

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT, *et al.*,

Defendants

No. 19-cv-8876 (JSR)

**BRIEF OF AMICUS CURIAE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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<i>Christopher v. Harbury</i> , 536 U.S. 403 (2002)	3
<i>Cox v. Louisiana</i> , 379 U.S. 559 (1965)	8
<i>New York et al. v. U.S. Dep’t of Justice et al.</i> , No. 19-267, 2020 WL 911417 (2d Cir. Feb. 26, 2020)	10
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<i>Northern Light Tech., Inc. v. Northern Lights Club</i> , 236 F.3d 57 (1st Cir. 2001)	3
<i>Philadelphia v. Sessions</i> , 309 F. Supp. 3d 289 (E.D. Pa 2018), <i>aff’d in part</i> , 916 F.3d 276 (3d Cir. 2019).....	5
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	3
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966)	8
<i>Stewart v. Ramsay</i> , 242 U.S. 128 (1916)	3
<i>U.S. v. Grace</i> , 461 U.S. 171 (1983)	8
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	6
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U.S. Const. Amend. X.....	<i>passim</i>

U.S. Const. Amend. XIV.....*passim*

Other Authorities

American Bar Association, *House urges Congress add courthouses to ‘sensitive locations’ to ICE guidelines*, Aug. 18, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_house_urges_cong/7

Adhikaar et al., Letter to Chief Judge Janet DiFiore Re: Escalation in ICE Arrests in New York State Courts (June 22, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/Open-Letter-to-Judge-DiFiore-06222017.pdf>6

Am. Immigration Council, *Immigrants in New York* (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_new_york.pdf3

Angela Irvine, Ph.D, et al., *The Chilling Effect of ICE Courthouse Arrests: How Immigration and Customs Enforcement (ICE) Raids Deter Immigrants from Attending Child Welfare, Domestic Violence, Adult Criminal, and Youth Court Hearings*, Ceres Policy Research (Oct. 2019)3

Assoc. of Bar of City of N.Y., *Recommendations Regarding Federal Immigration Enforcement in New York State Courthouses* (July 2018), <https://s3.amazonaws.com/documents.nycbar.org/files/2017291-ICEcourthouse.pdf>*passim*

Beth Fertig, *Outcry After Immigration Agents Seen at Queens Human Trafficking Court*, WNYC (June 16, 2017), <https://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/>7

Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, THE DAILY BEAST (Mar. 30, 2017)5

Caitlin Dickerson and Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, NY TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html>10

Catalina Amuedo-Dorantes & Esther Arenas-Arroyo, *Police Trust and Domestic Violence: Evidence from Immigration Policies*, IZA Institute of Labor Economics Discussion Papers No. 12721 (Oct. 2019), <http://ftp.iza.org/dp12721.pdf>4

Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. F. 410 (2017)3

Deepa Fernandes, *Undocumented Workers Fight for Wages Under the Threat of Deportation*, PRI (Mar. 20, 2018), <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation> 4

The Fund for Modern Courts, *Protecting the Administration of Justice in New York State: Impact of ICE Arrests on New Yorkers’ Access to State Courthouses* (Dec. 5, 2017), <http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf> 6, 7

H.D. Res. No. 10C (2017), https://www.americanbar.org/news/reporter_resources/annual-meeting-2017/house-of-delegates-resolutions/10c.html 7

ICE Directive No. 11072.1 *Civil Immigration Enforcement Actions Inside Courthouses*, U.S. Immigration and Customs Enforcement (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> 5

ICE Out of Courts Coalition, *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State* (Jan. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf> 4, 7

Immigrant Defense Project, *Denied, Disappeared, and Deported: The Toll of ICE Operations at New York’s Courts in 2019*, (Jan. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Denied-Disappeared-Deported-FINAL.pdf> *passim*

Immigrant Defense Project, *ICE in New York State Courts Survey*, <https://www.immdefense.org/ice-courts-survey/> 3

