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

February 15, 2023

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 related to New York City'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.

Disentangling local government from immigration enforcement across New York State has long been a priority for the NYCLU. For more than a decade, the NYCLU has helped shape the multiple iterations of New York City's local laws prohibiting law enforcement from responding to immigration detainers and otherwise limiting collusion with immigration enforcement. In 2017, the NYCLU worked closely with the Council on a package of legislation to prohibit the use of city resources for immigration enforcement, protect city data, and reaffirm the city's commitment to protecting its immigrant residents. Since that time, we have kept close tabs on the

city's observance of its disentanglement laws, where compliance has lapsed, and how those laws can be strengthened.

Today's hearing comes amid renewed attention towards how New York City welcomes and protects its immigrant residents. Since last fall, the city has welcomed thousands of new residents who have immigrated to the United States seeking better lives for themselves and their families. Though newly arriving migrants have been met with immense generosity from New Yorkers, they have unfortunately not been treated with the same kind of dignity from our city government. Mayor Adams has invoked New York's status as a "sanctuary city" while in the same breath speaking of excluding new arrivals from legally enshrined right to shelter.[1]

Against this backdrop, it is as important as ever that New York City's claim to be a safe and welcoming city for immigrants amount to more than rhetoric. That begins with an examination of the local laws that have for years placed a barrier between local government and federal immigration enforcement. Laws enacted by the Council over the past decade – restricting the use of immigration detainers and notifications to U.S. Immigration and Customs Enforcement (ICE),[2] prohibiting the use of city resources for immigration enforcement,[3] and limiting access to city property by non-local law enforcement[4] – are at the core of the city's disentanglement policies. But they also contain harmful exceptions that allow collusion between city law enforcement and ICE to continue.

The bills currently before the Council can begin to address the flaws in the city's existing disentanglement laws and fulfill the city's promise to its immigrant communities. Our testimony addresses the three bills before the committee today, and explores other ways that the city's disentanglement laws can be improved on and better enforced.

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[1] Chris Sommerfeldt and Michael Gartland, *Mayor Adams claims right-to-shelter law does not apply to NYC asylum seekers; critics pounce*, Daily News (Jan. 25, 2023), https://www.nydailynews.com/news/politics/new-york-elections-government/ny-adams-migrants-right-to-shelter-biden-harris-relief-center-legal-aid-20230125-cbb7g2sfbbdt5lrbdwlovxj7oy-story.html.
[2] NYC Admin. Code § 9-131; NYC Admin. Code § 14-154.
[3] NYC Admin. Code § 10-178.
[4] NYC Admin. Code § 4-210.

II. Intros. 184-2022 and 185-2022: Filling the gaps in New York City's detainer laws.

A key piece of New York City's disentanglement policies are its laws restricting law enforcement from honoring civil immigration detainers.[5] These laws have evolved over the years. In 2011, the Council enacted a local law to prohibit the Department of Correction (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.[6] At the urging of advocates, amendments were enacted in 2013[7] and 2014[8] to strengthen these laws and limit their exceptions.

As they currently exist, New York City's detainer laws prohibit both the DOC and the NYPD from honoring an immigration detainer by holding a person past their release date, or by notifying immigration authorities of a person's release, 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.[9] The city's prohibition on honoring immigration detainers was put in place years before the Second Department Appellate Division's holding in 2018 that law enforcement officers in New York have no authority under state law to detain a person for civil immigration purposes without a judicial warrant.[10]

The requirement for a judicial warrant issued by a federal judge or magistrate is one that ICE seemingly does not abide by. In 2021, city officials testified before this same committee that they were not aware of a judicial warrant having ever been provided alongside a detainer request.[11] Rather, ICE's general practice is to attach its own administrative warrants alongside its detainer requests.[12] Administrative warrants are issued by ICE itself, with no judicial or other independent review, and do not fall within the definition of arrest warrants recognized under state law.[13]

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[5] NYC Admin. Code § 9-131; NYC Admin. Code § 14-154.
[6] NYC Local Law No. 62 (2011).
[7] NYC Local Law No. 21 (2013); NYC Local Law No. 22 (2013).
[8] NYC Local Law No. 58 (2014); NYC Local Law No. 59 (2014).
[9] NYC Admin. Code § 9-131(b)(1)(ii); 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).
[11] NYC City Council Committee on Immigration, Hearing: Oversight of New York City's Detainer Laws, Testimony of NYC Department of Corrections and Mayor's Office of Immigrant Affairs, June 9, 2021, *available at* https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=868388&GUID=BFBC7758-EFA3-44A8-B76B-28FD920F1AC8&Options=info|&Search=.
[12] 8 U.S.C. 1226(a).
[13] *See Francis*, 168 A.D.3d at 43.

