice. Having witnessed years of very public entanglement between ICE and local law enforcement[1], court personnel[2], and corrections officials[3], New York's immigrant community is justifiably fearful of any government interaction. Our noncitizen clients are therefore tremendously concerned with the risk of ICE contact attendant in their arrest, court appearances, and sentences. Accordingly, in order to fully advise these clients and address their driving immigration-related concerns, our immigration attorneys routinely explore how different possible outcomes in their criminal cases might increase exposure to ICE.

That advice, and in turn, our clients' decisions in their criminal cases, hinge on the NYC Detainer Laws, New York City Administrative Code §§ 9-131, § 9-205, and 14-154, which permit varying degrees of coordination between federal immigration authorities and the New York City Police Department (NYPD), New York City Department of Probation (DOP), and NYC Department of Correction (DOC). Our immigration attorneys must explain to our noncitizens how these laws interface and may be unlawfully applied to their cases, which grafts a layer of difficult and sometimes elusive risk calculations onto what is already a complex decision-making process. In addition, in light of DOC's distorted interpretation and outright violation of the NYC Detainer Laws, NYCDS immigration attorneys are also compelled to advise some clients that they face a risk of ICE arrest upon entering city jails, *even where the law purportedly prohibits such exposure*.

This ultimately frustrates our noncitizen clients' ability to resolve their criminal cases, and compromises their ability to access their due process rights as they navigate the criminal legal system. In turn, NYCDS attorneys are forced to craft convoluted plea agreements that avoid probationary sentences and minimizes the risk of DOC-ICE transfer, or advise our clients to go to trial on unwinnable cases. This not only compromises NYCDS clients' constitutional rights, it wastes court and correctional resources and subverts the smooth functioning of the entire criminal legal institution.

Observation of NYC Detainer Law Violation:
Before joining NYCDS, I was a Criminal Immigration Specialist at the Legal Aid Society, and in March 2020, I represented a client who was transferred to ICE custody in violation of the NYC Detainer Laws.

My client, who I will refer to as S.S., was born in Gambia and had lived in the United States since 2014, when he came to the United States on a tourist visa with his parents. He later married a United States citizen, Rachel, and they had two children, Ryan, who is now three years old, and Marianne who is 18 months. In 2018, S.S. was arrested on a criminal matter and I assisted his criminal defense attorney in crafting a plea agreement that would preserve his eligibility to one

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[1] See, e.g., Saltonstall, Gus, ICE Agents Pose As NYPD Officers To Locate Inwood Man: Pols, *Patch*, Oct. 12, 2020, available at https://patch.com/new-york/washington-heights-inwood/ice-agents-pose-nypd-officers-locate-inwood-man-pols; Siegelbaum, Max, NYPD Says ICE HSI Agents Protecting Precincts, *Documented*, Juen 10, 2020, available at https://documentedny.com/2020/06/10/nypd-says-ice-hsi-agents-protecting-precincts/.
[2] Sidamed, Mazin, and De La Hoz, Felipe, Documents Show New York Court Officers Alerted ICE About Immigrants in Court, *Documented*, Jan. 29, 2019, available at https://documentedny.com/2019/01/26/documents-show-new-york-court-officers-alerted-ice-about-immigrants-in-court/.
[3] Lach, Eric, A Deportation Nightmare in the Bronx, *The New Yorker*, Feb. 28, 2021, available at https://www.newyorker.com/news/our-local-correspondents/a-deportation-nightmare-in-the-bronx.

day become a lawful permanent resident (AKA "green card holder") through his wife. The agreement entailed a plea to two felonies and a city jail sentence. Though these two felonies were both class E nonviolent offenses, they were included in the detainer law's enumerated list of offenses deemed "violent or serious crimes."[4] S.S. entered this plea knowing that convictions for these two offenses might permit DOC to alert ICE to his date and time of discharge from jail, but that absent a judicial warrant, his release from custody could not be prolonged for any length of time to facilitate the transfer to ICE custody, as is required under both the NYC Detainer Laws, and binding precedent by the Appellate Division, Second Department[5].

On the afternoon of March 26, 2020, shortly after New York City plunged into lockdown, I received a frantic call from my client's wife, Rachel. She stated that S.S. had just been told by corrections officers that he was going to be picked up by ICE. Rachel explained that at around eleven that morning, my client was informed that he was on Mayor DiBlasio's list of incarcerated individuals to be released from their local jail sentences early due to the coronavirus spiraling out of control on Riker's Island. Rachel told me that upon hearing this news, S.S. immediately packed up his belongings and, as instructed, proceeded to discharge planning. However, Rachel told me that about an hour later, at around noon, while he was in discharge planning, corrections officers halted his release processing. The deputy corrections officer in charge of discharge processing told S.S., "You're not going home. You're going back to Africa. ICE is coming to get you." The deputy corrections officer then sent S.S. back to his cell to wait for ICE pick-up.

After speaking to Rachel, I immediately called the ICE captain, Captain Rainey, to get more information. She informed me over the phone that there was an ICE detainer lodged against my client and that DOC would indeed be honoring it because my client had a conviction in the last five years for an offense listed as a "violent or serious crime" in the city detainer law. I confirmed with Captain Rainey that there was no judicial warrant for my client. She told me that she didn't need a judge-signed warrant, and that his convictions alone entitled DOC to honor the detainer. Accordingly, she said DOC planned to prolong his detention until ICE arrived to take custody.

After speaking with Captain Rainey, I promptly called Lauren Mello in the DOC Legal Department. Over the phone, Ms. Mello agreed that while the detainer law and court precedent permitted DOC to notify ICE about the release of a noncitizen with one of these felony convictions, it did not permit DOC to prolong the detention of any person for the purpose of enforcing an ICE detainer. Immediately after hanging up, at 4:22 PM, I emailed Ms. Mello to memorialize our conversation. Ms. Mello responded immediately and committed to reviewing S.S.'s case. However, despite many emails, text messages, voicemails and phone calls from me and my colleagues at the Legal Aid Society throughout the rest of the day, we heard no updates from DOC and S.S. was not released.

Finally, the next day, on March 27, 2020, Correction Officer Kevin Hayes emailed my colleagues and reported that Ms. Mello had "reviewed it herself and agreed with the decision that he should not be released" as he had "qualifying convictions within the last five years." At this point my

[4] NYC A.C. § 9-131(a)(7).

[5] *People ex rel. Wells v DeMarco*, 88 N.Y.S.3d 518 (2d Dept. 2018) (holding that New York state and local officials lack any legal authority to direct "the retention of prisoners, who would otherwise be released, pursuant to ICE detainers").

client had been detained approximately 24 hours past his release time solely for the purpose of transfer to ICE custody, a clear violation of the NYC detainer law.

Finally, after more probing on this point, and repeatedly urging that my client's continued custody was illegal, DOC adopted a new rationale for my client's continued detention, which ultimately sidestepped the issue. Instead, DOC took the position that they were not discharging my client from his sentence early despite his inclusion on the Mayor's list for early discharge, despite his ostensible eligibility for such release, and despite the urgent necessity of his release to stem the unprecedented public health crisis unfolding within its own walls. My client ultimately was forced to serve the entirety of his original sentence.

Months later, at the expiration of his city sentence in August 2020, S.S. was directly transferred from DOC to ICE custody. He informed me that he was awoken at 6 AM on his release date and escorted downstairs to the discharge planning room. Upon arriving, DOC guards opened the door and invited ICE officers to come inside. S.S. did not have an opportunity to call his attorney to protest the clear violation of his rights taking place, nor did he have an opportunity to call his wife. ICE agents promptly handcuffed my client and transported him to Bergen County Jail, an ICE detention facility in New Jersey.

Months later, S.S. was deported. While he had a viable pathway to lawful immigration status through his wife and children, he told me that ICE detention was unbearable, and he was too dispirited and depressed to keep fighting.

III. The Proposed Legislation

a. Res. 1648-2021 (the Public Advocate, CM Menchaca), calling on the New York State Legislature to pass, and the Governor to sign, the New York for All Act (A.2328 / S.3076), which would prohibit and regulate the discovery and disclosure of immigration status by New York state and local government entities.

NYCDS supports the resolution to urge the New York State Legislature and Governor to enact the New York for All Act (A.2328 / S.3076). This important state legislation would fully divest New York resources from federal immigration enforcement and end, once and for all, the cooperation between ICE and our state and local governments.

Most importantly, the New York for All Act will ensure that NYCDS's noncitizen clients can access the full range of due process rights they are entitled to in criminal proceedings without fear that doing so will lead to ICE apprehension due to the coordination – calculated or inadvertent – by police, probation, or corrections officials. This means, for example, that our immigration attorneys will finally be able to advise clients that they can safely accept pleas entailing probation sentences without fear that the NYC Department of Probation will report our clients to ICE in the intake process. This also means that our clients will be able to safely report their home addresses, employment information, and details about their household makeup to NYPD and CJA staff in their arrest processing without worry that these agencies will transmit this sensitive information to federal immigration officials. Finally, it means that when incarceration is required as part of a plea offer, our noncitizen clients can thoughtfully and

soberly weigh this option without the added concern that this sentence will inevitably result in deportation. In other words, this legislation will repair the immigrant community's widespread distrust in local and state institutions, sown by years of collaboration between ICE and New York law enforcement agencies and corrections officials.

Moreover, the New York for All Act will ultimately ensure that New York resources are invested in New Yorkers, rather than being coopted by a federal immigration enforcement agenda that New Yorkers resoundingly reject. As S.S.'s story demonstrated, the law must be clear that New York officials prioritize the health and safety of New Yorkers above all. At the height of the greatest public health catastrophe New York City has ever faced, NYC DOC officials were focusing their attention and resources on assisting federal ICE agents in a mission to deport a local husband and father. DOC's actions in S.S.'s case demonstrate how any allowance for coordination with federal immigration officials inevitably leads to fundamental misalignment of priorities, and a siphoning of important attention and resources away from New Yorkers.

b. [T2021-7658] (CM Menchaca), in relation to creating a private right of action related to civil immigration detainers.

NYCDS supports T2021-7658, which would create a private right of action for victims of violations of the NYC Detainer Laws. Currently, the law prohibits any party from bringing a civil claim against the NYPD and DOC in the event of a violation of the law.[6], This leaves those whose rights were violated without recourse. Once in ICE custody, a person cannot petition either for release from immigration detention or for termination of removal proceedings on account of a violation of local city law.[7] Of course, civil courts can offer only limited means of redress. They cannot confer lawful immigration status or mandate federal immigration authorities to abandon their enforcement pursuits. However, a private right of action would at least offer victims of detainer law violations and their families some meaningful compensation for their legal injury.

In addition, and perhaps most importantly, a private right of action will instill some measure of accountability to the NYC Detainer Law regime. The current state of affairs allows negligence, willful noncompliance, and even malicious violations to go completely unaddressed and unpunished. Without a legal mechanism to compel adherence, officials subject to the law have little incentive to scrupulously honor its mandates. DOC and NYPD officials also have no inducement to document their dealings with ICE or their applications of the NYC Detainer Laws, thus making any public monitoring and oversight elusive. The potential for lawsuit will encourage NYPD and DOC officials to carefully follow the legal parameters of the NYC Detainer Laws and record their compliance in cases involving their application.

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[6] NYC A.C. § 9-131(e) ("Nothing contained in this section or in the administration or application hereof shall be construed as creating any private right of action on the part of any persons or entity against the city of New York or the department, or any official or employee thereof.").

[7] *See People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (2d Dept. 2018) ("Here, of course, with Francis now being indisputably in the custody of ICE, and being lodged in a facility located out of the state, an adjudication of the merits will not have any practical, much less immediate, consequence to him.").

Accordingly, NYCDS supports the enactment of a private right of action for noncompliance with the detainer law, which we feel is the only effective tool to enforce compliance with these laws and make victims whole in the event of violations.

c. [T2021-7657] (CM Powers), in relation to limiting the circumstances in which a person may be detained by the police department on a civil immigration detainer

NYCDS supports T2021-7657 which would prohibit the NYPD from detaining an individual for the exclusive purpose of federal immigration enforcement in the absence of a judicial warrant. Currently, the law allows the NYPD to prolong the detention of a noncitizen for up to 48 hours beyond the time in which the person would otherwise be released where the noncitizen has 1) maintained a conviction for a "violent or serious crime" or is listed on the "terrorist watch list"; and 2) has been previously deported and (allegedly) unlawfully reentered the United States.[8]

This provision and its corresponding asymmetry with the DOC directives under the NYC Detainer Laws[9], create legally awkward and ethically fraught scenarios in which it is sometimes actually safer for our noncitizen clients to be incarcerated in our local jails than be released on their own recognizance. Thus, in an almost unthinkable twist, NYCDS attorneys are forced to advise our noncitizen clients to *affirmatively ask that bail be set* in order to avoid ICE apprehension at arraignments.

The current law thus imperils our noncitizen clients, needlessly exposing them to the trauma and disruption of incarceration and wastes important city resources on jailing these individuals.[10] NYCDS therefore urges the City Council to fix this problem by passing legislation, like T2021-7657, which eliminates this loophole and prohibits the NYPD from honoring a non-judicial detainer under any circumstances. This will ultimately spare our immigrant community the surreal trauma of being uprooted from their families and communities to go to jail, and will save thousands of taxpayer dollars for the city.

d. [T2021-7659] (CM Powers), in relation to limiting communication between the department of correction and federal immigration authorities

Finally, NYCDS supports the passage of T2021-7659, which would prohibit DOC from "notifying" ICE when any noncitizen is scheduled for release from its custody absent a judicial warrant. For years, DOC has maintained that an exception to the general judicial warrant exists under A.C. § 9-131(h)(1), which provides that "[d]epartment personnel shall not expend time

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[8] NYC A.C. § 14-154(b)(2).
[9] Compare NYC A.C. § 9-131 (permitting enforcement of ICE detainer only where there is 1) a judicial warrant and 2) a conviction for a violent or serious crime or inclusion on the terrorist watch list).
[10] According to the most recent report by the NYC Comptroller, it costs the city roughly $1,226 a day to detain someone in a DOC facility. NYC Comptroller, NYC Department of Correction FYs 2010-20 Operating Expenditures, Jail Population, Cost Per Incarcerated Person, Staffing Ratios, Performance Measure Outcomes, and Overtime, March 2021, available at https://comptroller.nyc.gov/reports/nyc-department-of-correction/?utm_source=Media-All&utm_campaign=4aa603ff0a-EMAIL_CAMPAIGN_2017_05_31_COPY_01&utm_medium=email&utm_term=0_7cd514b03e-4aa603ff0a-141571729.

while on duty or department resources of any kind disclosing information ... unless such response or communication: (i) relates to a person convicted of a violent or serious crime or identified as a possible match in the terrorist screening database[.]"[11] DOC further interprets "a person convicted of a violent or serious crime" to include those individuals whose conviction occurred in the past five years, pursuant to A.C. § 9-131(a)(2). Thus, it is DOC's position that when encountering a noncitizen with a conviction for one of the enumerated "violent or serious" offenses in the preceding five years, it is entitled to contact federal immigration authorities and alert them to the time and place of the noncitizen's expected release from DOC custody.