Immigrant Defense Project, *Protect Our Courts Act (NYS Assembly Bill 11013) Stories* (May 31, 2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/Protect-Our-Courts-FAQ-061118.pdf> 3

Letter from Former Judges – Courthouse Immigration Arrests, Dec. 12, 2018, <https://bit.ly/2BGdbyY> 8

Mayor’s Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018* (Mar. 2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf 3

Mirela Iverac, *City Limits Cooperation with Federal Immigration Officials at Rikers*, WNYC (Nov. 22, 2011), wnyc.org/story/171985-blog-city-limits-cooperation-ice-rikers/ 5

MODEL RULES OF PROF’L CONDUCT Preamble [9] (2019) 4

New York State Bar Association, *Committee on Immigration Representation Resolution Adopted by House of Delegates* (Jan. 28, 2018), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=80429>7

Office of the Chief Admin. Judge, N.Y. State Unified Court Sys., Protocol Governing Activities in Courthouses by Law Enforcement Agencies (Apr. 17, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf>.....*passim*

Rebecca Smith et al., *Iced Out: How Immigration Enforcement Has Interfered with Workers’ Rights* (Oct. 2009), https://www.jwj.org/wp-content/uploads/2013/12/icedout_report.pdf4

Stephen Rex Brown, *Give ICE Cold Shoulder in Courts, Dozens of Groups Urge Top Judge*, THE DAILY NEWS (Dec. 20, 2017), <http://www.nydailynews.com/new-york/give-ice-cold-shoulder-courts-dozens-groups-urge-top-judge-article-1.3710553>6

Tory Johnson, *Immigration Arrests at Courthouses Are Under Fire From State Officials*, IMMIGRATION IMPACT, (Sept. 28, 2017), <http://immigrationimpact.com/2017/09/28/immigration-arrests-at-courthouses-fire-stateofficials/>7

U.S. Immigration and Customs Enforcement, FAQ on Sensitive Locations and Courthouse Arrests, <https://www.ice.gov/ero/enforcement/sensitive-loc>7

Zolan Kanno-Youngs and Jesse McKinley, *Trump Administration Freezes Global Entry Enrollment in New York Over Immigration Law*, NY TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/06/us/politics/dhs-new-york-global-entry.html>10

CORPORATE DISCLOSURE STATEMENT

The Association of the Bar of the City of New York (the “City Bar”) is a non-profit corporation organized under the laws of the State of New York and having its principal place of business at 42 West 44th Street, New York NY 10023. Pursuant to Federal Rule of Civil Procedure 7.1, *amicus curiae* the City Bar states that it does not have a parent corporation and does not issue stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1870, the Association of the Bar of the City of New York (“City Bar” or “amicus curiae”) is a professional organization of over 24,000 attorneys and law students and has more than 150 standing and special committees, including the Immigration and Nationality Law Committee. The City Bar’s members represent a diverse cross-section of the legal profession, including prosecutors, criminal defense attorneys, immigration attorneys, judges, law firm pro bono attorneys, and lawyers in private practice, academia, non-profit organizations and public sector positions. The City Bar is affiliated with the City Bar Justice Center, which provides free legal services, including immigration and family representation, to low income New Yorkers through mobilizing pro bono lawyers, law firms, and corporate legal departments. The City Bar has a profound interest in ensuring equal access to courts in New York State and New York City.¹

SUMMARY OF ARGUMENT

When ICE officers conduct arrests in and around New York State courthouses, they impede equal access to courts, violate the principles of federalism enshrined in the United States and New York State constitutions, interfere with the fair and efficient administration of justice, and create a chilling effect among immigrants attempting to access the courts. Amicus curiae has leveraged its professional experience and drafted proposals that would mitigate the negative effects of Immigration and Customs Enforcement (“ICE”) courthouse enforcement operations, while respecting the federal interest in enforcing immigration laws.² ICE has failed to consider reasonable recommendations, instead increasing enforcement in and around courthouses.

