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January 9, 2013

The Honorable Christine C. Quinn
Speaker
New York City Council
250 Broadway, Suite 1856
New York, NY 10007

Re: Legislation on Persons Not to Be Detained With Respect to Collaboration with Immigration and Customs Enforcement (ICE)

Dear Speaker Quinn:

On behalf of the New York City Bar Association's Criminal Courts Committee, Civil Rights Committee, Corrections and Community Reentry Committee, Domestic Violence Committee, and Immigration and Nationality Law Committee, we write in support of the City Council's efforts to strengthen current limitations on the City's collaboration with U.S. Immigration and Customs Enforcement ("ICE") with respect to the holding of immigrant New Yorkers subject to ICE detainers. We moreover urge the City Council to consider further changes.

As we have previously expressed, and as the City Council has already recognized, ICE detainers have caused great harm to New Yorkers in recent years - undermining basic principles of fairness and due process, eroding community trust and raising concerns of racial profiling, interfering with the workings of the criminal justice system, and endangering New York's large, vital immigrant community.[1] Moreover, collaboration with ICE has cost the City millions of unreimbursed dollars every year, as individuals are held in city jails for an average of 73 days longer when detainers are issued.[2] Some may have valid claims to U.S. citizenship.[3] In light of

[1] *See* Letter of the New York City Bar Association to Hon. Christine Quinn, Speaker, New York City Counsel (Feb. 3, 2011), *available at* http://www.nycbar.org/pdf/report/uploads/20072056-LettertoSpeakerQuinnRePorposaltoLimitCollaborationBetweenDOCandICE.pdf; The New York City Bar Association, Report on Legislation in Support of City Council Int. 656-2011 (Sept. 14, 2011), *available at* http://www2.nycbar.org/pdf/report/uploads/1_20072182-Int.656-2011amendingcitycoderegardingdetention.pdf; Testimony of Alina Das, Member, Criminal Courts Committee of the New York City Bar Association, in Support of City Council Int. 656-2011 (October 3, 2011), *available at* http://www2.nycbar.org/pdf/report/uploads/20072186-CriminalCourttestimony insupportofInt.656-2011.pdf.

[2] Justice Strategies, *New York City Enforcement of Immigration Detainers, Preliminary Findings* (October 2010).

[3] Because immigration detainers are often issued based on incomplete information, foreign-born U.S. citizens are frequently erroneously detained. Many New York residents acquired citizenship derivatively through a parent's

these harms, New York City is well within its rights to place stronger limitations on the use of ICE detainers in its city jail and precincts. As ICE publicly acknowledges, its civil detainers are *requests* - not mandates - to local law enforcement agencies to detain named individuals for up to 48 hours after they would otherwise be released from criminal custody, to allow ICE the opportunity to take these individuals into immigration custody.[4] New York City is not legally obligated to collaborate with federal immigration detention requests.

The City Council's 2011 legislation (Int. 656-2011), which limited the Department of Correction's collaboration with ICE in certain cases, was an important first step in addressing the serious harms from detainers. Since then, however, ICE has implemented "Secure Communities" throughout New York City, causing an attendant increase in ICE presence and the use of detainers earlier in the criminal justice process, including at booking and arraignments. The harms mentioned above have thus expanded, with more individuals affected by detainers throughout New York City. The two recently introduced pieces of legislation (Int. 0982-2012 and Int. 0989-2012) address some of these additional concerns. However, as noted below, more must be done to alleviate the adverse effects of detainers.

We therefore urge the City Council to pass expanded legislation. Such an expansion would be in line with the City Council's interest in protecting immigrant New Yorkers and their families, but would not serve as a legal impediment to ICE's power to place any individual in removal proceedings.[5] Moreover, it would conform with ICE's own recent clarification that its use of detainers should be limited.[6]

<u>Action to Expand Limitations on Collaboration with ICE Is Timely and Justified</u>

The City Council's attention to the adverse effects of ICE's presence and activities throughout the criminal justice system comes at a critical time. On May 15, 2012, ICE implemented "Secure Communities" in New York City, despite both the City Council's and the New York State Governor's opposition to the implementation of this program in New York.