New York's detainer laws are often the reference point used when discussing New York City's "sanctuary" status. Yet these laws have not prevented the DOC from colluding with ICE and transferring people in city jails into immigration detention. By DOC's own accounting, it has transferred 108 people into ICE custody since 2017.[14] The purported authority invoked by the DOC for these transfers is a section of the law that prohibits use of department resources or communicating with ICE regarding a person's incarceration status, release dates, or court appearances – unless the person in question was convicted of certain offenses or is a match on a terrorist watch screening database.[15]

The city's detainer law regulating the NYPD contains additional problematic exceptions. Like the companion DOC law, the NYPD detainer law generally prohibits the NYPD from honoring an immigration detainer unless provided with a judicial warrant *and* the individual has a qualifying conviction or is a match on a watchlist.[16] However, the law separately allows 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 are a match on a terrorist screening database.[17] The validity of this exception, which purports to allow prolonged detention absent a judicial warrant, is called into serious question in light of the Second Department's decision in *Francis*.[18]

These loopholes in the city's detainer laws sow confusion, put people at risk, and undermine the city's claim as a safe and welcoming place for immigrants. The perplexing structure of the local laws sends mixed messages to city law enforcement about their role in immigration enforcement, inviting loose interpretations that keep city agencies actively engaged in immigration enforcement. Public records obtained by the Immigrant Defense Project and shared with the NYCLU reveal the alarming extent to which DOC and ICE employees communicate about people in custody, actively and sometimes gleefully arranging for people to be picked up.[19] This collusion between the DOC and ICE runs contrary to the spirit of the detainer laws and the city's commitment to immigrant communities.

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[14] *See* NYC DOC, *Statistics and Compliance: ICE Reports*, https://www.nyc.gov/site/doc/about/statistics-and-compliance.page (total number compiled from ICE reports posted starting in FY2017 and ending in FY2022).
[15] NYC Admin. Code § 9-131(h).
[16] NYD Admin. Code § 14-154(b)(1).
[17] NYC Admin. Code § 14-154(b)(2).
[18] *See Francis*, 168 A.D.3d at 53.
[19] Records obtained through the New York Freedom of Information Law (FOIL), filed by the Immigrant Defense Project and the Black Alliance for Just Immigration, in December 2018. Portions of these records were provided to the NYCLU by IDP and BAJI.

The convoluted drafting of the existing laws also invites errors by corrections employees. In one high-profile example in 2019, the DOC transferred a Bronx man into ICE custody in response to a detainer despite not having any prior convictions that might have invoked one of the detainer law's exceptions.[20] The city publicly acknowledged at the time that the transfer was an "operational error."[21] The existence of carveouts in the city's detainer law makes such mistakes by DOC employees all but inevitable.

If New York City is to live up to its claim to be a welcoming city for immigrants, it must finally close the loopholes in its detainer laws that enable ongoing collusion with immigration authorities. Doing so would bring the city in line with modern approaches pursued by other jurisdictions, such as Chicago, that have moved to eliminate similar exceptions in their local disentanglement laws.[22] To fully protect immigrants across New York, the state legislature must act to pass the New York For All Act,[23] which would prohibit transfers to ICE by all law enforcement agencies in New York, without criminal carveouts. But New York City must continue to lead the way by strengthening its own longstanding disentanglement laws.

Intros. 184 and 185 would take an important step in this direction. Intro. 184 would eliminate the suspect provision of local law that purports to allow the NYPD to hold a person beyond their release date for ICE even when they are not provided with a judicial warrant. Intro. 185 would remove the language that the DOC relies on to justify transferring a person into ICE custody in response to a detainer when a person has prior criminal convictions. These bills would significantly narrow the circumstances under which city law enforcement can collaborate with ICE.

While these two pieces of legislation would represent progress, they can still be improved upon to more completely move away from a model that categorizes immigrants based on their past contact with the criminal legal system. As drafted, these bills would leave in place references to particular offenses that the city has pointed to as justification for treating certain immigrant residents less favorably,

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[20] 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.
[21] Annie Correal and Ed Shanahan, *He Was Caught Jaywalking. He Was Almost Deported for It.*, N.Y. Times (March 11, 2021), https://www.nytimes.com/2021/03/11/nyregion/daca-ice-nyc-immigration.html.
[22] 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.
[23] New York for All Act, S.B. 987 (Gounardes), https://nyassembly.gov/leg/?bn=S00987&term=2023.

including by refusing to fund legal representation for some people under the New York Immigrant Family Unity Project (NYIFUP).[24] As these bills move through the legislative process, the Council should continue to work with advocates to refine and strengthen them.