¹ The Court granted amicus curiae’s oral motion for leave to file the instant amicus brief via e-mail on March 9, 2020. Plaintiffs consent to the filing of this brief. Defendants take no position.

² Assoc. of Bar of City of N.Y., *Recommendations Regarding Federal Immigration Enforcement in New York State Courthouses* (July 2018), <https://s3.amazonaws.com/documents.nycbar.org/files/2017291-ICEcourthouse.pdf> (app’x updated Oct. 10, 2019) (hereinafter “City Bar Recommendations”).

ARGUMENT

I. ICE’s Courthouse Enforcement Operations Undermine Access to Justice, the Proper Functioning of the Courts, and Longstanding Common Law Principles

Dispensing with the enforcement priorities of prior administrations, ICE, under the Trump Administration, has significantly increased enforcement operations in and around courthouses, particularly in “sanctuary” jurisdictions such as New York State and New York City.³ The impact has been the infringement of individual due process rights and the invasion of state sovereignty in violation of the First, Fifth, Tenth, and Fourteenth Amendments to the U.S. Constitution, as well as long-established common law principles.

As lawyers and frequent participants in the judicial system, amicus curiae’s members are champions of equal and unfettered access to courts, a foundational aspect of liberty and due process enshrined in the Constitution. The First Amendment protects the right “to petition the Government for a redress of grievances” and guarantees anyone, regardless of their immigration status, the right to complain to, or seek the assistance of, the government without fear of punishment or reprisal. The Fifth and Fourteenth Amendments guarantee due process of law—the right to sue and defend oneself in courts, including a meaningful opportunity to be heard. Due process is nowhere more important than in criminal court where a defendant must be given the chance to appear in court and confront the witnesses against her. This bedrock principle of equal access to courts also is enshrined in the long-standing common-law privilege against civil arrests of litigants and interested parties while attending judicial proceedings.⁴ “Courts of justice ought everywhere to be

³ Immigrant Def. Project (“IDP”), *Denied, Disappeared, and Deported: The Toll of ICE Operations at New York’s Courts in 2019*, at 2 (Jan. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Denied-Disappeared-Deported-FINAL.pdf> (hereinafter, “IDP Report (Jan. 2020)”).

⁴ *New York v. U.S. Imm. & Customs Enf’t*, No. 19-cv-8876 (JSR), 2019 WL 6906274, at *8-9 (S.D.N.Y. Dec. 19, 2019) (finding that the common law privilege against civil arrests in and around courthouses is still operative in U.S. law and applies to civil immigration arrests);

open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them.”⁵ Barriers that selectively prevent discrete classes of persons from meaningfully accessing the courts should be removed.⁶ ICE’s courthouse enforcement operations deny a class of noncitizens equal opportunity to access the court system in violation of these foundational principles.⁷ ICE’s heightened courthouse activity, replete with shows of force and surveillance, has had a well-documented chilling effect, denying immigrants the opportunity to litigate their legal rights and claims.

Immigrants comprise one out of every five residents in New York State,⁸ and almost four out of every ten residents in New York City.⁹ When so many of our residents, especially those who are most likely to depend on the legal and judicial systems to avail themselves of rights,¹⁰ are

Northern Light Tech., Inc. v. Northern Lights Club, 236 F.3d 57, 62 (1st Cir. 2001) (discussing the “historical pedigree” of the privilege); see also Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. F. 410, 423 (2017).

⁵ *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916).

⁶ *Plyler v. Doe*, 457 U.S. 202, 218-219 (1982) (“The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”); *Christopher v. Harbury*, 536 U.S. 403, 413 (2002) (“the essence of the access claim” as “official action [that] is presently denying an opportunity to litigate for a class of potential [litigants]”); see also *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Boddie v. Conn.*, 401 U.S. 371, 377 (1971).