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naturalization, which agency records may not reflect. *See* Jacqueline Stevens, *<u>U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens</u>*, 18 Va. J. Soc. Pol'y & L. 606 (2011).

[4] See, e.g., Letter from David Venturella, Assistant Director of ICE, to Miguel Martinez, County Counsel, County of Santa Clara, California, in or about September 2010.

[5] ICE initiates removal proceedings against an individual by serving him or her with a Notice to Appear or other charging document and filing that document with an immigration court. A decision to lodge or lift a detainer does not affect ICE's ability to initiate removal proceedings.

[6] ICE recently issued guidance limiting the use of detainers in certain cases, in response to leadership by the City and other localities across the country. *See* Secretary John Morton, *Immigration and Customs Enforcement, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems* (Dec. 21, 2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf. (Last visited January 7, 2012). As noted below, this guidance - while a welcome policy development - is purely discretionary and unenforceable, thus local legislation is still necessary to protect immigrant New Yorkers from the harms caused by detainers.

Under Secure Communities, fingerprint information collected at arrest and booking is automatically shared with the U.S. Department of Homeland Security. Based on this information, ICE will lodge a detainer on anyone it believes is removable, regardless of whether that person has a substantial challenge to the removal charges or is eligible for discretionary relief from removal. ICE has long issued detainers in cases involving individuals in Department of Correction ("DOC") custody (at a rate of 3,000-4,000 New Yorkers each year).[7] But as a result of Secure Communities, ICE is now additionally lodging detainers for individuals held by the New York City Police Department ("NYPD") at booking, before those individuals enter into DOC custody. ICE is also appearing at arraignments to detain individuals who otherwise would have been released.

Collaboration with ICE detainer policy is inconsistent with New York City's interests in protecting due process and other rights of its immigrant residents. These New Yorkers subjected to immigration detention are detained at far greater rates (80% denied bail entirely) than those in criminal proceedings (68% released on recognizance).[8] Thus, New Yorkers subjected to ICE detainers are routinely separated from their families and homes in the City, and forced to defend themselves while detained in facilities as remote as Louisiana and Texas - often without access to counsel, evidence, and witnesses.[9] Unsurprisingly, detained and unrepresented immigrants commonly lose their deportation cases. Only 3% of noncitizens apprehended in New York who are detained and unrepresented had a favorable outcome, compared to 74% of noncitizens apprehended in New York who are released (or never detained) and represented.[10]

Criticism of ICE detainer policy has prompted many localities, including this City, to take action. The leadership of the City and these other localities has in turn prompted ICE to issue guidance

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[7] *See* ICE FOIA Response Letter to Prof. Nancy Morawetz, New York University School of Law, dated Dec. 12, 2008.

[8] NYU Immigrant Rights Clinic & Families for Freedom, *Insecure Communities, Devastated Families: New Data on Immigration Detention and Deportation Practices in New York City* 9-10 (July 23, 2012) (1 percent of New Yorkers in New York City Criminal Courts are denied bail entirely) *available at* http://familiesforfreedom.org/sites/default/files/resources/NYC%20FOIA%20Report%202012%20FINAL_1.pdf. (Last visited January 7, 2012). Moreover, even when ICE sets bond, it is often prohibitively high. 75% of bond settings are $5,000 and up, with 35% $10,000 and up. This contrasts with New York criminal pretrial detention in, where 80% of bond settings are $1,000 or below. *Id.* at 11.

[9] Nationally, only 22% of detained immigrants had counsel, with much lower rates of representation in some detention centers. *See* Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication, at* Appendix 3 (June 2012) available at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf. *See also* Human Rights Watch. *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (Nov. 2009); *Report on the Right to Counsel for Detained Individuals in Removal Proceedings*, New York City Bar Association (August 2009) available at http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf. (Last visited January 7, 2012).