This interpretation has always been problematic. First, DOC's reading appears on its face to conflict with A.C. § 9-131(b)(1), which dictates that DOC may only "honor" a detainer when accompanied by a warrant. While DOC may claim that it is not "honoring" a detainer but merely "communicating" with ICE, in fact, as S.S.'s story clearly demonstrated, this distinction is blurry at best. Indeed, as has long been suspected and recently discovered, DOC officials, under the auspices of "notifying" or "communicating" release information about noncitizens, in fact affirmatively coordinate with ICE to effectuate their transfer to ICE custody. In the process, noncitizens are unduly detained for hours and sometimes days with no legal authority. In essence, DOC officials use this provision to do just what the statute was enacted to prohibit – honoring a warrantless ICE detainer.

DOC, by exploiting the ambiguous language of the notification provision found in subsection (h)(1), has both distorted the letter of the NYC Detainer Law and subverted its spirit. The only appropriate way to fix this problem is to eliminate the notification provision entirely, and require judicial warrants for any cooperation with federal immigration authorities in the name of an ICE detainer. NYCDS therefore wholeheartedly supports this legislation and urges the City Council to pass it immediately.

IV. **Conclusion**

For all of the reasons stated above, NYCDS strongly supports the resolution and bills before this Committee today and urges you to pass them.

For any questions about my testimony, you can email me at cdalporto@nycds.org.

[11] NYC A.C. § 9-131(h)(1)

Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

Testimony of the New York Civil Liberties Union
to
The New York City Council Committee on Immigration
and
Committee on Criminal Justice
regarding
Oversight of New York City's Detainer Laws
and Related Legislation

June 9, 2021

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony with respect to the joint New York City Council Committee on Immigration and Committee on Criminal Justice oversight hearing concerning New York City's detainer laws and multiple bills and resolutions related to New York City and New York State's non-cooperation in immigration enforcement matters.

I. Introduction.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 100,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, through an integrated program of litigation, legislative advocacy, public education and community organizing.

The NYCLU has long fought for policies to protect New York's immigrant residents, and has worked closely with the New York City Council to disentangle the city from immigration enforcement. In 2011 and 2013, the NYCLU supported passage of local laws that restrict law enforcement from honoring immigration detainer requests, and subsequent legislation that strengthened those protections. The NYCLU worked closely with the city council in 2017 on a package of legislation that restricted using city resources for immigration enforcement and bolster the city's status as a place that welcomes immigrants. These local laws represent a

commitment from city officials to disentangle city law enforcement and other government agencies from federal immigration enforcement, and we welcome the Council's vigilance in making sure that commitment is kept.

Today's hearing and package of legislation provides an opportunity to take a critical look at how the city's local laws are being implemented and revisit loopholes and exceptions in those laws that continue to put New York City's immigrant residents at heightened risk. The laws passed by the Council over the past decade – restricting the use of immigration detainers and notifications to U.S. Immigration and Customs Enforcement (ICE),[1] prohibiting the use of city resources for immigration enforcement,[2] and limiting access to city property by non-local law enforcement[3] – provide a strong framework for protecting the rights of immigrant New Yorkers. But they are also beset by exceptions and carve-outs that exact double punishment on those with criminal convictions and extend the flaws of a racist criminal legal system.

The bills currently before the Council can help fix some of the shortcomings in the city's existing laws and constitute a step towards true disentanglement from immigration enforcement. Our testimony today focuses on the three bills before the committee, further steps the Council could take to disentangle the city from immigration enforcement, and how the Council can support legislative efforts at the state level to protect immigrants throughout all of New York.

II. Preconsidered T2021-7657 and T2021-7659: Removing harmful carve-outs from New York City's detainer laws.

Over the past decade, New York City has taken steps to limit the circumstances under which law enforcement will honor civil immigration detainers – requests by ICE to hold people in custody on criminal charges so that they can be transferred to ICE custody. In 2011, the Council enacted a local law to prohibit the DOC from honoring civil immigration detainers unless a person had been convicted of a crime, was a defendant in a pending criminal case, had an outstanding criminal warrant, or was identified as a gang member or match in a terrorist watch database.[4] The

[1] NYC Admin. Code § 9-131; NYC Admin. Code § 14-154.
[2] NYC Admin. Code § 10-178.
[3] NYC Admin. Code § 4-210.
[4] NYC Local Law No. 62 (2011).

Council acted again in 2013[5] and 2014[6] to strengthen the city's detainer laws by further limiting the circumstances under which detainers could be honored.

Today, city law generally prohibits the New York City Department of Correction (DOC) and the NYPD from holding a person on an immigration detainer unless presented with a judicial warrant *and* that person was convicted of certain enumerated violent or serious crimes or is identified as a match on a terrorist watch list.[7] The city's requirement of a judicial warrant to honor a civil immigration detainer in nearly all circumstances predates the recognition by the Second Department Appellate Division in 2018 that law enforcement officers in New York have no authority under existing state law to detain a person for civil immigration purposes without a judicial warrant, effectively prohibiting civil immigration detainers statewide.[8]

Yet the city's laws contain misguided exceptions that permit the DOC and NYPD to continue colluding with immigration authorities and funnel people into ICE custody. Though prohibited from holding a person beyond their release date for ICE without a judicial warrant, the DOC is permitted to disclose information to ICE regarding a person's incarceration status, release dates, or court appearances if it relates to a person convicted of certain offenses or is a match on a terrorist watch screening database.[9] This loophole has been used by the DOC to transfer 89 people to ICE since 2017.[10]

Local laws also permit the NYPD to hold people for ICE for up to 48 hours after their release date if a search reveals that they were convicted of certain crimes and re-entered the country after a previous removal, or is a match on a terrorist screening database.[11] This exception, which allows the NYPD to hold people without a judicial warrant, is called into serious question in light of the Second Department's decision in *Francis*.[12]

Permitting the DOC and NYPD to collude with ICE and transfer people into federal custody based on a person's criminal history or match on a government watch list is

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[5] NYC Local Law No. 21 (2013); NYC Local Law No. 22 (2013).
[6] NYC Local Law No. 58 (2014); NYC Local Law No. 59 (2014).
[7] NYC Admin. Code § 9-131(b)(1)(ii); NYC Admin. Code § 14-154(b)(1)(ii).
[8] *People ex rel. Wells o.b.o. Francis v. DeMarco*, 168 A.D.3d 31 (N.Y. App. Div. 2018).
[9] NYC Admin. Code § 14-154(h).
[10] *See* NYC DOC, *Statistics and Compliance: ICE Reports*, https://www1.nyc.gov/site/doc/about/statistics-and-compliance.page (total number compiled from ICE reports posted starting in FY2017 and ending in FY2020).
[11] NYC Admin. Code § 14-154(b)(2).
[12] *See Francis*, 168 A.D.3d at 53.

deeply misguided. Doing so doubles down on the well-recognized flaws of the criminal legal system, which disproportionately targets Black and Brown people and fails to provide defendants with meaningful due process. These exceptions also invite errors, such as in 2019 when the DOC transferred a Bronx man who did not fall within one of the above-noted exceptions into ICE custody in an admitted violation of local law.[13] Such a mistake would likely not have happened had the city's laws did not allow for ICE transfers in the first place. Other jurisdictions, such as Chicago, have backed away from similar carve-outs in recognition of the harm they cause.[14]

Preconsidered T2021-7659 would take a step towards ending ICE transfers by making clear that the DOC could only use city resources to disclose information to ICE under the same circumstances that it could honor a detainer, thus requiring a judicial warrant, or if the communication was unrelated to civil immigration enforcement. Preconsidered T2021-7657 would eliminate the suspect provision of local law permitting the NYPD to hold a person for ICE absent a judicial warrant. Together, these bills would meaningfully narrow the circumstances under which city law enforcement can collaborate with ICE and further safeguard the rights of immigrant New Yorkers.

III. Preconsidered T2021-7658: Permitting those unlawfully transferred to ICE custody to seek relief in court.

New York City's local laws restricting cooperation between city employees and ICE are designed to help protect immigrant New Yorkers from ICE's ruthless and expansive enforcement regime. Yet when those laws are broken, and people are held for ICE or transferred to federal custody unlawfully, there are few options for those people to hold the city accountable. The city's disentanglement laws provide for no specific remedies for such violations of local law, and the city's detainer laws pertaining to the DOC and NYPD expressly state that they shall not be construed to create a private right of action for people against the city.

Preconsidered T2021-7658 would fix this by allowing people who are detained in violation of the DOC and NYPD detainer laws to bring an action in any court of

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[13] Eric Lach, *A Deportation Nightmare in the Bronx*, The New Yorker (Feb. 20, 2021), https://www.newyorker.com/news/our-local-correspondents/a-deportation-nightmare-in-the-bronx.
[14] Fran Spielman, *City Council eliminates carve-outs to strengthen Welcoming City ordinance*, Chicago Sun-Times (Jan. 27, 2021), https://chicago.suntimes.com/2021/1/27/22252689/immigration-chicago-city-council-eliminates-carve-outs-welcoming-city-ordinance-ice-undocumented#:~:text=By%20a%20vote%20of%2041%20to%208%2C%20the%20Chicago%20City,or%20prior%20felony%20convictions%3B%20or.

competent jurisdiction for a claim of unlawful detention and seek civil damages or declaratory or injunctive relief. Creating such a cause of action would ensure that the city's laws have real teeth, and fill an accountability void that leaves law enforcement without consequences for violating local law. The Council should also consider extending the opportunity to seek judicial relief to other types of cooperation between local government and ICE that violates local law.

IV. Additional improvements to local law to disentangle New York City from immigration enforcement.

The three bills before the committee today represent a start to strengthening city laws that keep local law enforcement out of immigration enforcement. But this legislation must be the beginning, not the end. There is much more the city can do to better ensure that New York City is a welcoming place for immigrants and that city resources are not misused doing the work of federal immigration authorities.

In 2017, the Council passed a local law that broadly prohibits the use of city resources, including time on duty, for immigration enforcement.[15] This additional prohibition was intended to cover any gaps in city laws and executive orders that distance city employees from the work of immigration authorities, and make sure that all city agencies and contractors are covered, not just law enforcement. However, this law also contained vague exceptions and caveats, providing that it shall not prevent city employees from "performing their duties in accordance with state and local laws" and allowing the use of city resources for immigration enforcement if done as part of cooperative arrangements with federal law enforcement that are not "primarily intended to further immigration enforcement" and is necessary to otherwise."[16]

These exceptions are open to interpretation, and have left law enforcement and other city agencies too much latitude to determine when cooperation with immigration authorities is justified. In implementing this prohibition, the NYPD permits decisions about whether to support non-local law enforcement agencies to be made by the highest ranking officer at the scene in "emergency, public safety related situations," rather than going through more rigid review protocols.[17] The Patrol Guide also reminds officers that the prohibition on resources does not apply to task forces not primarily intended to further immigration enforcement, without

[15] NYC Local Law No. 228; NYC Admin. Code § 10-178.
[16] NYC Admin. Code § 10-178(e).
[17] NYPD Patrol Guide No. 212-126 (June 13, 2019).

providing any more guidance as to what that means.[18] It is unclear how these permissions are being exercised in practice. The Council should revisit these exceptions, and in doing so, use its oversight authority to gather more information about how they are currently being applied.

The Council should also ensure better transparency in the implementation of city laws pertaining to immigration enforcement. The city resources law requires that requests to assist immigration enforcement be recorded, along with the action taken, and reported to the speaker of the City Council.[19] However, the city is not required to post the reports publicly, and advocates have had difficulties obtaining them in a timely manner. Both the DOC and NYPD are also required to report on the detainers they receive and how they respond, but because those reports are only required annually, they provide only a distant rearview look at the operation of the city's detainer laws. The information contained in all of these reports is often quite bare, omitting details that would give the public and advocates a real sense of how city employees' interactions with ICE play out.

The Council should revisit the reporting provisions in both the detainer and city resources law and provide for true transparency. At minimum, the Council should require that all reports be made available to the public and posted online, and require a more detailed narrative accounting of interactions with ICE with specific data points. The Council should also work with advocates to develop a system by which those representing people detained can obtain real-time information about detainers that have been lodged so they can appropriately protect the rights of their clients and monitor how the city is or is not complying with its obligations.

V. Res. 1648-2021: Calling on the New York State legislature to pass the New York For All Act (A.2328/S.3076).

Within New York State, New York City has led the way in recognizing that immigration enforcement is not the job of local authorities, and has enacted local laws aimed at restricting cooperation with ICE. A few other localities, such as Westchester County,[20] have passed laws for resolutions of their own, and some law enforcement agencies have adopted internal policies limiting cooperation with ICE. Yet across the state, a patchwork of local laws and policies leaves immigrant New

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[18] *Id*.
[19] NYC Admin. Code § 10-178(d).
[20] Westchester Immigrant Protection Act, Westchester County Board of Legislators Act 19-2018 (Revised Feb. 22, 2018), *available at* https://humanrights.westchestergov.com/images/stories/pdfs/2018immigrationAct.pdf.

Yorkers vulnerable to insidious collusion between local police and ICE and U.S. Customs and Border Protection (CBP).