⁷ See IDP, *ICE in New York State Courts Survey*, <https://www.immdefense.org/ice-courts-survey/>; Angela Irvine, *The Chilling Effect of ICE Courthouse Arrests: How Immigration and Customs Enforcement (ICE) Raids Deter Immigrants from Attending Child Welfare, Domestic Violence, Adult Criminal, and Youth Court Hearings*, Ceres Policy Research, at 8-9 (Oct. 2019); IDP, *Protect Our Courts Act (NYS Assembly Bill 11013) Stories* (May 31, 2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/Protect-Our-Courts-FAQ-061118.pdf>.

⁸ Am. Immigration Council, *Immigrants in New York* (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_new_york.pdf.

⁹ Mayor’s Office of Immigrant Affairs, *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018* (Mar. 2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

¹⁰ Studies have shown that immigrants are more likely to be victims of wage and workplace violations, sexual harassment, and domestic violence. See Rebecca Smith et al., *Iced Out: How*

denied access to courts and equal opportunity to exercise their rights, the entire legal and judicial systems suffer. The legitimate fear and apprehension among immigrant clients, witnesses, and litigants about the court system have complicated and frustrated the work of lawyers and members of the City Bar. District Attorneys' Offices in Manhattan, Bronx, and Brooklyn reported heightened fear among immigrant victims and witnesses of testifying in criminal court since 2017, making cases harder to prosecute.¹¹ In New York City, civil legal service providers serving domestic and gender-based violence victims reported a substantial decline in the number of clients seeking assistance, and public defender offices reported systematic disruptions to their work, including having to advise their immigrant clients about the risks of attending court.¹² ICE's courthouse enforcement actions force attorneys to balance their duty to zealously advocate for the best possible disposition in criminal court¹³ with the risk of ICE arrest, detention, and deportation.

Further, if ICE's enforcement of *civil* immigration laws around state courthouses sows distrust of the judicial system and law enforcement among immigrant populations, discouraging them from accessing courts and reporting health, safety, and welfare concerns, then these arrests hamper the functioning of the overall justice system.¹⁴ ICE has publicly justified its courthouse

Immigration Enforcement Has Interfered with Workers' Rights (Oct. 2009), https://www.jwj.org/wp-content/uploads/2013/12/icedout_report.pdf; Deepa Fernandes, *Undocumented Workers Fight for Wages Under the Threat of Deportation*, PRI (Mar. 20, 2018), <https://www.pri.org/stories/2018-03-20/undocumented-workers-fight-wages-under-threat-deportation>; Catalina Amuedo-Dorantes & Esther Arenas-Arroyo, *Police Trust and Domestic Violence: Evidence from Immigration Policies*, IZA Institute of Labor Economics Discussion Papers No. 12721 (Oct. 2019), <http://ftp.iza.org/dp12721.pdf>.

¹¹ ICE Out of Courts Coalition, *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State*, at 10-13 (Jan. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf>.

¹² *Id.* at 23-25, 40-42.

¹³ See MODEL RULES OF PROF'L CONDUCT Preamble [9] (2019).

¹⁴ See, e.g., *Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 297-99 (E.D. Pa 2018), *aff'd in part*, 916 F.3d 276 (3d Cir. 2019) (fear of accessing one arm of government can lead to fear of

arrest policy by claiming that “courthouse arrests are often necessitated by the unwillingness of [sanctuary] jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.”¹⁵ In the case of New York City, this claim is misleading because the sanctuary policies that ICE points to have existed since at least 2011,¹⁶ and ICE courthouse arrests increased by 1700% from 2016 to 2019 and increasingly targeted individuals with no prior criminal history.¹⁷

In actuality, ICE is pursuing courthouse arrests for simple expediency, placing their own efficiency above due process and public safety.¹⁸ Because information about when and where a litigant must appear in court is publicly available, ICE agents use courthouses to surveil individuals as they attend their mandated court appearances, conducting arrests in courtroom hallways and by entrances. The use of the courthouse as a springboard for civil enforcement actions undermines state court administration, state public safety decisions, and individual rights. Even after New York State’s judiciary took a clear stance limiting ICE civil courthouse arrests,¹⁹ ICE has continued

accessing other arms and finding need for local and state governments to build trust with its residents, especially those who are most vulnerable).