[10] Steering Comm. of the N.Y. Immigrant Representation Study Report, *New York Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357, 363-64 (2011).

to its officers, urging greater prosecutorial discretion in the issuance of detainers.[11] However, ICE's new guidance "does not create or confer any right or benefit" to immigrants affected by detainer policy and is subject to discretion of local officers.[12] The City Council's continuing leadership is therefore required to ensure that immigrant New Yorkers remain protected from the harms caused by detainers.

The City Council's new proposed legislation takes some important steps towards addressing these concerns. These developments are significant and will have a substantial impact on many New Yorkers' lives.

Current law, while providing some limitations on the use of detainers for certain New Yorkers, applies only to people held in DOC custody. Moreover, the current law applies only to people with no criminal record. The proposed legislation would ensure that New Yorkers held at earlier stages of the criminal process will also benefit from limitations on the scope of detainers. The proposed legislation also would expand these limitations to apply to individuals with minor criminal records, namely individuals who have never been convicted of a felony and who have not been convicted of almost any misdemeanor offense[13] within the last 10 years. Finally, the new proposed legislation would also apply to individuals who have certain pending misdemeanor cases, giving them an opportunity to be released on bail. These are welcome changes given the significant harms that detainers cause to our city and its residents.

More Expansive Changes are Required Due to the Significant Public Safety Concerns, Due Process and Civil Rights Implications, and Fiscal Costs of ICE Detainer Policy

The City's current detainer policy and its newly proposed legislation, while a step in the right direction, will have a limited impact in light of Secure Communities. For all individuals not covered by the limits on detainers discussed above - including those with no record but with pending cases involving certain charges specified by the legislation (and who would otherwise be released on bail but for the detainer), and those with criminal records not covered in the legislation (such as those with a felony conviction or a more recent but still nonviolent misdemeanor record) - ICE regularly lodges detainers and takes such people into their custody regardless of the resolution of their current criminal cases or any valid challenges to their removability.

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[11] *See supra* note 7.

[12] *See id*. at 3.

[13] Individuals who have misdemeanor convictions for unlicensed driving (though there remains a lack of clarity on what types of unlicensed driving charges will be excluded), prostitution (NYPL § 230.00), and loitering for the purposes of prostitution (NYPL § 240.37) will not trigger NYPD or DOC to honor a detainer regardless of whether they have been convicted of such offenses within the past 10 years. In this respect, the proposed legislation is more expansive than ICE's new discretionary guidance, which would generally require that detainers be lodged in cases involving three or more prior misdemeanor convictions (other than traffic offenses and other relatively minor misdemeanor offenses), even if such misdemeanors convictions occurred more than ten years ago. *See supra* note 7, at 2.

Changes Are Needed to Better Address the Adverse Effect of Detainers on Individuals with Pending Criminal Cases

As we have previously indicated, legislation should be expanded to cover individuals with pending criminal cases.[14] For example, we urge the City Council to consider the millions of dollars of unreimbursed cost to the City caused by the delayed justice that the current detainer policy creates for immigrants with pending criminal cases. The placement of immigration detainers in pending cases often complicates a plea bargaining resolution that would otherwise be straightforward, practical, and just for all stakeholders in the criminal justice system. Instead, the protracted resolution of these cases, resulting from collaboration with ICE, results in prolonged detention in City jails in instances when an individual would otherwise be released on bail; requires the City to pay for transportation of detainees to and from court; and extends case processing costs for District Attorneys' offices, public defense providers, and the courts.

In addition, immigration detainers often interfere with a defendant's ability to participate in the City's renowned alternative to incarceration programs, even when the judge, prosecutor, defense attorney, defendant, and other stakeholders *all* agree that this alternative would be the best course for the defendant and the community. For these individuals, and many others with pending cases, the current detainer policy burdens the criminal justice system as a whole. By expanding the category of people exempt from ICE detainers, legislation could further reduce the amount of wasted City resources and promote criminal justice.