Local law enforcement and other state and local government agencies have no business enforcing immigration law anywhere in New York. Police should not have more leeway to turn someone over to ICE in Elmont than they do in St. Albans. And while New York City is justified in regulating its own police and corrections departments, state law should make clear as a bedrock matter that no law enforcement can entangle themselves in immigration enforcement.

The New York For All Act[21] would end this patchwork of local laws by prohibiting, in a variety of different ways, state and local law enforcement and government employees across New York from assisting with immigration enforcement. The legislation would make clear that a police or peace officer's duties shall not include immigration enforcement, and that they shall not use public resources to enforce immigration law. The bill would specifically prohibit notifying ICE of a person's release date, court appearance, or other information available to an officer as a result of their employment, and prohibit facilitating transfers to ICE without a court order or judicial warrant. The bill would further require that people in local custody are told of their rights if they are interviewed by ICE and prohibit the use of ICE or CBP as translators. Restrictions would apply to all police and peace officers, and to state and local government employees throughout New York.

The New York For All Act would bolster the city's existing restrictions and make sure these protections are felt across New York. Other states, such as California and Washington, have taken the lead in restricting entanglement with immigration authorities statewide. New York State lags behind. We urge the Council to use its voice to push for statewide protections for immigrant New Yorkers by passing Res. 1648-2021 and calling on the legislature to pass the New York For All Act.

VI. Conclusion.

For the past decade, New York has taken steps toward becoming a city that truly welcomes immigrants by making clear that it won't take part in ICE's cruel enforcement regime. But there is more work to be done, both locally and throughout New York State. We thank the City Council for its interest in improving the city's detainer laws and pushing for statewide protections, and we look forward to working with city officials on these issues moving forward.

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[21] A.2328-A (Reyes) / S.3076-A (Salazar) [2021-22].

THE LEGAL AID SOCIETY
Justice in Every Borough.

TESTIMONY BEFORE
THE COUNCIL OF THE CITY OF NEW YORK
COMMITTEES ON IMMIGRATION AND
CRIMINAL JUSTICE

JUNE 9, 2021

Introduction

This testimony is submitted on behalf of The Legal Aid Society. We want to thank the New York City Council for their interest in providing oversight and enforcement of New York City's Detainer Law, and for inviting us to participate in this hearing.

The Legal Aid Society

The Legal Aid Society (LAS), originally founded in 1876 to provide comprehensive services to New York City's immigrant community, is the nation's oldest and largest non-profit legal service provider of legal help for vulnerable low-income children and adults. LAS is organized into three practice areas: Civil, Juvenile Rights and Criminal Defense. Each year, the Society's staff provides free legal services in over 300,000 legal matters involving indigent families and individuals in all five boroughs of New York City. LAS's experience and knowledge, makes it uniquely qualified to address the issue before the Council.

LAS has for decades maintained a robust citywide Immigration Law Unit (ILU) that specializes in representing non-citizens in removal proceedings before the New York immigration courts, in petitions before the United States Citizenship and Immigration Service (USCIS) and in federal court, and on appeals. Staff also advises criminal defense attorneys about the immigration consequences of criminal convictions. LAS has a specialized unit, the Criminal Immigration Practice, dedicated to advising and assisting non-citizens who have contact with the criminal justice system. In this capacity, the Criminal Immigration Practice has

worked closely with non-citizen clients at Rikers Island, their lawyers, and the Department of Corrections (DOC) in navigating the New York City Detainer Law.

The New York City Detainer Law Creates Barriers to Treatment

LAS routinely encounters non-citizen clients who are charged violent or serious felonies. Frequently these clients are suffering from untreated mental health or addiction issues, and are offered treatment as a way to humanely resolve their case. Although not required by law, District Attorneys will often require the client to plead guilty to the most serious offense charged as a condition of their treatment offer. If the client successfully completes the program, the plea can later be withdrawn, and the case either dismissed or resolved with a lower level offense.

Non-citizens who have been charged with violent or serious felonies, however, are unable to take advantage of these treatment programs, for fear that the initial plea will trigger notification to Immigration and Customs Enforcement (ICE), transfer from New York criminal custody to immigration detention by ICE, and potential removal from the United States. Non-citizens instead plead guilty to lower level offenses which are not violent or serious felonies, accept longer periods of incarceration, and are eventually released into the community without treatment. The New York Detainer law constrains non-citizens from taking advantage of the mental health and addiction services that they often need, harming both the client and the community at large.

The Department of Corrections Liberally interprets the Notification Provision of the Detainer Law to Circumvent the Law's Judicial Warrant Requirement

DOC's interpretation of the "notification provision" undermines the NYC Detainer Law, which requires ICE to produce a judicial warrant before taking a non-citizen into custody. Although the DOC does transfer clients to ICE if they have a violent or serious felony, ICE rarely, if ever, produces a judicial warrant, as required by the code. DOC justifies their actions by relying on the "notification" section of the detainer law, which reads:

> Department personnel shall not expend time while on duty or department resources of any kind **disclosing information** that belongs to the department and is available to them only in their official capacity, in response to federal immigration inquiries or in communicating with federal immigration authorities regarding any person's incarceration status, release dates, court appearance dates, or any other information related to persons in the department's custody, other than information related to a person's citizenship or immigration status, **unless such response or communication: (i) relates to a person convicted of a violent or serious crime** or identified as a possible match in the terrorist screening database; (ii) is unrelated to the enforcement of civil immigration laws; or (iii) is otherwise required by law. NYC Administrative Code 9-131(h) (emphasis added.)

In 2018, LAS represented a mentally-ill legal permanent resident of the United States, W.S. W.S. had prior misdemeanor convictions which the lawyers believed to be crimes involving moral turpitude. W.S. also had a 2014 conviction for attempted reckless assault in the second degree, a legally impossible crime which does not carry negative immigration consequences, but nonetheless falls within the ambit of the Detainer Law. W.S.'s lawyers worked tirelessly to place W.S. in mental health treatment, and to negotiate pleas which maintained his eligibility for cancellation of removal, a form of discretionary relief from removal in immigration court. After extensive negotiations, W.S. pled guilty to immigration-safe pleas in New York Criminal Court. Because W.S. had already served his time, he expected to be released from the courthouse, back into the community. He was returned to Rikers Island, ostensibly for mental health discharge planning. Instead, he was turned over to ICE by the Riker's Island staff, even though ICE had not presented a warrant from a federal judge. DOC justified their transfer to ICE under the communication section of the NYC Detainer law.

In W.S.'s case, DOC's coordination with ICE went well beyond communication**.** DOC informed ICE of the date and time of W.S.'s release, permitted ICE onto Rikers Island to arrest him, oversaw his transfer to ICE, and then recorded this transfer on the DOC website. DOC's justification was that as a public safety policy, DOC had decided to ensure an "orderly transfer" to ICE when someone has a violent or serious felony.

The "notification loophole" is being used by DOC to evade the NYC Detainer law – DOC is not simply informing ICE of non-citizen's release dates, they are using DOC resources and property to oversee well-coordinated transfers, without ICE producing any judicial warrants.

Conclusion

LAS asks that the City Council ensure that the letter and spirit of the NYC Detainer Law are enforced, and that there is meaningful oversight to protect non-citizen New Yorkers from DOC's deliberate abuses of the notification loophole. For New York to truly be a sanctuary city, these abuses must end immediately. Thank you for the opportunity to testify on this important issue. We welcome any questions from the panel.

The Legal Aid Society

By:

CARDOZO LAW
BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY
KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC

Peter L. Markowitz, *Co-Director*
Professor of Law

Lindsay Nash, *Co-Director*
Clinical Assistant Professor of Law

Mauricio E. Noroña
Clinical Teaching Fellow

Alisa R. Whitfield
Clinical Teaching Fellow

(646) 592-6416
Fax (212) 790-0256

MAKE THE ROAD NEW YORK
DIGNIDAD, COMUNIDAD Y PODER

92-10 Roosevelt Ave.
Queens, NY 11372

301 Grove St.
Brooklyn, NY 11237

161 Port Richmond Ave.
Staten Island, NY 10302

Joint Testimony of the Kathryn O. Greenberg Immigration Justice Clinic and Make the Road New York
to
The New York City Council Committee on Immigration
and
Committee on Criminal Justice
regarding
Oversight of New York City's Detainer Laws and Related Legislation

June 9, 2021

Thank you to the Committees on Immigration and on Criminal Justice ("the Committees") for holding this public hearing to address devastating violations of New York City's detainer laws. The Kathryn O. Greenberg Immigration Justice Clinic ("IJC") at the Benjamin N. Cardozo School of Law and Make the Road New York ("MRNY") jointly submit the below written testimony in support of: Intros. T2021-7657 and T2021-7659 to further limit any communication between New York City agencies, including Department of Corrections ("DOC") and the New York Police Department ("NYPD") and Immigration and Customs Enforcement ("ICE"); Intro. T2021-7658 to allow those unlawfully transferred to ICE custody a private right of action; and Res. 1648-2021, to call on the New York State legislature to pass the New York For All Act (A.2328/S.3076).

I. I. Introduction

IJC is a law clinic that represents individuals facing deportation as well as community-based organizations in public policy and litigation matters. IJC has a long-established interest in fighting for the rights of immigrants in the U.S., including by representing people who have been detained and otherwise harmed as a result of ICE detainers. Of particular relevance here, IJC has played a pivotal role in developing the concept of detainer discretion and helping develop New York City's initial disentanglement laws as well as subsequent amendments. IJC also works with individuals, including organizations who represent clients, harmed by the violation of these laws. Accordingly, IJC has a strong interest in strengthening these laws and ensuring that municipal law enforcement adheres to the letter and spirit of these laws.

Make the Road New York, is the largest participatory immigrant-led organization in New York City, with over 23,000 members. MRNY has locations across New York City, Westchester County and Brentwood, Long Island and works closely with black, brown, and working class immigrant families. MRNY operates through four core strategies: legal and survival services, transformative education, community organizing and policy innovation. Through our organizing and legal teams, MRNY has an immigrant defense initiative that has supported over 300 New York families whose loved ones have fallen into the deportation pipeline. We understand that senseless hyper enforcement criminalizes Black and brown communities, and many of our members have been unjustly persecuted and detained by ICE as well as by the continued relationship of local enforcement, including the NYPD and New York City Department of Correction, with ICE.

Together, the IJC and MRNY have long worked to propose and support municipal laws and policies to protect New York's immigrant community members, including by working closely with the City Council on the laws at the heart of the hearing today: those that seek to disentangle local law enforcement and other city agencies from federal civil immigration enforcement. These municipal laws have been critical in limiting the interactions between city law enforcement and other government agencies from federal immigration enforcement, and in protecting immigrant community members. As a result of New York City's disentanglement laws, immigrants across the country have often looked to our city as a "sanctuary city"—a place where immigrants can feel safe and thrive. But despite the sanctuary moniker, New York City has a long way to go to make immigrants feel safe from ICE and senseless ICE enforcement that threatens to deprive them of liberty and separate them from their families. We appreciate the City Council's recognition that it must take additional steps to close loopholes and gaps in these laws and ensure that local officers comply with them. This joint written testimony recognizes the importance of the package of legislation listed above, applauds Council Members Menchaca and Powers for taking steps to address this issue, and describes some of the ways in which this package of legislation must go further.

II. II. Urgent Need to Eliminate Ongoing Cooperation Between City Agencies III. and Immigration Enforcement.

MRNY has worked with hundreds of families who have had encounters with Immigrations and Customs Enforcement (ICE), either by witnessing an arrest or being the person detained. In some cases, city officers are directly involved. In other cases, ICE officers masquerade as NYPD officers, sowing confusion and terror as well. Unfortunately, in both types of cases, the stories are consistently characterized by deep trauma, unnecessary use of force, surveillance, and lack of transparency--and they often end with family and community members confused as to who actually carried out the arrest and unsure where to turn. In addition to the proposed legislation that rightly aims to close some of the loopholes in the city's disentanglement legislation, the city must take affirmative measures to eliminate the fuller set of harms that affect our immigrant community members.

To illustrate the magnitude of these harms, we offer the story of an MRNY member who was detained in 2020, in the midst and peak of the COVID pandemic.[1] The morning of the arrest, he was awoken by ICE agents—who did not identify themselves as ICE—banging on the door. Scared, he called 911. NYPD officers arrived shortly thereafter, and they twice called and urged him to come outside, telling him there was "no one there." But, as the NYPD officers clearly knew, that was not true. ICE was there, waiting for the MRNY member. When the MRNY member came outside, at the urging of the two NYPD officers, he was quickly arrested by ICE. Adding insult to injury, the NYPD officers who had lied to him were not wearing masks; transferred to ICE detention, the MRNY member quickly caught COVID, a miserable and harrowing experience he suffered alone in a county jail, and he was ultimately deported from the country in which he had lived since the age of 12.

To our knowledge, the NYPD did nothing to report this collaboration and facilitation of an ICE arrest to either MOIA or City Council. The single short record that he obtained via FOIL, after a two-month wait, contained no mention of ICE.

This experience shows why New York City must ensure that it closes loopholes and gaps in all of its disentanglement laws rather than just its detainer-related laws. These loopholes amplify the harms from the criminal legal system, which disproportionately targets Black and brown New Yorkers, and sow fear and mistrust in immigrant communities. The City Council should completely and clearly prohibit local law enforcement agencies from supporting ICE enforcement actions, which should include taking—at minimum—the following four steps:

1. Eliminate the current "cooperative arrangement" exception that exists in current municipal disentanglement laws. The past four years have demonstrated like never before the brutality and lawlessness that permeate DHS and make it clear that DHS—and ICE in particular—cannot be relied upon to adhere to limits. New York City must fully disentangle itself from cooperative arrangements with DHS. The City should follow the lead of other cities that have done away with cooperative arrangement exceptions altogether.

2. Prohibit *any* NYPD support for ICE enforcement actions. Given recent reports of the NYPD providing assistance for ICE enforcement actions in the name of public safety, including the story shared above, the City must take further steps to come into compliance with existing law: the NYPD should not be involved in facilitating ICE enforcement actions and public safety will not be accepted as a pretext. The City should make clear at every opportunity, including through the NYPD patrol guide and training for officers, that ICE alone is responsible for adequately staffing its own enforcement actions and avoiding the creation of public safety concerns. The NYPD's record-keeping and reporting obligations, including those at NY Admin Law § 10-178e(d), must also be fully enforced through the creation of a rigorous regime requiring detailed reporting on *all* communications and interactions with ICE.