¹⁵ *ICE Directive No. 11072.1 Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018),

<https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>.

¹⁶ See Mirela Iverac, *City Limits Cooperation with Federal Immigration Officials at Rikers*, WNYC (Nov. 22, 2011), wnyc.org/story/171985-blog-city-limits-cooperation-ice-rikers/.

¹⁷ See IDP Report (Jan. 2020), *supra* 3, at 2.

¹⁸ Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, THE DAILY BEAST (Mar. 30, 2017), <https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice> (ICE spokesperson: “ICE agents show up at courthouses because they are often the easiest places to find people they are looking for.”).

¹⁹ Office of the Chief Admin. Judge, N.Y. State Unified Court Sys., Protocol Governing Activities in Courthouses by Law Enforcement Agencies (Apr. 17, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf> (hereinafter, “UCS Directive”). The Directive was preceded by an April 2017 Protocol and May 7, 2018 Instructions. Office of the Chief Administrative Judge, Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies, (April 26, 2017), http://www.nycourts.gov/whatsnew/pdf/2017_law_enforcement_activities.pdf; OCA May 7, 2018 Instructions (additional instructions issued to judges and non-judicial supervisors from the administrative judge for the New York City Criminal Court).

the manner and increased the frequency of enforcement operations in and around courthouses.²⁰ Such federal interference with access to state and local courthouses, not only threatens individual rights, but also impermissibly impedes the state's sovereign rights to ensure public safety and administer its court system in violation of the Tenth Amendment.²¹

II. ICE Could Have—and Should Have—Considered Reasonable Constraints On Its Enforcement Operations at New York State Courts, But Failed To Do So

New York State stakeholders issued reasonable recommendations to mitigate the harms caused by ICE courthouse enforcement operations, but these recommendations were largely ignored by the agency. ICE's failure to meaningfully engage with alternatives that would have served the agency's goals constitutes arbitrary and capricious action in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).²²

Having monitored the adverse effects ICE courthouse arrests have on the administration of justice and the legal community in New York,²³ members of the City Bar have engaged in ongoing public advocacy efforts against ICE's courthouse arrests for over two years.²⁴ In July 2018, amicus

²⁰ IDP Report (Jan. 2020), *supra* note 3, at 3, 11 (nearly half of reported ICE operations in and around courthouse occurred after the UCS Directive of April 2019 and that ICE has used tactics designed to skirt the UCS directive).

²¹ *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("Our Federalism" dictates that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

²² Compl. ¶¶ 130-134.

²³ City Bar Recommendations, *supra* 2.

²⁴ See, e.g., Stephen Rex Brown, *Give ICE Cold Shoulder in Courts, Dozens of Groups Urge Top Judge*, THE DAILY NEWS (Dec. 20, 2017), <http://www.nydailynews.com/new-york/give-ice-cold-shoulder-courts-dozens-groups-urge-top-judge-article-1.3710553>; Adhikaar et al., Letter to Chief Judge Janet DiFiore Re: Escalation in ICE Arrests in New York State Courts (June 22, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/Open-Letter-to-Judge-DiFiore-06222017.pdf>; The Fund for Modern Courts, *Protecting the Administration of Justice in New York State: Impact of ICE Arrests on New Yorkers' Access to State Courthouses* (Dec. 5, 2017), <http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf>.

curiae issued recommendations for reasonable constraints on ICE courthouse enforcement operations.²⁵ These recommendations attempt to balance the federal interest in enforcing immigration laws with the State interests in preserving public safety and decorum in New York State courthouses, providing unfettered access to the legal system, and protecting due process for *all* individuals regardless of immigration status.