Changes Are Needed to Better Address the Adverse Effect of Detainers on People with Past Criminal Records Who May Nonetheless Be Eligible for Relief from Removal

Moreover, we note that our concerns about due process, public safety, and community trust in the criminal justice system extend not only to individuals with no conviction histories, but also to the many lawful permanent residents, refugees, and other immigrants who may have conviction histories, but have a substantial challenge to removal or would be eligible for waivers of deportation if given the chance to defend their immigration cases close to family and counsel here in the City. As noted above, New Yorkers are far more likely to find counsel and successfully defend their cases if they are able to remain in New York and are not detained during their removal proceedings. We therefore support the expansion of the current detainer policy to cover individuals with conviction histories more expansively defined than in the proposed legislation, along the lines of our previous communications on this matter.[15]

Changes Are Needed to Better Address the Unintended Consequences of ICE Collaboration on Public Safety and Community Trust

The impact of Secure Communities and the increased use of detainers prior to an individual's transfer into DOC custody raise additional concerns. As a matter of public safety, the City's

[14] *See supra* note 1.

[15] *Id.*

police and prosecutors have cultivated a relationship of trust with the immigrant communities.[16] The increased ICE presence and collaboration at NYPD precincts and at court arraignments undermines the ability of the police and the courts to build community trust and promote public safety. While the proposed legislation will ensure that the NYPD is covered by this city's detainer policy, the detainer policy itself only applies in limited cases. The NYPD's ability to foster community trust is therefore similarly limited. The perception that a criminal arrest will automatically lead to immigration detention and deportation can have a chilling effect on immigrant New Yorkers who may wish to report a crime for fear that any interaction with police and the courts will result in the deportation of their immigrant family member or loved one. Immigrants' fear of coming forward to report a crime will result in a less safe New York.

Additionally, current law required the Department of Corrections to report statistics on its compliance with ICE detainers by September 30, 2012. We support the amendments that expand these reporting requirements in line with proposed changes. However, the Department should release complete statistics as soon as practicable so the public can evaluate the City's policy.

Changes Are Needed to Avoid the Counterproductive and Harmful Effects Caused by Specific Carve-Outs

Finally, we note that several of the carve-outs in the current law and proposed legislation exacerbate these concerns discussed above. For example, the carve-outs for people with prior assault and/or contempt charges in the proposed legislation are harmful to immigrant domestic violence victims, who are especially vulnerable to manipulation of the legal system by abusers, and to mistaken arrests by law enforcement. Abusers have always been adept at using the criminal justice and court systems against their victims. Secure Communities gives an abuser yet another tool to exert power and control over his victim, and gives weight to his threats that he can have her deported and separate her from her children.[17] Abusers routinely falsely accuse their victims of assault, often resulting in cross arrests and cross orders of protection. Immigrant New Yorkers who do not speak English are particularly susceptible to cross arrests and cross orders of protection, as they cannot explain their story to police at the scene. Cross orders of protection are also common in New York City Family Courts, where *pro se* victims are coerced by their batterers and the courts into agreeing to "settle" an order of protection on consent. After securing a consent order of protection, the abuser then promptly calls the police to falsely report a violation, initiating criminal contempt charges against his victim.

The assault and contempt carve-outs in the proposed legislation thus capture domestic violence victims in their net. We urge that these carve-outs be eliminated, and that detainers not be honored even for people with prior assault or contempt charges. Alternatively, we suggest, at a minimum, additional safeguards to help identify immigrants whose prior assault or contempt charges may have been part of a pattern of abuse. For example, the legislation could place an

[16] As part of this effort, for example, District Attorneys' offices make no distinction between crime victims who are citizens and those who are not (except when they may assist undocumented crime victims to achieve certain immigration protections).