[1] The MRNY member will remain anonymous to protect his privacy.

3. End *all* transfers to ICE and all communications between DOC and ICE. While the City prohibits its officers from using time to provide information to ICE or transferring people to ICE custody in many instances, it still permits some notifications and transfers to ICE based on a person's criminal history and other factors. This exception is unjust. It has allowed DOC to do an end-run around city law by transferring people to ICE without judicial warrants; it leads to prolonged detention (a practice DOC neither documents nor acknowledges) and other adverse consequences for people in DOC custody; and it creates the unnecessary risk that municipal officers will erroneously provide information about a person or facilitate their transfer to ICE, a documented problem, and it must be eliminated.

4. Take strong action to prevent ICE "ruses," in which ICE impersonates the NYPD, including through community education, advocacy with federal officials, and possible steps to distinguish NYPD uniforms.

IV. III. Critical Importance of Robust Private Rights of Action Legislation

Given the critical nature of the city's disentanglement laws, the fact that local officers and agencies are violating these laws, and the devastating harms that result when violations occur, it is imperative that the city take strong action to assure compliance and hold bad actors accountable when they violate these laws. For this reason, IJC and MRNY strongly support the adoption of Intro. T2021-7658—which would provide a private right of action for certain violations of the city's detainer laws—with the crucial amendments described below.

As a threshold matter, it is important to underscore why this bill is important: it recognizes the need for accountability when local officers violate these laws, and it seeks to place the power to hold officers accountable in the hands of those who have been harmed. It also allows the veil of secrecy in cases like that of MRNY's member, described above, to finally be lifted in the context of litigation and discovery. This accountability-enhancing mechanism is something that, to date, has been absent from the City's disentanglement laws and, as the continued violations of law by city actors described today show, is sadly critical for promoting the efficacy of these laws. This legislation is a laudable first step toward that goal, but, to make this legislation meaningful and to ensure that it promotes genuine accountability, the City Council should make the following changes to this legislation:

1. This bill only provides a cause of action when people are *detained* in violation of the city's detainer laws. While this is a good start, we know that there are other types of violations of the city's disentanglement laws, including its detainer laws, which can have equally devastating consequences. In an era of surveillance and regular ICE raids at homes and places of employment, DOC and NYPD must be held responsible for ICE detention that results from their passage of information on to ICE and other violations of city law, just as they would be if they handed a person directly to ICE. The City should provide a private right of action where city agencies provide notifications of release or other information to ICE, as well

as instances in which city officers and agencies provide other kinds of support to ICE.

2. This legislation should set a statutory damages amount so that, when a party proves a violation, they are automatically entitled to some significant amount of damages, as a minimum. This would allow people who have already been deeply wronged by the violation to avoid having to prove the harm that they experienced and why that should be compensated at a certain level. Adopting a statutory damages amount is necessary because having to prove the extent of and type of harm of disentanglement law violations is often difficult in practice even where very real harm exists. Having to prove damages also burdens the person whose rights were violated and their family members, as it can expose many sensitive aspects of their life to invasive discovery. Creating a set statutory damages amount would allow them to avoid these problems and recover after proving a violation.

3. While this bill provides for prevailing parties to recover the costs expended in litigation, it should explicitly provide for them to recover attorneys' fees as well. A vindication of rights under this law requires an attorney. Yet often individuals who have experienced violations do not have the funds to hire an attorney; nonprofit civil damages attorneys are extremely rare; and private attorneys cannot afford to take on individual cases with damage amounts likely lower than other types of civil cases and no possibility of attorneys' fees. For these reasons, adopting a fee-shifting provision to provide for attorneys' fees will be critical to ensuring that harmed individuals can access counsel to help them litigate these cases. In addition, the bill should specify that fees will be calculated based on the hourly rate charged by attorneys of similar skill and experience litigating similar cases when it chooses to factor the hourly rate into an attorney's fee award.

4. The bill should impose more transparency-inducing measures, including real-time agency reporting of any contact with ICE or CBP and a right of access to certain documents associated with potential violations of city law. The bills should allow people who believe they have experienced a violation to immediately obtain the records associated with the incident or interaction at issue, without requiring them to go through the lengthy and frustrating Freedom of Information Law (FOIL) process. The delays and inadequate responses available through FOIL allow agencies to shield their interactions with ICE from awareness and accountability, as MRNY's member detained by ICE with the assistance of the NYPD found.

5. This bill should ensure that damages awards for violations of these laws are paid by the party responsible, whether that be the officer or the agency at fault. At present, these awards are paid through a general municipal fund, and it is important—for the accountability-enhancing goals of the legislation—that the agency and officers themselves feel the financial consequences of their actions.

6. The bill should provide that exhaustion of any administrative remedies is not required for a person aggrieved to commence a civil action under the law, and—particularly given the challenges of obtaining documentation of these violations—it should provide a four-year statute of limitations.

7. The bill should provide that neither qualified immunity or any similar type of immunity is a defense in actions commenced under the law.

* * * * *

In sum, the package of legislation proposed represents an important step in strengthening and ensuring municipal compliance with letter and spirit of the city's disentanglement laws. With the modifications we describe above, these laws will provide urgently needed restrictions on municipal cooperation with ICE and powerful tools for holding local law enforcement accountable for complying with these laws.

My name is Caren Holmes and I am testifying from Brooklyn. I'm here today to talk about how both the NYPD and DOC fail to comply with NYC's detainer laws and willingly jeopardize the lives of immigrant New Yorkers.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. As is, NYC's detainer laws allow for City resources to be used for federal immigration law enforcement. Under no circumstances should the NYPD or DOC be allowed to collaborate with ICE. NYPD and DOC should not be able to share information with ICE, notify ICE of someone's imminent release from NYPD or DOC custody, transfer people into ICE custody, and otherwise be complicit in ICE arresting immigrant New Yorkers. There should be no exemptions to the detainer laws whatsoever, including the De Blasio administration's 177 "convictions carveouts" which create ambiguous, discretionary loopholes that NYPD and DOC can - and do - abuse to further conspire with ICE.

Under the current law, the NYPD and DOC act as foot soldiers for ICE. What do I mean by that? NYPD routinely arrests our immigrant neighbors, often without cause and under unconstitutional circumstances, which is wrong in any case but is doubly damaging for people who aren't US citizens. NYPD and DOC then routinely report criminal arrests to federal ICE agents, who then detain people, often indefinitely, as they process them in deportation courts where due process matters even less than in criminal courts. At a time when COVID continues to ravage our federal detention centers, detaining people in ICE facilities and deporting them can be, and often is, a death sentence.

The detainer laws extend ICE's reach throughout New York neighborhoods, increase our overall jail and prison population, and exacerbate an existing culture of fear that disproportionately affects immigrant communities. Put simply, the current detainer laws and DOC and NYPD's failure to properly comply with them make a mockery of the idea that NYC is a sanctuary city. A sanctuary city protects all immigrant New Yorkers from the federal deportation machine.

The City Council must stop being complicit in ICE surveillance and enforcement. End the 177 convictions carveouts. Give reparations to Black and brown immigrants who are survivors of NYPD, DOC, and ICE violence. Defund NYPD for regularly flouting NYC law at the expense of the lives of immigrant New Yorkers. And close Rikers now without any new jails.

hispanicfederation

NATIONAL HEADQUARTERS
55 Exchange Place, 5th FL
New York, NY 10005
Phone: 212.233.8955
Hotline: 1.866.HF.AYUDA

NYC Council Committee on Immigration and Committee on Criminal Justice
Public Hearing on New York City Detainer Laws

Written Testimony Submitted by
Yamilka Mena, Director of Immigration Initiatives
Hispanic Federation

Wednesday, June 9, 2021

Good morning Co-Chairs Menchaca, Powers, Ranking Members and Members of the committee. Thank you for the opportunity to testify before you today on behalf of New York City Detainer Laws. My name is Yamilka Mena and I am the Director of Immigration Initiatives at the Hispanic Federation (HF). For 30 years, Hispanic Federation's work has centered on building power and capacity in Latino and immigrant communities and in the nonprofits that serve them through institutional development, policy advocacy and programs in the areas of education, immigration, health, civic engagement, and economic and community development.

Immigrants are vital to the fabric of America and New York. About 36.7 percent of New York City residents are foreign-born[1]. Out of all foreign born, almost 6 percent (476,000 New Yorkers) are undocumented[2]; the vast majority are of Latino backgrounds. During the height of the pandemic, they became the lifeline of New York City. Immigrant essential workers—many of them undocumented—supplied and delivered our food, cleaned our hospitals and grocery stores, and were at the frontline of the healthcare industry[3]. The recognition of their commitment and service was heard all throughout New York City—yet we can do more to ensure that we continue to protect our immigrant neighbors.

Impact of ICE in our Communities

Although it was heavily acknowledged that immigrants keep our city running, the undocumented immigrant community has continuously been left out of federal aid such as receiving stimulus funding, expansion of health benefits, housing assistance and more. The Excluded Workers Fund passed by the state was a huge win for our communities. However, as a sanctuary city, we must ensure that we continue to push for reform that will further mitigate the serious challenges faced by undocumented immigrants, and especially as it pertains to federal immigration enforcement.

[1] Mayor's Office of Immigrant Affairs (MOIA) Annual Report 2020.
https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2020.pdf
[2] MOIA Annual Report 2020
[3] FWD.US- Undocumented Immigrant Essential Workers: 5 Things to Know
https://www.fwd.us/news/undocumented-essential-workers-5-things-to-know/

Immigration and Customs Enforcement (ICE) has deep history of cruel and illegal treatment of undocumented immigrants. Between 2017 and 2018, the Immigrant Defense Project (IDP) noted a 1700% increase[4] in arrests and attempted arrests by ICE in or around courthouses. The reports of ICE alone have had a chilling effect on the ways that undocumented immigrants interact in our city. There is a deep embedded fear of deportation every day when stepping outside of their door. Mixed-status and multi-generational households are constantly fearing for the safety of their family members while experiencing feelings of guilt that some are safe from ICE, while others are not. This fear is so deeply integrated that many families do not live full lives—this anxiety and distress must end.

A Safer New York For All

When the Protect Our Courts Act (POCA) became law in 2020, it was the first step toward protecting the undocumented community from the cruelty of ICE in our court system. Now, as the inequities that have existed within the undocumented communities continue to expand, Hispanic Federation is asking the City Council to act more broadly.

Under the New York For All Act (A.2328 / S.3076), state and municipal officers are prohibited from enforcing federal immigration laws, funneling people into ICE detention, and sharing sensitive information with ICE. The legislation prohibits ICE from entering non-public parts of state and local property without a judicial warrant. It also ensures that all detainees are informed of their rights prior to being interrogated. The State must pass this legislation to create a safer New York for immigrant communities.

The proposed legislation from Council Member Powers (T2021-7657 and T2021-7659) are immediate actions that will create direct alignment between all municipal and state officers. By prohibiting the Department of Corrections and the NYPD from honoring civil immigration detainers without a judicial warrant, undocumented individuals will feel safer in this city. Council Member Menchaca's legislation (T2021-7658) creates a private right to action that will support undocumented immigrants' rights to protect themselves and their families while demanding accountability if they are wrongfully detained. Together, these policies will serve as further commitment to protect all New Yorkers regardless of their status.

When immigrants feel safe in their communities, they are more likely to participate in our society—economically, socially, and civically. Mitigating the continuous fear of deportation is the responsibility of us all and the proposed legislations can help us move toward a more just city for everyone.

Recommendations

As a sanctuary city, New York must reinforce its commitment to protect all New Yorkers despite their immigration status. The City Council can act on this commitment by:

[4] Immigrant Defense Project- The Protect Our Courts Act is Now Law in New York State! [Fact Sheet] https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Community-FAQ-POCA-EN-1.pdf

- Passing the Resolution to call on the New York State Legislature to pass, and the Governor to sign, the New York for All Act (A.2328 / S.3076);
- Adopting the three aforementioned legislations to align with the hopeful passage of the New York for All Act in the State Legislature;
- Consider coupling the elimination of ICE from New York City with expanded immigration legal services for the most vulnerable populations in need of representation;
- Emphasizing the distribution of multi-lingual community updates pertaining to the ever-changing status of immigration law, detainer policies, and protections from ICE; and
- Supporting continued expansion of benefits that will support the undocumented community such as the Excluded Workers Fund.

Thank you for your time. Hispanic Federation continues our commitment to work with the New York City Council to support the prioritization of policies and programs that will make our undocumented immigrant community feel safe at home in the city they kept moving during the gravest of times.

New York City Council Committees on Immigration and on Criminal Justice
June 9, 2021
Hearing on New York City Detainer Laws and Related Legislation
Testimony of Genia Blaser, Senior Staff Attorney, Immigrant Defense Project

Thank you to the Committees on Immigration and on Criminal Justice ("the Committees") for holding this public hearing to address the New York City Detainer Laws[1]. I am testifying today in support of Intros. T2021-7657 and T2021-7659 to further limit any communication between New York City agencies, including Department of Corrections ("DOC") and the New York Police Department ("NYPD") and Immigration and Customs Enforcement ("ICE"), and to pass Intro. T2021-7658 to allow those unlawfully transferred to ICE custody a private right of action.

The Immigrant Defense Project ("IDP") is a New York-based nonprofit that works to minimize the harsh and disproportionate immigration consequences of contact with the criminal legal system by working to transform unjust deportation laws and policies, and educating and advising immigrants, their criminal defenders, and other advocates.

In an effort to limit the damage that ICE surveillance and policing wreaks on New York communities, IDP has long advocated to end the entanglement between the criminal legal system and ICE. Through our criminal-immigration helpline, IDP has fielded thousands of inquiries over the years from concerned New Yorkers, both directly impacted individuals and their family members. Through our *Padilla Support Center*, IDP is a Regional Immigration Assistance Center ("RIAC") for New York City. The IDP RIAC trains and advises criminal defense attorneys on the Assigned Counsel Plan[2] in New York City about the immigration consequences of criminal cases, including issues regarding ICE detainers, the New York City Detainer Law, and ICE policing trends. We are constantly confronted with the unnecessary and heedless cruelty caused when ICE rips New Yorkers out of their communities and away from their families, through the agency's indiscriminate deportation dragnet.