Other stakeholders have similarly made reasonable proposals for ICE to consider.²⁶ New York’s Chief Judge Janet DiFiore, as well as officials in numerous other states around the country,²⁷ have urged ICE to add courthouses to its list of “sensitive locations” (locations where ICE enforcement actions are not to occur).²⁸ Nearly 70 former federal and state judges—including 25 former state Supreme Court justices, among them former Chief Judge of the New York Court of Appeals, Jonathan Lippman—signed on to a December 2018 letter asking ICE to stop making arrests at courthouses, stating “our justice system cannot function effectively—if victims, defendants, witnesses and family members do not feel secure in accessing the courthouse.” The

²⁵ City Bar Recommendations, *supra* note 2, at 19-24.

²⁶ See *ABA House urges Congress add courthouses to ‘sensitive locations’ to ICE guidelines*, Aug. 18, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_house_urges_cong/ (citing H.D. Res. No. 10C (2017)); see also New York State Bar Association, *Committee on Immigration Representation Resolution Adopted by House of Delegates* (Jan. 28, 2018), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=80429> (similar resolution by New York State Bar Association). The Fund for Modern Courts as well as the ICE Out of Courts Coalition also put forth recommendations to address the disruptions caused by ICE courthouse arrests. See Fund for Modern Courts Report (Dec. 5, 2017), *supra* 24, at 18-23; ICE Out of Courts Coalition Report (Jan. 2020), *supra* 11, at 80-81.

²⁷ See Beth Fertig, *Outcry After Immigration Agents Seen at Queens Human Trafficking Court*, WNYC (June 16, 2017), <https://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/>; Tory Johnson, *Immigration Arrests at Courthouses Are Under Fire From State Officials*, IMMIGRATION IMPACT, (Sept. 28, 2017), <https://immigrationimpact.com/2017/09/28/immigration-arrests-at-courthouses-fire-state-officials/#.XmvwdZNKiu4>.

²⁸ See ICE, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc> (Last Reviewed/Updated Sept. 25, 2018) (while ICE enforcement actions may occur at sensitive locations “in limited circumstances,” such activities “will generally be avoided”).

former judges strongly urged ICE to include courthouses in the list of sensitive locations, as “obstacles . . . to fully accessing courts are intolerable.”²⁹

These recommendations and proposals show, at the least, that there has been ample room for cooperation by ICE on these issues. ICE should have considered these proposals, both prior to implementing a heightened and forceful practice of courthouse enforcement operations, and once New York State and legal stakeholders raised their concerns and began implementing concrete mitigation efforts. Instead, ICE has continued to increase its courthouse enforcement operations, including after the UCS Directive instituted protections regarding ICE practices.³⁰

Paramount among amicus curiae’s recommendations was the requirement of judicial, not merely administrative, warrants for civil immigration arrests conducted in and around New York State courthouses.³¹ While ICE arrests have similarly dire consequences of detention and deprivation of liberties, in contrast to state or federal criminal arrests, ICE administrative warrants need not be based on probable cause, are often based on outdated information, and require only internal, supervisory review. A requirement for judicial warrants ensures that the civil detainer contains accurate information and has a legal basis that has been independently reviewed. The City Bar also recommended that presiding judicial officers be notified of the presence of ICE agents and the intended target of a civil arrest so as to give the individual an opportunity to consult

²⁹ Letter from Former Judges – Courthouse Immigration Arrests, Dec. 12, 2018, <https://bit.ly/2BGdbyY>.

³⁰ IDP Report (Jan. 2020), *supra* 3, at 3.