III. Intro. 158-2022-A: Creating a private right of action related to civil immigration detainers and cooperation with federal immigration authorities.

New York City's multiple laws concerning detainers and immigration enforcement, while far from perfect, have provided a meaningful buffer that restricts city employees from colluding with ICE. But when those laws are violated and people are transferred to ICE custody unlawfully, there are few remedies that individuals can pursue to hold city agencies accountable. The DOC, NYPD, and other agencies subject to the city's disentanglement laws are largely left to police themselves and deal with any violations they identify through their own disciplinary procedures.

Intro. 158-A attempts to fill this accountability void by allowing those who were detained by immigration authorities and their relatives, where such detention resulted from the deprivation of a right created or protected by one of the city's disentanglement laws, to bring a civil action for legal or other equitable relief. Giving those who have been wronged by the actions of law enforcement a pathway to the courts is an important part of holding officers accountable and deterring unlawful behavior, in addition to compensating those harmed. We look forward to working with the Council to ensure that those who have been wronged by disentanglement law violations by city employees receive their day in court and are afforded meaningful relief.

IV. Further efforts to disentangle New York City from immigration enforcement.

In addition to the legislation before the Council at today's hearing, there are other steps that the city can take to strengthen its disentanglement laws. In 2017, the Council passed a local law that broadly prohibits the use of city resources, including time on duty, for immigration enforcement.[25] The goal was to create comprehensive restrictions on ICE collusion for city employees that extend beyond

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[24] Jeff Coltin, *NYC covers immigrants' legal costs for those without criminal conviction*, City & State (June 14, 2018), https://www.cityandstateny.com/politics/2018/06/nyc-covers-immigrants-legal-costs-for-those-without-a-criminal-conviction/178375/.

[25] NYC Local Law No. 228; NYC Admin. Code § 10-178.

the context of people held in local jails or police custody. The passage of Local Law 228 was a significant addition to the city's disentanglement laws, and the Council should be attentive to its implementation.

While strong in many respects, Local Law 228 contained unfortunate and unclear exceptions. For example, the law provides that city employees shall not be prevented from "performing their duties in accordance with state and local laws" and allows 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."[26] Such exceptions can be interpreted in multiple ways, and it is unclear how city agencies and departments might be invoking them in practice to continue colluding with ICE.

For example, in its patrol guide, the NYPD lays out a procedure for responding to requests for immigration enforcement that generally requires such requests to be decided on by a duty chief, "considering the need to ensure public safety."[27] Yet the guide 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 being elevated up the chain of command.[28] The patrol guide also states, without additional guidance, that the prohibition on resources does not apply to cooperative agreements such as task forces not primarily intended to further immigration enforcement, seemingly leaving it to individual officers to determine when that exception applies.[29]

As part of its oversight into New York City's disentanglement laws, the Council must not lose sight of Local Law 228 and the many questions concerning its implementation. The Council should scrutinize how different city agencies, including the NYPD, are applying the law in particular situations, such as when ICE officers request traffic or crowd control support when conducting a raid. Most importantly, the Council should revisit the exceptions built into the local law to ensure that they are not leaving the door open for unintended ICE collusion.

The Council should also use its authority to increase transparency around the city's disentanglement laws and their implementation. Local Law 228 requires that requests to assist immigration enforcement be recorded, along with the action

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[26] NYC Admin. Code § 10-178(e).
[27] NYPD Patrol Guide No. 212-126 (June 24, 2020), *available at* https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide2.pdf.
[28] *Id.*
[29] *Id.*

taken, and reported to the speaker of the City Council.[30] However, the city is not required to post the reports publicly. Recent reports obtained by the NYCLU have contained no entries, raising questions about how diligently agencies are adhering to their reporting requirements. The DOC and NYPD are also required to report annually on the detainers they receive and how they respond and post those publicly, but those reports contain minimal details on the individual instances in which the agencies communicate and transfer people to ICE.

As the Council is considering revisions to the city's disentanglement laws, it should consider how transparency around the laws can be enhanced. All reports should be made available to the public and easily accessible online. The law should mandate more specific details be provided about how the DOC, NYPD, or other agencies receive and respond to requests from ICE. We would welcome the opportunity to work with the Council to shape future legislation to accomplish this.

V. Conclusion.

Now as much as ever, New York City must make clear that it is committed to welcoming and protecting its immigrant residents. That commitment must be reflected in our city's laws and carried out faithfully. We urge the City Council to move quickly in passing legislation to fill the holes in the city's detainer laws, continue its oversight of the implementation of those laws, and work with advocates on further legislation to protect the rights of immigrant New Yorkers.

[30] NYC Admin. Code § 10-178(d).