After significant advocacy by IDP and other advocates, New York City passed its first Detainer Law in 2011, on the premise that immigrant New Yorkers should be protected from the overreaching arm of ICE. This law was passed while ICE was aggressively implementing its Secure Communities program nationally. This program effectively

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[1] Int. No. 656, L.L. 62-2011, codified at N.Y.C. Admin. Code § 9-131; Int. No. 928, L.L. 2013/021, codified at N.Y.C. Admin. Code § 14-154; Int. No. 989, L.L. 2013/022, codified at N.Y.C. Admin. Code § 9-131; Int. No. 468, L.L. 2014/058, codified at N.Y.C. Admin. Code § 9-131; Int. No. 487, L.L. 2014/059, codified at N.Y.C. Admin. Code § 14-154; Int. No. 1558, L.L. 2017/226, codified at N.Y.C. Admin. Code § 9-205; Int. 1568, L.L. 2017/228.

[2] New York County Law 18-B, *see* https://www.nysenate.gov/legislation/laws/CNT/A18-B.

transformed the police precinct into a notification system for ICE by automatically forwarding the fingerprints of all people arrested by local law enforcement from the FBI database to the Department of Homeland Security ("DHS"). After processing this information, ICE will lodge a request with local law enforcement— an administrative form called a "detainer"—asking whichever agency had the individual in its custody to either hold the person for ICE or notify ICE about release.

Since that time, ICE has embedded itself in the criminal legal system, requiring cities such as New York to come up with policies to limit the harms of ICE's looming presence in our city. After the initial detainer policy, New York City passed two other policies, with each one becoming increasingly more protective of immigrants' rights. One goal of passing a detainer law in New York City was to send a clear message that an arrest by NYPD should not be a pipeline to ICE detention and deportation. In February 2020, IDP testified before this Council as to the harms of ICE policing, particularly to their pretending to be NYPD officers in making arrests.

The current version of NYC's detainer law, in place since December 2014, falls short of this message and the original premise of a New York City anti-detainer policy. Under N.Y.C. Admin. Code § 9-131, DOC is prohibited from honoring ICE detainers or notifying ICE about the release of immigrant New Yorkers from its custody, except for people who fall into a particular "carve-out" category. Pursuant to the carve-out, DOC will honor a detainer or notify ICE when ICE presents a judicial warrant (issued by an Article III judge) and also where the individual in DOC's custody has either 1) been convicted of one of 177[3] enumerated "Violent or Serious Crimes" (VSCs) within five years of the current arrest *or* 2) the individual is a possible match on the terrorist watch list. At the time this law passed, advocates raised concerns about having any carve-outs in a law intended to cut off the arrest-to-deportation channel and protect immigrant New Yorkers. Advocates pointed out how the carve-out feeds into ICE's false rhetoric that some immigrants are perpetual threats to public safety and therefore, disposable under our sanctuary policies.[4] Advocates also highlighted the mixed message being sent by Council, that some people **should** be transferred and others should be spared.[5] In response to this concern, the judicial warrant requirement for cooperation was added to

[3] While the 2014 detainer law included 170 offenses labelled "Violent or Serious Crimes" in the carve-out, 7 additional offenses were added in December 2019. *See* Rules of the City of New York, Title 39, Chapter 2,*"Violent or Serious Crimes for Purposes of Honoring Civil Immigration Detainers",* accessible at https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-123703.

[4] Testimony from the October 15, 2014 hearing on proposed changes to N.Y.C. Admin. Code §9-131 available by clicking on "testimony" link in the middle of the page: https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1935437&GUID=0A456911-54A6-41E5-8C5A-1D3B231D56AA

[5] *Id.*

further due process for immigrant New Yorkers but the carve- out remained part of the law.

It has become increasingly clear that because of the carve-out, DOC's interpretation of the law is against the spirit of the law. As advocates today will testify, carve-outs have led to a systemic problem of misinterpretation within DOC as to when and for whom communication with or notification to ICE is allowed, allowing officers to work outside the law by maintaining lines of communication between DOC and ICE. For example, as advocates will testify about today, some officers have facilitated warrantless custodial transfers in cooperation with ICE, continuing ICE's entanglement into New York City's criminal legal system. DOC and the Mayor's Office of Immigrant Affairs (MOIA) have failed to provide any clear answers about the confusion and concern created by the carve-out. This murkiness has increased the time in which criminal cases are resolved for immigrants with detainers, prolonging their time in jail, and has prevented some immigrant New Yorkers from being released from DOC custody to access programs or treatment.

IDP, Black Alliance for Just Immigration ("BAJI"), and the New York University School of Law's Immigrant Rights Clinic submitted a FOIL requesting documents related to collaboration between DOC and ICE, in order to better understand the agency's internal protocols and the extent of communication and collaboration between DOC and ICE. Only after litigation did DOC produce nearly 1,000 pages of documents. An analysis of the production is currently in progress. But even at first glance, the production demonstrates how DOC officials work extremely collegially with ICE. It also demonstrates how DOC officials express and hold animus towards immigrant New Yorkers, including describing their support of deporting immigrants and expressing frustration at not being able to honor detainers. It is also evident that DOC officials have an eagerness to discuss cases with ICE prior to criminal case resolution and/or an individual's release from DOC custody.

Through the community members we've spoken to on our criminal-immigration helpline, the FOIL we are currently analyzing, and our experience supporting defense counsel and working with other advocates in the City, it is plainly evident that DOC has helped to facilitate ICE's arrest of some immigrant New Yorkers as a result of the carve-outs in our current detainer law. Incidents of unlawful cooperation have come to light publically over the years. Yet there is no transparency or public protocol about how the city responds when violations occur or DOC helps facilitate individuals into the hands of ICE. The secrecy and lack of communication on this issue has an irreparable impact on immigrant New Yorkers who find themselves in ICE's crosshairs after coming into

contact with local law enforcement. Once someone has been arrested by ICE, they face deportation regardless of whether the City's agencies misinterpreted or violated our local detainer law. There is no going back once ICE has been brought into the picture.

By approving circumstances in which DOC can collaborate with ICE, New York City's current detainer law's carve-outs fall far short of the promise of "sanctuary" to immigrant New Yorkers. This policy has proven to enable officials to skirt the spirit of the law and act on their personal beliefs. The very existence of this policy is a codification of a list of people New York City Council has deemed "disposable", immigrants against whom the City's distaste for ICE is thrown to the side. The City's role in extending the deportation pipeline into our communities by way of the detainer law exceptions must end.

New York City can take additional actions to make clear that the criminal legal and immigration systems stand separate and apart from one another. Today, the Committees will hear a resolution introduced last week by Public Advocate Jumaane Williams, and Councilmembers Menchaca and Rosenthal (Res. 1648-2021). The resolution calls on the State Legislature to sign the New York for All Act (A.2328 / S.3076), which prohibits New York's state and local government agencies, including correctional officers and law enforcement officers, from conspiring with ICE, including the disclosure of sensitive information, and diversion of personnel or other resources to support federal immigration enforcement.[6] This legislation makes clear that the first priority of any law intended to protect immigrants is to ensure that no one's immigration status results in exposure to additional harm, risk, or vulnerability following contact with public officials. The Protect Our Courts Act, signed into law last year, set a clear precedent that people should be treated equally by public institutions, regardless of their immigration status. New York for All ensures that rogue officers and public agencies cannot dispatch this fundamental principle at their leisure. In addition to resolution, we are in support of the passage Intros. T2021-7657 and T2021-7659 to further limit any communication between New York City agencies, including NYPD, and ICE, and of the passage of Intro. T2021-7658 to allow those unlawfully transferred to ICE custody a private right of action.

We hope that the Committees will consider taking further action to protect our immigrant communities.

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[6] N.Y. Legis. Senate, New York for All Act, S.3076, Reg. Sess. 2021-2022 (2021), https://www.nysenate.gov/legislation/bills/2021/s3076/amendment/a.

New York City Council
Committees on Immigration and Criminal Justice
Oversight Hearing on The New York City Detainer Law
June 9, 2021

Written Testimony of The Bronx Defenders
By Rosa Cohen-Cruz & Sophia Gurulé, Policy Counsels to the Immigration Practice

Chairs Menchaca and Powers and Committee Members, we are immigration attorneys at The Bronx Defenders ("BxD").[1] Thank you for your attention to these critical matters and for the opportunity to testify before you today.

INTRODUCTION

Freedom to live without fear of sudden, unexpected ICE arrest and family separation is what is at stake today. New York City cannot call itself a "sanctuary city" as long as it continues to collaborate with U.S. Immigration and Customs Enforcement ("ICE") to funnel immigrant New Yorkers into the deportation machine.

State and local law enforcement collaboration with ICE undermines the basic rights of immigrant New Yorkers and magnifies the harms of our deeply flawed system of criminalization. Allowing ICE to conspire with the Department of Corrections ("DOC") and the New York Police Department ("NYPD") to detain and deport immigrants exacerbates the violence and injustices of the criminal legal system, which deliberately targets Black, Latinx, and other marginalized

[1] The Bronx Defenders is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called *holistic defense* that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

communities. When New York law enforcement agencies prioritize ICE's mission instead of complying with local laws passed by this City Council to protect immigrant New Yorkers, it creates pervasive fear and deepens the belief that New York City is working against, not for, the 3.1 million immigrants living and working in our communities. New York City must stop conspiring with ICE, full stop. To that end, the City Council must ensure that New York's resources are not spent funneling immigrants into the deportation machine by:

- Passing T2021-7657 and T2021-7659, prohibiting all communications between local law enforcement agencies and ICE, eliminating criminal conviction carve outs to the City's detainer laws, and ceasing to honor civil immigration detainers entirely, ;
- Passing T2021-7658, which would create a private right of action to penalize and enforce compliance with New York City's detainer laws; and
- Passing Res. 1648-2021, urging the New York State legislature to pass the New York For All Act (A.2328/S.3076), which would prohibit and regulate the discovery and disclosure of immigration status by New York State, local government entities, and ultimately strengthen New York City's detainer laws.

DOC and NYPD regularly and flagrantly violate the intent and spirit of the detainer laws. They exploit aspects of the law that allow communication or notification to ICE without a judicial warrant, causing illegal prolonged detention and transfers of immigrant New Yorkers into ICE custody. In this testimony we will detail five specific types of violations that BxD has tracked for our clients, including:

A. Transfer or communication of people with a "violent or serious conviction" without a judicial warrant;
B. Communications with ICE when there is no "violent or serious conviction";
C. Prolonged detention caused by DOC's inefficient, non-transparent analysis of whether an ICE detainer can be honored;
D. NYPD collaboration with ICE in making arrests and sharing information; and
E. The prejudice to people who seek to resolve open criminal cases due to failure to comply with NYC's detainer laws.

In addition to our testimony, the Council will also hear from advocates detailing explicit violations of the City's detainer law.[2] Taken together, these violations demonstrate the serious weaknesses in our existing detainer laws and highlight the urgent need to create meaningful, responsive mechanisms to protect immigrant New Yorkers from not only ICE's abuses, but also the abuses perpetrated by DOC and NYPD.

[2] Correal, Annie and Shanahan, Ed, "*He Was Caught Jaywalking. He Was Almost Deported for It",* N.Y. Time (March 11, 2021) https://www.nytimes.com/2021/03/11/nyregion/daca-ice-nyc-immigration.html.

A. Transfer or notification of people with a "violent or serious conviction" without a judicial warrant.

New York City's detainer law prohibits DOC from transferring custody of an individual to the Department of Homeland Security ("DHS") unless that individual has been convicted of a "violent or serious conviction"[3] *and* federal immigration authorities have presented the City agencies' with a judicial warrant, signed by a federal judge, authorizing the arrest of that same person.[4]

Despite the requirement of a signed judicial warrant, DOC issued guidance in a March 2019 Operations Order, entitled "Interactions with Federal Immigration Authorities," detailing its procedures for compliance with DHS detainers. The guidance explains that DOC "intends to cooperate with DHS's written request for advance notice of release, whether such request appears on an Immigration Detainer or otherwise, and cooperation in transferring custody of the inmate to DHS on Department property by notifying DHS of the time the inmate would ordinarily be released. *In other words, the pick up by DHS shall not extend the time normally needed to complete the discharge process*, and the Department will not detain such an individual beyond the time authorized under New York State and local law."[5] Under this guidance, DOC does not require a judicial warrant to transfer custody of an individual with a "violent or serious conviction" as long as the person is not detained beyond the time it takes to complete the discharge process.

Setting aside whether this reading of New York City law is correct, DOC uses this guidance and the "request for notification" procedure to entirely circumvent the warrant requirement of the detainer laws to effectuate transfers of people to ICE custody. Because of this improper interpretation of the City's detainer laws, DOC provides no transparency about its discharge process for individuals transferred to ICE, leaving advocates with little to no information to challenge whether the person was held beyond the time necessary to effectuate the discharge process.

For example, in March of this year, a BxD client finished a six-month sentence on Rikers Island for a "violent or serious conviction." Our client was informed by DOC staff that he was going to be released alongside two other people on the same day. Nevertheless, that day he was the only person taken from his housing area to wait in a separate holding cell for two hours without any explanation. Then officers -- who he later learned were from ICE -- went into the Rikers holding cell and told him to follow them. It was only then that he was informed that he was under arrest by ICE and would be transported from DOC custody to ICE custody. No accounting of the time he was held in the holding cell was provided, and no judicial warrant was ever presented to our

[3] As defined by N.Y.C. Admin. Code § 9-131(a)(7)(i))
[4] N.Y.C. Admin. Code § 9-131(b)(1).
[5] The City of New York Department of Corrections Operations Order No. 9/19.

client or DOC. Under their own guidance, DOC is permitted to only notify ICE of the time of his release, but not to hold him for any additional time. That we are left to guess as to why our client was held for two hours — whether it was the normal course of discharge or a delay tactic — is a consistent theme in our cases and allows DOC to evade accountability. Even if DOC could give a minute-by-minute accounting of the time this or any other person is held before being transferred to ICE custody, the fundamental problem of DOC prioritizing their collaboration with ICE over their own duties to the people in their custody, or to the laws passed by the City Council, remains. Indeed, DOC's actions and communications regularly demonstrate an eagerness and enthusiasm to collaborate with ICE.