³¹ City Bar Recommendations, *supra* 2, at 20-21. If public access threatens the constitutional rights of the litigants and orderly operation of courts, as described above, exclusion is justified. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (holding that “the unhindered and untrammelled functioning of our courts is part of the very foundation of our constitutional democracy”); *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (“[T]he courtroom and courthouse premises are subject to the control of the court.”); *U.S. v. Grace*, 461 U.S. 171, 178 (1983) (“There is little doubt that in some circumstances the Government may ban the entry on to the public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”).

with her counsel about the future of her legal case in the sanctity of the courtroom.³² These recommendations, and other protections, were included in the April 2019 UCS Directive. In response, just one day after the UCS Directive went into effect, ICE declared its intention to skirt the State's rules by instructing its officers that they should continue to use state courthouses as venues to surveil immigrant New Yorkers since "[they] are good to make the arrest outside the courthouse with or without a judicial warrant."³³

ICE's formal and informal communications evince a disregard for legitimate concerns of the State and indicate a stark disinterest in cooperation. Since the UCS Directive, ICE has continued to make arrests in the immediate vicinity of courthouses, with half of total operations in 2019 occurring after the April 2019 UCS Directive and 80% of courthouse arrests in 2019 being made while individuals were going into or exiting the courthouse building.³⁴ ICE enforcement operations in and around courthouses have continued to swell in 2019, and ICE has shifted its tactics to skirt the UCS Directive: plainclothes ICE agents now station themselves in courthouses waiting for individuals to be called in criminal court so as to identify them, trail individuals undercover, and then arrest individuals immediately outside courthouses.³⁵ In certain instances, ICE failed to comply with the UCS Directive by not identifying themselves to court staff or waiting for court personnel to review warrants before arresting individuals, and by apprehending individuals inside a courthouse and then escorting them outside to be arrested.³⁶ This type of pervasive presence and surveillance in courthouses actively disregards the State's desire to mitigate fear among immigrant populations and, indeed only fuels this fear further.

³² City Bar Recommendations, *supra* 2, at 21-22.

³³ IDP Report (Jan. 2020), *supra* 3 at 3,11 (citing Email Re: Courthouse Arrests (Apr. 18, 2019)).

³⁴ *Id.* at 3, 7.

³⁵ *Id.* at 3, 11 (nearly half (47%) of the 2019 operations occurred after the OCA April 17, 2019 Directive that implemented protections around ICE courthouse arrest practices).

³⁶ *Id.*

This response by ICE and the federal government is consistent with how the Trump Administration has treated jurisdictions like New York State, which seek to protect the proper administration of their state and local governments, and ensure access to courts and other public agencies for all residents regardless of immigration status.³⁷ For example, a plan to deploy immigration SWAT teams known as the Border Patrol Tactical Unit (“BORTAC”), who receive military special forces training, to a number of sanctuary jurisdictions including New York, could further exacerbate immigration enforcement actions at courthouses in New York.³⁸

Thus, ICE continues its practice of surveillance, intimidation, and arrest of victims, witnesses, defendants, and other court-involved individuals in and outside courthouses, despite the well-documented impact this has on individual rights and state sovereignty. At the very least, ICE should have considered and addressed proposals by local and state stakeholders that sought to mitigate these harms and provided adequate reasons for disregarding them. Instead, the agency stayed its course, failing to offer a rational connection between the facts on the ground and their enforcement practices.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that the Court grant Plaintiffs’ motion for summary judgment.

³⁷ See, e.g., *New York et al. v. Dep’t of Justice et al.*, No. 19-267, 2020 WL 911417 (2d Cir. Feb. 26, 2020) (DOJ could withhold millions of dollars in federal law-enforcement grants from New York City and seven states over their sanctuary policies on immigration); see also Zolan Kanno-Youngs and Jesse McKinley, *Trump Administration Freezes Global Entry Enrollment in New York Over Immigration Law*, NY TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/06/us/politics/dhs-new-york-global-entry.html>.

³⁸ Caitlin Dickerson and Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, NY TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html>.

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2020, I electronically filed a copy of the attached amicus curiae brief, using the CM/ECF System for the United States District Court for the Southern District of New York, which will send notification of that filing to all counsel of record in this litigation.

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