[17] New York State Judicial Committee on Women and the Courts, *Immigration and Domestic Violence: A Short Guide for New York State Judges* (March 2004).

affirmative duty of inquiry on the NYPD or DOC to determine whether the individual is a victim of domestic violence and/or trafficking, before honoring an ICE detainer. Officers are already trained to recognize domestic violence and identify primary aggressors and true victims. Otherwise, to eliminate the need for subjective discretion, the laws could state that NYPD and DOC will honor the ICE detainer for individuals with prior charges of assault and/or contempt, *unless* that individual also had an order of protection in their favor against someone else (suggesting a cross order of protection situation).[18]

Another chilling effect of Secure Communities on domestic violence victims is that they may be reluctant to come forward to report abuse or to press charges if they fear that doing so will lead to their *abuser's* deportation, particularly if they have children with the abuser and/or he or she is the family's primary or sole provider.[19] The Secure Communities program strips victims of the power to decide how to deal with the abuse, whether to keep their families together, or how to separate from their abuser in the safest and most financially sound way possible.

Indeed, in other criminal contexts as well, if someone in a position to report a crime knows that NYPD and DOC collaboration with ICE will result in an immigration detainer against the perpetrator, there is a good chance that he or she will not want to get the police involved. This directly contravenes efforts by the City to encourage its residents to report crime and work with law enforcement officers to make communities safer.

Another problematic carve-out in both current law and the proposed legislation is the exception permitting detainers to be lodged on "known gang members" and individuals "identified as a possible match in the terrorist screening database." Reliance on the use of gang and terrorist databases raises serious civil liberties concerns, which have been well documented.[20] Problems include, but are not limited to: inaccurate identification methods, erroneous and outdated records, lack of due process for providing notice or a mechanism for challenging inclusion in the databases, the disproportionate inclusion of Black, Latino and Asian youth, and the negative impact inclusion in the databases has on pre-trial release and case outcomes. For these reasons, such automatic carve-outs based on these inaccurate and problematic databases should be eliminated. Again, nothing prevents ICE from initiating removal proceedings against those individuals for whom it can support its charges of removability.

[18] These proposed additional safeguards will not protect every domestic violence victim from an ICE detainer, especially those victims who are reluctant to self-report, which is why we urge City Council to eliminate the assault and contempt carve-outs altogether.

[19] *See supra* note 15.

[20] *See generally,* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 Stan. J.C.R. & C.L. 115 (Nov. 2005); K. Babe Howell, *Gang Databases: Labeled for Life*, The Champion (Jul.-Aug. 2011); Stacey Leyton, *The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases*, in CRIME CONTROL AND SOCIAL JUSTICE : THE DELICATE BALANCE (Westport, CT: 2003); US Department of Justice, *The FBI's Terrorist Threat and Suspicious Incident Tracking System,*Office of Inspector General Audit 09-02 (November 2008).

Conclusion

Other communities across the country have reacted to the concerns presented by detainers and Secure Communities by creating detainer limitation policies that cover a wider range of immigrant residents and ensure a clear division between the role that their local officials play in criminal justice enforcement versus immigration enforcement. Policies in Cook County, Illinois; Santa Clara County, California; and Washington, D.C., all provide more protective measures to address the negative impact of detainers on local residents.[21]

For these reasons and for the reasons outlined in our previous communications, we applaud the City Council's most recent proposals to strengthen the current law and respectfully ask the City Council to consider our committees' suggestions with respect to a more robust change to the detainer policy in New York.

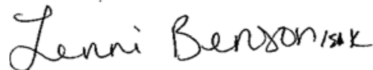
Sincerely,

Robert Dean, Chair
Criminal Courts Committee

Brian Kreiswirth, Chair
Civil Rights Committee

Anna Ognibene, Chair
Domestic Violence Committee

Sara Manaugh, Chair
Corrections & Community Reentry Committee



Lenni Benson, Chair
Immigration and Nationality Law Committee

cc: Councilmember Daniel Dromm
Councilmember Melissa Mark-Viverito

[21] *See, e.g.,* Cook County Code, Ch. 46 Law Enforcement, Sec. 46-37; Santa Clara County Board Policy Request 3.54 Relating to Civil Detainers; Washington, D.C., Immigration Detainer Compliance Amendment.