Additionally, that ICE went into a Rikers Island holding cell, ushered a person out of the cell, and then directed him to follow them until he was arrested qualifies as more than a response to a request for notification. Similarly, in August 2019 a BxD client with a qualifying conviction was arrested by ICE without a judicial warrant *in his housing unit* at Rikers. Moreover, both of these instances were transfers of custody without a judicial warrant. Neither person ever had an opportunity for liberty, despite completing their sentences to incarceration and New York City's detainer laws prohibiting unlawful transfers of custody. These are but two illustrations of how DOC regularly violates the detainer law under the guise of responding to a request for notification. A transfer of custody without a judicial warrant violates the intent of the law and eviscerates the protections the law is meant to confer.

As attorneys, we, too, have experienced the game-playing, dodging, lies, and lack of transparency when trying to advocate for, or even meet, with our clients. DOC's allegiance to ICE has not only resulted in extended custody for our clients but also compromised our clients' right to counsel.

In October 2017, a BxD immigration attorney went to Rikers Island to meet with a client who was scheduled for release after completing his sentence to incarceration. The attorney called DOC in advance to inform the facility that she would be there to meet with the client at 10:00am. The attorney was advised by DOC that there was an ICE hold and that ICE would be permitted until midnight on the release day to take the client into custody. The attorney asked if there was a judicial warrant, but was not given a direct answer. The attorney arrived at Rikers at 9:00 that morning and remained there until approximately 2:00 in the afternoon. She spoke to several DOC officers during her time on Rikers Island and repeatedly asked to meet with her client. She was told to wait, to talk to other officers, and even shuttled back and forth between different buildings. After waiting for over four hours she was then told her client had been released to ICE during the time she had been at the facility waiting. This type of obfuscation and misdirection is the norm for advocates working with criminalized and incarcerated immigrant New Yorkers.

New York City agency employees are first and foremost accountable to New Yorkers. This is true no matter a person's immigration status or criminal arrest history. Colluding with ICE dangerously shifts that dynamic and cases like these demonstrate that DOC employees will put the requests of ICE above their own duties to people in their custody, attorneys they interact with, and New Yorkers as a whole.

B. Communications with ICE when there is no "violent or serious conviction".

DOC not only fails to account for discharge timing, but it also fails to adequately account for their communications with ICE. We know that some communications with ICE occur through emails, but we also have reason to believe that DOC staff communicate with ICE by phone and fail to log the timing and substance of their communications. The timing and substance of communications with ICE are important in ensuring DOC's basic compliance with its statutory obligations -- obligations consistent with basic notions of due process and fundamental fairness. Timing is especially important because often our clients find themselves in DOC's custody with charges that *may or may not* result in "violent or serious conviction." It is undisputed that DOC cannot respond to a request for notification unless the subject of the request has actually been *convicted* of a violent or serious crime.

We have seen some concerning cases in which our clients in DOC custody with pending criminal charges have been arrested by ICE pursuant to a request for notification on the same day that they took a plea to a qualifying crime. The clear implication is that ICE receives advance notice that certain people might plead guilty to a qualifying "violent or serious" conviction. The lack of transparency makes assessing whether a violation has taken place next to impossible as noted above.

C. Prolonged detention caused by DOC's inefficient, non-transparent analysis of whether an ICE detainer can be honored

DOC's lack of transparency and accountability is a serious issue, even for people who are not ultimately transferred to ICE custody. In our experience, people in jail with immigration holds remain in custody longer after their scheduled release time than those without lodged detainers. The detainer law authorizes DOC to continue detention past release for a reasonable amount of time in order to verify whether they may communicate with ICE about a particular individual.[6] What constitutes a "reasonable amount of time" is not defined, and DOC is eager to extend people's detention regardless of the pain, trauma, and fear they instill for the people inside and the families who are doing whatever they can to reunite with their loved ones.

[6] N.Y.C. Admin. Code § 9-131(b)(1).

For example, in late August 2020, a BxD attorney confirmed with DOC's Department of Custody Management that a detainer would not be honored for their client. DOC's counsel confirmed the same. Nevertheless, on September 2, when the client's family arrived to pay bail, a DOC Captain informed our client's family that a "special warrant" had been lodged *prior* to our conversations with DOC and that DOC was required to call ICE about their family member's release from DOC custody. The Captain further informed our client's family that it "wouldn't make sense" to bail him out because ICE would take custody of our client. Consequently, the family was told they would not be able to pay bail. On September 4, the client's family was still not able to pay bail until our office intervened again and reminded DOC there was no lawful ground for his detention in their custody and that DOC must immediately release our client. While two days may not mean much to DOC, it is an eternity for a family trying to be reunited. For them, these were a terrifying, stressful, and painful two days of not knowing if they would all be together again. Had our client been a U.S. citizen, this never would have happened.

This is not an anomaly. As recently as March 12, 2021, a BxD client was ordered released on his own recognizance by the criminal court, but was held past his release date at Rikers Island due to an ICE detainer. This client did not have a qualifying conviction so an ICE detainer could not be honored under the law. Despite that, our client was not released until early in the morning on March 13, 2021. During the evening of March 12, our office tried to contact Captain Rainey[7] and DOC Counsel's office but received no response. Ultimately, we contacted representatives from the Mayor's Office of Immigrant Affairs to assist in securing our client's release. Again, this delay may not matter to DOC, but for someone waiting for their liberty, any extra time in custody is a hardship, and one that is unequally impacting non-citizen New Yorkers.

D. NYPD collaboration with ICE in making arrests and sharing information.

Though this hearing largely focuses on the detainer law with respect to DOC, this is an important opportunity also to shed light on the collaboration between NYPD and ICE and the way NYPD is complicit in terrorizing immigrant communities in New York City. NYPD's cozy relationship with ICE has furthered distrust in their agency for many immigrant communities.

One of the most pervasive reasons for this distrust is that ICE frequently identifies themselves as police, or even NYPD when attempting to arrest individuals in their homes. ICE also sometimes engages the NYPD to assist it in making an arrest for a purely civil immigration matter. These interactions are terrifying for the communities we serve. ICE uses the NYPD as an intimidation tool.

[7] Captain Deshan Rainey is a DOC Supervisor in the Custody Management/ICE Unit, who oversees reviews of ICE detainers and requests for notification.

We believe the NYPD cooperates with ICE to enforce immigration laws in our city. In May 2020, a BxD client was woken up by loud knocking on his door. The three plain clothed people at his door began yelling, "If you don't open the door, we're going to knock it down and arrest everyone." They yelled threats and said they would knock the door down without asking someone to open it first. No one in the apartment opened the door because they were terrified. The people continued knocking so hard that they damaged the door. BxD obtained the video footage of this incident and it was consistent with what our client told us. The video appeared to show NYPD officers with ICE officers attempting to enter our client's apartment by force.[8] When our client went to the local precinct to find out more information he was told there was no record of the NYPD being at his apartment that morning.

With respect to the detainer law, NYPD is permitted to honor an immigration detainer under a three-pronged analysis: if an individual has been convicted of a violent or serious crime *and* has been previously deported and returned to the United States without permission *and* they are presented with a judicial warrant.[9] Absent a judicial warrant, the statute authorized NYPD to hold someone who meets the above criteria for up to 48 hours in order for ICE to attempt to secure a judicial warrant. This allowance is at odds with the court's decision in *Francis* and she be amended per our recommendations below[10].

E. <u>People are Prejudiced in Resolving Criminal Cases</u>

Finally, even the possibility of communication with ICE by DOC or NYPD negatively impacts immigrant New Yorkers as they navigate the criminal legal system. Immigrants who are incarcerated while their cases are pending have fewer safe case resolutions at their disposal due to the City's collaboration with ICE. An incarcerated immigrant who would benefit from and wishes to participate in inpatient treatment programs outside of DOC may not be able to risk paying bail or seeking a disposition from the court that includes programming if they believe that ICE will arrest them as soon as they are released from jail.

Many criminal defense attorneys without immigration counsel do not understand the parameters of the detainer law. Our deportation defense attorneys who represent clients in the NYIFUP program regularly encounter clients who did not realize they were taking a plea to an offense that would cause them to lose detainer law protections. Even if a client is properly advised about the legal consequences that a particular disposition might have on their immigration status, they might not have been advised of the consequences that such a plea might have on enforcement consequences. Indeed, given the opaque, unpredictable patterns and behavior of our City's agencies described in the testimony above, even if aided by competent *Padilla* counsel, a

[8] Our attempts to verify NYPD's presence on the video were unsuccessful as they raised privileges or were otherwise unresponsive to the substance of our FOIL requests.
[9] NYC Admin. Code § 14-154(b)(1)(ii).
[10] *People ex rel. Wells o.b.o. Francis v. DeMarco*, 168 A.D.3d 31 (N.Y. App. Div. 2018).

criminal defense attorney might not be able to fulfill their constitutional duty[11] to properly advise a client about the enforcement consequences of a plea.

CONCLUSION AND RECOMMENDATIONS

Broadly speaking, New York City should end all communications with ICE. There should be no exceptions based on criminal or immigration history, as all people are equally deserving of legal protections and due process.

Absent ending all New York City collaboration with ICE, the proposed legislation will dramatically reduce communications with ICE by clearly strengthening the warrant requirement in both the DOC and NYPD detainer laws. Intros. T2021-7659 would reduce DOC-to-ICE transfers by clearly requiring a judicial warrant in order for DOC to disclose information to ICE under the same circumstances that it could honor a detainer. T2021-7657 would eliminate NYPD's ability to hold a person for ICE absent a judicial warrant. Together, these bills would not only reduce the circumstances under which city law enforcement can collaborate with ICE, but would require some measure of due process on the part of ICE before engaging with them further.

Yet these additional measures are not enough to hold the NYPD and DOC accountable to the detainer law. When the City has broken the detainer laws in the past, people have been transferred into ICE custody with extremely limited opportunities to hold the City accountable. A private right of action is necessary so people harmed by these violations have some mechanism for redress. T2021-7658 would allow people held in violation of the DOC and NYPD detainer laws to bring a claim for unlawful detention in court and seek civil damages or declaratory or injunctive relief.

The Council should also require increased and improved transparency by DOC and NYPD in the implementation of the detainer laws. Though detainers and other requests to assist ICE must be recorded and reported to the Council,[12] those records are not publicly available. Information contained in the annual reports made available to the public lack details and any accounting of the timing of communications or release, both of which are necessary in some cases to substantiate a detainer law violation. DOC's testimony before the Council on June 9, 2021 was that it will be difficult to differentiate cases in which an individual is held for an extended period due to an immigration detainer versus when an individual is held for an extended period due to other factors[13]. It is the responsibility of DOC to detail any reason for an extension of detention so the public, advocates, and those harmed by DOC's violation of the law can seek redress. The

[11] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[12] NYC Admin. Code § 10-178(d).
[13] NYC Detainer Laws: Hearing Before New York City Council Committee on Immigration and Committee on Criminal Justice (June 9, 2021) (Testimony of Kenneth Stukes, Bureau Chief of Security.)

Council should require that all reports be made publicly available and should require specific and concrete information, logs, and notations detailing communications with ICE, the process and timing of discharge, and an account of how ICE obtained custody of the individual so advocates and individuals can meaningfully avail themselves of the private right of action.

Finally, the Council must recognize that the issues encompassed by the weaknesses in the detainer law extend beyond New York City and cause immense harm across New York State. Earlier this year a BxD client who was reporting to and complying with probation in Putnam county, was arrested by ICE agents when he went to check in with his probation officer. BxD discovered that Putnam County has an ongoing agreement with ICE to share information through its probation office that will lead to the arrest and detention of immigrants. Instead of working with our client to help him navigate the probation system and be successful in fulfilling his obligations to the court, the Putnam County Probation Office prioritized their relationship with ICE and caused our client to be arrested and incarcerated in an ICE facility despite not being sentenced to any jail time.

Stories like these are increasingly common and demonstrate the extent to which New York State's collusion with ICE creates disparate impacts for immigrants in the criminal legal system. The Council should pass Res. 1648-2021, calling on the New York State Legislature to pass the New York For All Act (A.2328/S.3076). The New York for All Act would prohibit and regulate the discovery and disclosure of immigration status by New York State and local government entities and prevent New York State resources from being used to further ICE's agenda.

TESTIMONY OF:

Catherine Gonzalez – Senior Staff Attorney and Policy Counsel

BROOKLYN DEFENDER SERVICES

Presented before

The New York City Council Committee on Immigration Jointly with the Committee on Criminal Justice

Oversight Hearing – NYC Detainer Laws

June 9, 2021

My name is Catherine Gonzalez and I am a Senior Staff Attorney and Policy Counsel in the Immigration Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy to nearly 30,000 people and their families in Brooklyn every year. I thank the New York City Council Committee on Immigration and Committee on Criminal Justice, in particular Chair Carlos Menchaca and Chair Keith Powers, for the opportunity to testify today about the New York City detainer laws and proposed legislation regarding communication between city law enforcement agencies and federal immigration authorities.

BDS' multi-unit immigration practice works to minimize the negative immigration consequences of criminal charges for non-citizens, represent people in applications for immigration benefits and defend people against ICE detention and deportation. Since 2009, we have counseled, advised, or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system.

About a quarter of BDS' criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our *Padilla* criminal-immigration specialists provide support and expertise on thousands of cases, including advocacy regarding

Lisa Schreibersdorf
Executive Director

177 Livingston Street, 7th Floor
Brooklyn New York 11201

T (718) 254-0700
F (718) 254-0897

www.bds.org
@BklynDefender

enforcement of New York City's detainer law, individualized immigration screenings, and know-your-rights advisals.

