



Legislative Affairs
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2019-2020 Legislative Memorandum

**Subject: The Protect Our Courts Act
A.2176-A (Solages) / S.425-A (Hoylman)**

Position: SUPPORT

As civil immigration enforcement has grown more aggressive under the Trump administration, one of the more pernicious tactics used by U.S. Immigration and Customs Enforcement (ICE) is the practice of arresting people in or around courthouses. Since 2017, in New York City and other parts of the state, ICE agents have been spotted routinely lurking the hallways of state courthouses and arresting people attending their court dates. These tactics undermine the state's court system and threaten due process and the administration of justice.

The NYCLU supports the Protect Our Courts Act as a means of ensuring that New Yorkers' access to the courts is not compromised by this misguided approach to immigration enforcement.

ICE's courthouse enforcement tactics threaten New Yorkers' constitutional right to access the courts.

The ability to access the state court system is essential to our notions of liberty and due process. The right to sue and defend in the courts is "the right conservative of all other rights, and lies at the foundation of orderly government."¹ Preserving that right requires that the government do more than merely open the courthouse doors. The government must remove barriers that prevent certain classes of persons from availing themselves of the courts, lest their right to court access be effectively foreclosed.² The Supreme Court has required state authorities to take affirmative steps to ensure that the right of court access is realized.³

¹ *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

² See *Boddie*, 401 U.S. at 377. (court filing fee could not prevent indigent couple from filing for divorce); *Burns v. State of Ohio*, 360 U.S. 252, 257 (1959) (access to appellate review could not be effectively foreclosed due to appellant's poverty).

³ *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72 (1977) (requiring prison authorities to assist prisoners to prepare court papers and provide them with adequate law libraries).

ICE's practice of targeting and arresting people at courthouses directly undermines this constitutional right, and compels the state to act. In a national survey conducted by the ACLU and the National Immigrant Women's Advocacy Project of judges, court administrators, attorneys, and law enforcement, more than half of judges surveyed reported that court cases in 2017 were interrupted because of an immigrant domestic violence survivor's fear of coming to court.⁴ Several New York district attorneys have condemned ICE's courthouse enforcement, citing the fear it strikes in witnesses they are relying on to testify.⁵ It is impossible to quantify just how great of a chilling effect ICE's misguided practices have on litigants and witnesses. Yet if even a small number of New York's 4.3 million foreign-born residents are deterred from availing themselves of the courts, the state's judicial system is compromised.

Urgent action is needed to curb ICE's abusive courthouse enforcement.

Legislation to address ICE's courthouse enforcement is urgently needed. In just the past few years, the number of immigration arrests at New York courthouses has skyrocketed. In 2018, ICE arrested more than seventeen times the number of people at New York courthouses as in 2016, according to statistics gathered by the Immigrant Defense Project.⁶ Advocates have also observed ICE's courthouse actions growing more brazen and aggressive, with reports of ICE using physical force against arrestees, surveilling people in courtrooms and hallways, and even eavesdropping on privileged attorney-client conversations.⁷

ICE cannot be counted on to correct these abuses itself. Advocates have for years called on the U.S. Department of Homeland Security (DHS) to add courthouses to its list of sensitive locations where ICE cannot make arrests absent exigent circumstances,⁸ but the agency has not done so. In January 2018, ICE issued a formal directive to its officers about enforcement actions in courthouses.⁹ Though the directive sets out some general guidelines for how ICE courthouse arrests should be

⁴ ACLU, *Freezing Out Justice: How immigration arrests at courthouses are undermining the justice system*, p. 2, https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf.

⁵ Immigrant Defense Project, *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State*, pp. 7-13, <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf>.

⁶ Immigrant Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*, January 2019, p. 6, <http://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>.

⁷ *Id.* at 8-10.

⁸ See, e.g., ACLU, *ACLU Recommendations to DHS on Sensitive Locations Enforcement*, March 2014, <https://www.aclu.org/other/aclu-recommendations-dhs-sensitive-locations-enforcement>.

⁹ U.S. Immigration and Customs Enforcement, *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>.

targeted, the policy contains few bright lines and largely reinforces ICE's overall practice of arresting people in courthouses for civil immigration violations.

The Office of Court Administration (OCA) of the New York State Unified Court System recently acted to limit ICE arrests in courthouses, issuing a directive in April 2018 requiring that ICE only conduct arrests in courthouses under its jurisdiction if done pursuant to a judicial warrant or court order, and that no arrests take place in courtrooms absent exigent circumstances.¹⁰ These are meaningful steps to curb ICE's courthouse actions, and the legislature should act to codify these protections into state law.

The Protect Our Courts Act would bolster these administrative protections by giving individuals a privilege from civil arrest without a judicial warrant both within the confines of courthouses and when coming to and leaving court proceedings. Similarly to the OCA's directive, the bill would require ICE agents to identify themselves when entering a courthouse either to make an arrest or to observe. The bill would also provide protections to those accompanying their family members to court, and would cover town and village courts that are not subject to the OCA's existing policy.

ICE's escalating courthouse enforcement tactics continue to threaten the functioning of New York's courts and undermine due process. The New York Civil Liberties Union calls on lawmakers to defend the integrity of our judicial system by passing the Protect Our Courts Act.

¹⁰ State of New York Unified Court System, Office of the Chief Administrative Judge, *Directive: Protocol Governing Activities in Courthouses by Law Enforcement Agencies*, April 17, 2019, available at <https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf>.