BDS is also one of three New York Immigrant Family Unity Project (NYIFUP) providers and has represented more than 1,500 people in detained deportation proceedings since the inception of the program in 2013. Our NYIFUP team represents people in detained and non-detained removal proceedings in bond, merits hearings, release advocacy with ICE, administrative and federal court appeals, and federal district court challenges to unlawful detention.

Additionally, our Immigration Community Action Program (ICAP), which receives Immigrant Opportunity Initiative (IOI) funding, represents people in non-detained removal proceedings as well as applications for immigration benefits, including family-based applications for lawful permanent status, fear-based applications, U & T visas, Special Juvenile Immigrant Status (SIJS), DACA renewal and related applications. BDS' ICAP team specializes in providing affirmative immigration legal services in complicated cases and prioritizes people that are current or former clients of BDS and their families, formerly justice-system involved non-citizens, community residents referred from partner organizations, and individuals referred by constituent affairs offices.

Thank you, City Council, for your continued funding of indigent defense for immigrant New Yorkers and low-income people.

Background

Immigration and Customs Enforcement (ICE) and its predecessor, the Immigration and Naturalization Service (INS), has long relied upon state and local criminal legal systems to find non-citizens who may be removable in order to detain them and subject them to the civil deportation process. Historically, ICE, and the legacy INS, would identify undocumented or deportable people in jails and prisons and issue an "immigration detainer" to detain a person for up to 48 hours beyond their mandated release time so that ICE could assume custody of the person and transfer them to an immigration detention facility. Multiple courts across the United States, including in New York State, have held that this practice is unconstitutional.

New York City, and in particular, the City Council, continues to be a leader in the protection of non-citizen residents. In October 2014, the Council passed groundbreaking legislation (detainer discretions laws)[1] that removed ICE from Rikers Island and prevented Department of Corrections ("DOC"), the New York City Police Department ("NYPD"), and Department of Probation (DOP) from unlawfully detaining non-citizens without a judicial warrant.

These detainer discretion laws were intended to prevent non-citizens detained in DOC and NYPD custody from being transferred to immigration detention, with hopes of sparing thousands of New Yorkers from the mass-deportation regime. However, given the intransigence of ICE's aggressive apprehension and detention policies, and the agency's enforcement priorities, seven

[1] NYC Administrative Code §§ 9-131, 9-205, and 14-154, available at https://www1.nyc.gov/assets/immigrants/downloads/pdf/nyc-detainer-laws.pdf

years later, it is evident that our criminal legal system continues to cause non-citizens to be apprehended by Immigration and Customs Enforcement ("ICE").

Detainer requests and requests for notification are encompassed on one form. ICE's immigration detainer form[2] requests the law enforcement agency to which it is sent that they both "[m]aintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from…custody to allow DHS to assume custody"[3] and [n]otify DHS as early as practicable (at least 48 hours, if possible) before the alien is released from…custody."[4]

Notification Exception

The 2014 detainer laws include an exception that allows DOC and NYPD to notify the Department of Homeland Security (DHS) of an individual's release based on a finding of "dangerousness," as established by a recent conviction for one of the enumerated 177 offenses, or inclusion on the terrorist watch list.

In the past seven years, BDS clients have continued to be arrested by ICE agents immediately upon their release from DOC custody (whether at Rikers Island or the Brooklyn Detention Complex) and transferred to immigration custody. BDS believes that in those cases, DOC notified ICE about the individuals' pending release pursuant to a request for notification and ICE arrested and detained the individuals.

What we are seeing is, essentially, a fluid transfer of custody between DOC and ICE under the purview of the notification exception. Whether there has been a violation of the detainer laws is a question BDS cannot answer because there is a lack of transparency. We do not have information about the actual communications between DOC and ICE. We do not know whether our clients for whom DOC receives an ICE detainer are released after the same amount of time as a client with no ICE detainer. Importantly, we suspect that DOC compliance with ICE requests for notifications may be reason behind some, often unexplained, delays in BDS clients' release from DOC custody.

In these instances, our BDS attorneys, appointed by the criminal court to represent these individuals, are not informed by DOC about the request for notification of the person's release to ICE. Instead, upon our inquiry before each client's anticipated release date from DOC custody, we are informed generally that the individual was to be released pursuant to the DOC detainer law. Subsequently, BDS has not been informed about the release of the individual to ICE custody directly from DOC custody.

Additionally, BDS is not provided with a copy of the detainer or request for notification to determine whether or not it was lawful or accurate. Finally, we are also not provided sufficient

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[2] Department of Homeland Security, Form I-247A (Immigration Detainer—Notice of Action), *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf
[3] *Id.*
[4] *Id.*

information about who within the Department makes the ultimate determination to release our clients to ICE or who notifies ICE of pending release of our client and under what authority that determination is based.

These instances highlight the urgent need for transparency about the DOC's internal detainer and request for notification compliance policy. Defense counsel's job is to hold the government to its constitutional and statutory obligations. We are essentially blocked from being able to fulfill that mandate and defend the rights of New Yorkers if we are not provided with the appropriate information. Defense counsel and affected individuals in the City's custody must be informed in advance about the existence of a detainer or request for notification, the alleged basis of that detainer, and the City's determination about whether or not the detainer or request for notification will be fulfilled.

We know from our experience that even minor offenses, often the result of over-policing, can result in mandatory incarceration in DHS detention facilities for someone who is hauled into immigration proceedings. New York City should not be aiding and abetting in this. ICE detainers are only one link in a chain that ties our clients to the detention and deportation system. With or without a detainer, ICE can arrest people at home, work, and around court, detain them or release them, and give them a court date for deportation proceedings. After a person's transfer to ICE custody, it can be needlessly difficult and labor intensive to successfully navigate the bureaucracy involved in having ICE produce them back to DOC custody for purposes of resolving their criminal cases. This task falls to both the District Attorney and the Courts, as defense counsel is unable under the Criminal Procedure Laws to request a writ of habeas corpus ad prosequendum.

Mere arrests, regardless of findings of innocence or case dismissals, can trigger deportation actions. All fingerprints taken by the NYPD are automatically provided to the FBI and ICE. The NYPD's high-arrest policies thus effectively provide the federal government with ready-made lists of thousands of immigrant New Yorkers whose humanity, family and community ties, and even lawful residency, can be undermined simply because they bear the label of "criminal" for the most paltry alleged offenses. ICE collects information gathered through arrests regardless of whether the District Attorney declines to prosecute a case, a case is still pending so has no final resolution, all the charges are dismissed, or a case results in a non-criminal violation. This information gathering happens irrespective of any communications ICE has with DOC.

<u>NYC DOC Officers Not Accepting Bail for Cases with ICE Detainers</u>

Additionally, we frequently encounter issues with DOC officers at the bail windows refusing to accept payment of bail for BDS clients for whom DOC has received a detainer from ICE. These refusals often result in delays in someone's release.

Based on our conversations with various DOC staff, there is definite confusion among department staff about whether an ICE detainer (or warrant) will be honored, as well as confusion about the difference between an ICE administrative warrant, an ICE detainer, an ICE hold, and a federal judicial warrant. This confusion has resulted in difficulty in posting bail and other delays in our client's release from DOC custody.

We have heard of NYC DOC officers erroneously telling family members and friends that if they pay bail, DOC will call ICE and the person will be transferred to ICE custody, regardless of whether the person has a prerequisite prior conviction or is listed on a terrorist watchlist. In these instances, BDS attorneys' step in and contact DOC Legal and the DOC ICE captain to confirm whether there is a judicial warrant for the person and after confirming that there is no judicial warrant, we explain to the family members or friends to pay the bail despite the bad information they are receiving from the DOC officers at the bail window. While we have not seen this situation result in someone's actual transfer to ICE custody, it often results in BDS clients spending additional time in DOC custody.

At BDS, we work at the intersection between the criminal legal system and the immigration legal system and witness everyday how it treats immigrant New Yorkers unequally. Small criminal legal system contact can end up leading to permanent separation from family and exclusion from this country because of the entanglement of the criminal legal system with the immigration legal system.

All New Yorkers benefit when our diverse communities can thrive together. As this Council has always noted, immigrants, regardless of their status, are the backbone of our City, our culture and our economy. The 2014 Detainer Discretion Laws were a critical step in the right direction, and we applaud our City Council's leadership in forging these city laws. However, immigrant communities continue to face an enormous threat in an era of increased surveillance and enforcement. The City can and should do more to ensure that residents are not unnecessarily targeted for detention or deportation because of some action or failure to act by the City.

Recommendations

To ensure that all New Yorkers in the City's custody receive due process and sufficient legal advice before transfer to immigration custody, we respectfully offer the following recommendations:

1. **Eliminate the notification exception to the detainer laws.** The past seven years have uncovered that this exception is merely a loophole which allows for the continued entanglement of our city agencies with the federal mass-deportation regime.

2. **Defense counsel should be notified immediately if there is a detainer or a request for notification from ICE to NYPD, DOC or DOP**. People in custody and their counsel must be provided with a copy of the detainer, request for notification and any accompanying information issued by federal law enforcement.

3. **DOC, NYPD, and DOP should be required to publish on their website and share with the Council its policy for complying with detainers and requests for information from federal law enforcement**. The policy should articulate the chain of command for the decision-making process, including a final decision maker and point person for individuals and defense counsel to contact in the respective agency's legal departments.

4. **Require DOC to contemporaneously document movement from scheduled release time to time of actual release.** These notes should be made available to person who is detained and to their counsel without having the need for a FOIL request.

5. **Require documentation of any communication between DOC, NYPD and/or DOP with ICE.** These requirements would go a long way to ensuring transparency and accountability for these agencies that deal with New Yorkers accused or convicted of crimes, a group highly vulnerable to immigration enforcement.

6. **The reporting requirements for NYPD, DOC and DOP should be expanded to include requests for notification received, requests for notification fulfilled, and transfer to ICE custody from the City's custody, regardless of whether or not an individual was held beyond the time he would otherwise be held pursuant to a detainer**. Specifically, they should be required to report annually:
    - How many times NYPD called ICE or federal immigration enforcement to verify a National Crime Information Center (NCIC) "hit" for an individual in NYPD custody;
    - How many times ICE was called about a person in DOC custody to verify or request information;
    - How many times ICE picked up an individual within DOC custody—how many times an individual in DOC custody was released to ICE custody;
    - How many times NYPD called ICE to notify about an individual who falls within the "violent or serious felony conviction" definition under NYPD detainer law;
    - How many times DOC called ICE to notify about an individual who falls within the "violent or serious felony conviction" definition under DOC detainer law;

Client Story

BDS has represented many people over the past seven years who, after being detained in DOC custody, ended up in a DHS detention facility. BDS believes that in those cases, it was a notification by DOC to ICE about the individual's pending release that led to those clients ending up in immigration custody.

Today, we wish to highlight the story of our client Juan Cruz Mestizo because his story is an important example of how these interactions–cooperation, and collaboration of City agencies with ICE and information sharing between agencies and the intersection of the criminal legal system with the immigration legal system–can have tragic results.

Juan Cruz Mestizo was loving a husband, father, and grandfather. He is described as the heart of his family. He was an active member of his community and had been continuously living in Brooklyn since 1989. In 2018, Mr. Cruz Mestizo became a NYIFUP client after ICE raided his workplace and unnecessarily detained him. Mr. Cruz Mestizo was the only member of his large immediate family who was not a U.S. citizen. Around mid-2018, he was transferred to Rikers from ICE custody for a pending misdemeanor. In April 2020, Mr. Cruz Mestizo was in DOC custody at Rikers when he contracted COVID-19. Mr. Cruz Mestizo became very ill and ended up on a ventilator, handcuffed to a bed at Bellevue Hospital, with an officer from DOC posted at his bedside. His bail was set at $1.00 because there "an immigration hold" pursuant to an ICE

detainer requesting that he be transferred back to ICE custody upon completion of the proceeding although ICE had no legal requirement to detain Mr. Cruz Mestizo. Our attorneys advised Mr. Cruz Mestizo's family to pay the $1 bail. Mr. Cruz Mestizo's son paid the $1 bail on May 22, 2020 (and the receipt DOC gave him had a note that said "immigration detainer"). Even after the bail was paid, DOC refused to remove the handcuffs from Mr. Cruz Mestizo (although he was still on a ventilator and unable to physically leave his own bed). The DOC officer refused to leave the hospital under the horrendous premise that Mr. Cruz Mestizo was a "borrowed prisoner" and therefore DOC could not remove the handcuffs or officer posted at his bedside until ICE lifted the detainer request. Due to Mr. Cruz Mestizo's grave condition, ICE ultimately granted our request asking to lift the hold and release him on his recognizance, and thereafter DOC discharged him. After being admitted to Bellevue, Mr. Cruz Mestizo spent 21 days struggling for his life while handcuffed to his bed. He spent 21 days being guarded by a DOC officer while struggling to breathe. His family spent 21 days painfully witnessing how their father's dignity and their familial communications were disrespected by those handcuffs and DOC's presence. Ultimately, DOC removed the handcuffs and redeployed the DOC officer from Mr. Cruz Mestizo's bedside. Tragically, Mr. Cruz Mestizo died 20 days later at Bellevue Hospital. This Friday, June 11, 2021, will be the tragic one-year anniversary of Mr. Cruz Mestizo's unnecessary death. We believe that Mr. Cruz Mestizo died because he was caught within the intersection of these inhumane systems.

Proposed Legislation

BDS supports Res. 1648-2021, which calls on the New York State Legislature to pass, and the Governor to sign, the New York for All Act (A.2328 / S.3076), which would prohibit and regulate the discovery and disclosure of immigration status by New York state and local government entities.
ICE' continued intimidation and terrorization of communities in New York must end. For years ICE has cruelly targeted immigrants and separated families. To do this, ICE relies on local law enforcement and government agencies to search for, arrest, and deport people, and to separate families who are part of our state. This is a misuse of our local tax dollars and resources for ICE's racist and abusive agenda.

The passage of New York For All Act is an opportunity not only to strengthen the City's current detainer laws but also to bring uniformity to the state with regards to how all of our City and state agencies interact with ICE.

BDS supports the pre-considered introduction in relation to a private right of action. BDS supports legislative efforts to ensure people have their day in court. This bill is an important step, and we welcome the opportunity to discuss with the Council Member's staff to ensure the most robust protection.

BDS supports the pre-considered introduction in relation to limiting the circumstances in which a person may be detained by the police department on a civil immigration detainer. The bill makes clear that city officers and employees shall not accede to requests by federal law enforcement agencies to support or assist in operations primarily in furtherance of federal civil immigration enforcement and that no city resources shall be used for such efforts.

BDS supports the pre-considered introduction in relation to limiting communication between the department of correction and federal immigration authorities.
The bill makes clear that city officers and employees shall not accede to requests by federal law enforcement agencies to support or assist in operations primarily in furtherance of federal civil immigration enforcement and that no city resources shall be used for such efforts.

Conclusion

BDS is grateful to the Committee on Immigration and Committee on Criminal Justice for hosting this critical hearing and shining a spotlight this issue. We thank the Council for your continued support of low-income immigrant New Yorkers. The Council continues to play a critical role in safeguarding New York City's immigrant community. Thank you for your time and consideration of my comments. If you have any questions, please feel free to reach out to me at cgonzalez@bds.org.

My name is Maureen and I am testifying from Manhattan as a member of Survived & Punished New York. My focus today is on the human tragedy caused by failing to fully protect immigrant NYers through laws such as the detainer laws, and the state-level New York 4 All bill.

Assia Serrano is a Survived & Punished NY member. Assia is our friend - she is a mother and a beautiful poet who took care of other people's children at Bedford Hills Correctional Facility. It is disheartening and egregious that Assia- who taught us so much and cared for so many - is perpetually punished by the state.
She was incarcerated in New York over 15 years ago for actions taken under the immense psychological duress of her abusive partner. This year, she was released early under a law called the Domestic Violence Survivors Justice Act, in recognition of the fact that her abuser's coercive control and psychological manipulation contributed significantly to the commission of the crime. The state violence inflicted upon Assia Serrano- a Black immigrant from Panama - is emblematic of how racism and the criminalization of gender, survivorship and immigration dehumanize and oppress immigrant survivors of color. The continuation of these oppressive practices toward Assia Serrano only serves to bolster the patriarchal white supremacist state- and the profits gained off the suffering of Black bodies- with no benefit to our society.

Instead of releasing her to freedom, however, NY transferred her directly to ICE, which is currently incarcerating her and imminently trying to deport her. She now faces being permanently separated from her family and her entire life in the United States.

First, and obviously, I acknowledge Assia's transfer is a state-level issue—and I urge this Council to pass its resolution calling on the state to enact New York 4 All, which would have prevented Assia's transfer to ICE if it had been law today.

But second, I feel compelled to mention that NYC also bears responsibility for tragedies like the one playing out in Assia's case.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. Not only are there instances when NYPD and DOC actively collaborate with ICE—as is well-documented and as discussed by prior testimony— but also, the mere arrest and fingerprinting of people by NYPD triggers automatic notifications for ICE. There should be no exemptions to the detainer laws, no data sharing, and no collaboration. These onerous laws not only cause pervasive harm- they also do nothing to make our city and state safer or more humane. Imagine- - if the resources invested in human suffering and oppression would be reinvested in life affirming care that actually promote community wellness and a true sanctuary city!!

Enacting legislation to prevent NYPD and DOC from acting as ICE's foot soldiers is an essential first step towards NYC living up to the idea that it is a sanctuary city, which at present is a misstatement as best and a cruel joke at worst. End the detainer law carveouts, defund NYPD, and close Rikers now with no new jails. Free Them All . I call on New York City Council to End The Cruel , Inhumane - - Hypocritical practices in NYC - and New York State by implementing

the recommendations of Survived and Punished NY. It is time for NYC to protect and treat immigrants and other vulnerable communities with the dignity they deserve! It is time for NY to have a real sanctuary city!

Hi I'm writing to record my testimony on the matter of the detainer laws, which currently do not do enough to protect New Yorkers from ICE despite NYC's commitment to being a sanctuary city. If indeed NYC is to be a sanctuary city, and we have all always agreed it should be, then it should be no problem for the city council and the Mayor to take the necessary steps to stop NYPD and ICE collaboration. It's in our best interest to protect undocumented New Yorkers, who are the lifeblood of NYC not only for their economic contributions but for their cultural and social enrichment of the city.

Collaborations between ICE and NYPD turn the city's electeds into liars. By ending these partnerships and covert collusions, the city can truly move forward as a sanctuary space.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. As is, NYC's detainer laws allow for City resources to be used for federal immigration law enforcement. Under no circumstances should the NYPD or DOC be allowed to collaborate with ICE. NYPD and DOC should not be able to share information with ICE, notify ICE of someone's imminent release from NYPD or DOC custody, transfer people into ICE custody, and otherwise be complicit in ICE arresting immigrant New Yorkers. There should be no exemptions to the detainer laws whatsoever, including the De Blasio administration's 177 "convictions carveouts" which create ambiguous, discretionary loopholes that NYPD and DOC can - and do - abuse to further conspire with ICE.

Under the current law, the NYPD and DOC act as foot soldiers for ICE. What do I mean by that? NYPD routinely arrests our immigrant neighbors, often without cause and under unconstitutional circumstances, which is wrong in any case but is doubly damaging for people who aren't US citizens. NYPD and DOC then routinely report criminal arrests to federal ICE agents, who then detain people, often indefinitely, as they process them in deportation courts where due process matters even less than in criminal courts. At a time when COVID continues to ravage our federal detention centers, detaining people in ICE facilities and deporting them can be, and often is, a death sentence.

The detainer laws extend ICE's reach throughout New York neighborhoods, increase our overall jail and prison population, and exacerbate an existing culture of fear that disproportionately affects immigrant communities. Put simply, the current detainer laws and DOC and NYPD's failure to properly comply with them make a mockery of the idea that NYC is a sanctuary city. A sanctuary city protects all immigrant New Yorkers from the federal deportation machine.

The City Council must stop being complicit in ICE surveillance and enforcement. End the 177 convictions carveouts. Give reparations to Black and brown immigrants who are survivors of NYPD, DOC, and ICE violence. Defund NYPD for regularly flouting NYC law at the expense of the lives of immigrant New Yorkers. And close Rikers now without any new jails.

My name is Nadav and I am testifying from Brooklyn. I'm here today to talk about how both the NYPD and DOC fail to comply with NYC's detainer laws and willingly jeopardize the lives of immigrant New Yorkers.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. As is, NYC's detainer laws allow for City resources to be used for federal immigration law enforcement. Under no circumstances should the NYPD or DOC be allowed to collaborate with ICE. NYPD and DOC should not be able to share information with ICE, notify ICE of someone's imminent release from NYPD or DOC custody, transfer people into ICE custody, and otherwise be complicit in ICE arresting immigrant New Yorkers. There should be no exemptions to the detainer laws whatsoever, including the De Blasio administration's 177 "convictions carveouts" which create ambiguous, discretionary loopholes that NYPD and DOC can - and do - abuse to further conspire with ICE.

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My name is Ngozi Alston and I am testifying from Brooklyn. I'm writing to talk about how both the NYPD and DOC fail to comply with NYC's detainer laws and willingly jeopardize the lives of immigrant New Yorkers.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. As is, NYC's detainer laws allow for City resources to be used for federal immigration law enforcement. ***Under no circumstances should the NYPD or DOC be allowed to collaborate with ICE. NYPD and DOC should not be able to share information with ICE, notify ICE of someone's imminent release from NYPD or DOC custody, transfer people into ICE custody, and otherwise be complicit in ICE arresting immigrant New Yorkers.*** There should be no exemptions to the detainer laws whatsoever, including the De Blasio administration's 177 "convictions carveouts" which create ambiguous, discretionary loopholes that NYPD and DOC can - and do - abuse to further conspire with ICE.

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For those working to decarcerate NYC, close Rikers without new jails, and abolish ICE, the ongoing collusion between ICE and NYPD is evidence of not only the city's apathy towards immigrants, but of the future of criminalization where immigrants form the basis of a new era of policing.

No single Mayoral candidate currently offers a plan for getting ICE out of New York City. despite ICE terrorizing New Yorkers and flouting NYC's local laws. As a bureaucrat in the De Blasio administration, mayoral candidate Maya Wiley worked to make NYC's detainer laws *even weaker* in 2014 when the City Council was first trying to pass the laws.

The detainer laws extend ICE's reach throughout New York neighborhoods, increase our overall jail and prison population, and exacerbate an existing culture of fear that disproportionately affects immigrant communities. Put simply, the current detainer laws and DOC and NYPD's failure to properly comply with them make a mockery of the idea that NYC is a sanctuary city. A sanctuary city protects all immigrant New Yorkers from the federal deportation machine.

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My name is Sarah Schrading and I am testifying from Brooklyn. I'm here today to talk about how both the NYPD and DOC fail to comply with NYC's detainer laws and willingly jeopardize the lives of immigrant New Yorkers.

The detainer laws are inherently flawed because they allow for immigrant New Yorkers to be turned over to ICE based on their criminal convictions. As is, NYC's detainer laws allow for City resources to be used for federal immigration law enforcement. Under no circumstances should the NYPD or DOC be allowed to collaborate with ICE. NYPD and DOC should not be able to share information with ICE, notify ICE of someone's imminent release from NYPD or DOC custody, transfer people into ICE custody, and otherwise be complicit in ICE arresting immigrant New Yorkers. There should be no exemptions to the detainer laws whatsoever, including the De Blasio administration's 177 "convictions carveouts" which create ambiguous, discretionary loopholes that NYPD and DOC can - and do - abuse to further conspire with ICE.

Under the current law, the NYPD and DOC act as foot soldiers for ICE. What do I mean by that? NYPD routinely arrests our immigrant neighbors, often without cause and under unconstitutional circumstances, which is wrong in any case but is doubly damaging for people who aren't US citizens. NYPD and DOC then routinely report criminal arrests to federal ICE agents, who then detain people, often indefinitely, as they process them in deportation courts where due process matters even less than in criminal courts. At a time when COVID continues to ravage our federal detention centers, detaining people in ICE facilities and deporting them can be, and often is, a death sentence.

The detainer laws extend ICE's reach throughout New York neighborhoods, increase our overall jail and prison population, and exacerbate an existing culture of fear that disproportionately affects immigrant communities. Put simply, the current detainer laws and DOC and NYPD's failure to properly comply with them make a mockery of the idea that NYC is a sanctuary city. A sanctuary city protects all immigrant New Yorkers from the federal deportation machine.

The City Council must stop being complicit in ICE surveillance and enforcement. End the 177 convictions carveouts. Give reparations to Black and brown immigrants who are survivors of NYPD, DOC, and ICE violence. Defund NYPD for regularly flouting NYC law at the expense of the lives of immigrant New Yorkers. And close Rikers now without any new jails.

UnLocal
Community Immigration
Legal Services & Education

Testimony submitted to the Committees on Immigration and Criminal Justice,
New York City Council
Wednesday, June 9, 2021, 10:30am
Re: New York City Detainer Laws
Res. 1648-2021 (PA Williams, CM Menchaca), calling on the New York State Legislature to pass, and the Governor to sign, the New York for All Act (A.2328 / S.3076), which would prohibit and regulate the discovery and disclosure of immigration status by New York state and local government entities.
[T2021-7658] Preconsidered Int. No. ___ (CM Menchaca), in relation to creating a private right of action related to civil immigration detainers
[T2021-7657] Preconsidered Int. No. ___ (CM Powers), in relation to limiting the circumstances in which a person may be detained by the police department on a civil immigration detainer
[T2021-7659] Preconsidered Int. No. ___ (CM Powers), in relation to limiting communication between the department of correction and federal immigration authorities

Good morning. My name is Rebecca Press and I am the Legal Director of UnLocal, a community-centered non-profit organization that provides direct community education, outreach, and legal representation to New York City's immigrant communities. My testimony today will focus on the need to cease any and all communications between ICE and city agencies and the need to create a private right of action for those harmed by New York City's overt and covert violations of our detainer laws.

45 W 29TH STREET, SUITE 203, NEW YORK, NY 10001
main 646-216-8210 | *fax* 212-602-0071 | INFO@UNLOCAL.ORG | UNLOCAL.ORG
/UnLocalInc | @UnLocalInc | @UnLocal

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UnLocal testifies today to uplift the story of our client Javier Castillo Maradiaga because it demonstrates all the ways in which the current Detainer Laws fail. As a result of City employee error--purposeful or not--Javier and his family were terrorized by ICE for an excruciating 15 months. Imagine for a moment what those 15 months were like. One minute he is celebrating his brother's birthday, the next he is subjected to ICE jail and the potential for a life-time banishment from the country he has called home for two decades, where he spent nearly all of his formative years, where nearly his entire family resides.

Javier's experiences are appalling and I repeat these facts, which we have testified about repeatedly, because so often violations of law can seem so dry and cold. But the reality is that real people, real lives, suffer devastating consequences when they occur. And they happen. Javier's is the most blatant and obvious example of the City's violation of the Detainer Law. But he is hardly the only one. This is why it is imperative that the Council amend the Detainer Laws to create a private right of action. The reality is that the City can never return those 15 months to Javier or his family. But what it can do, and perhaps one of the only things that will ensure that such an error never happens again, is compensate him and all those harmed by the City's continued collaboration with ICE.

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The City must also prohibit any and all communication between city employees and ICE, or, at the very least, drastically reduce, regulate, and monitor all communication between the two, making any communications public quickly. One of the most shocking aspects of Javier's case is that the City knew of this illegal transfer a year before admitting to it. And we still don't know which City employee communicated with ICE, how that communication took place, and how it was allowed to occur without supervisory review. Such a gap in information-sharing is unacceptable and cannot be allowed to continue. The most effective way to minimize the likelihood of such a terrible violation of law re-occurring is to cease communication with ICE altogether. There is no justification for the continued collaboration between the City and ICE. ICE threatens our public safety. We are less safe when we empower ICE to tear apart families and communities. We demand that the City stop paying lip service and finally make good on its commitment to ensure the safety and security of its immigrant communities and prohibit ALL communication with ICE.

Thank you.

Rebecca Press
Legal Director, UnLocal
rebecca@unlocal.org