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TESTIMONY OF ALINA DAS, MEMBER, CRIMINAL COURTS COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION

NEW YORK CITY COUNCIL
COMMITTEE ON IMMIGRATION HEARING
REGARDING INT. 982 AND INT. 989
January 25, 2013

My name is Alina Das, and I am a member on the Criminal Courts Committee of the New York City Bar Association. I am testifying on behalf of the Criminal Courts Committee, Civil Rights Committee, Corrections and Community Reentry Committee, Domestic Violence Committee, and Immigration and Nationality Law Committee of the New York City Bar Association.

The New York City Bar Association applauds the City Council for taking on this important issue and supports Int. 982 and Int. 989, which mark an important step in limiting the Department of Correction's (DOC) and New York Police Department's (NYPD) collaboration with U.S. Immigration and Customs Enforcement (ICE) in our City. Moreover, based on our collective view of the scope of the problems posed by the current ICE detainer policy, our committees would support even more robust measures to limit this collaboration in light of the harm it causes New York immigrants and the criminal justice system as a whole.

As our committees expressed in our letter to the Honorable Christine Quinn earlier this month,[1] we believe that the NYPD's and DOC's current collaboration policy with ICE imposes significant harms on our City's residents and exacts a high financial burden on the City's budget. As a bar association that is representative of a broad cross-section of the legal community—defense attorneys and prosecutors, judges, professors, and lawyers who practice in immigration law, domestic violence prevention and law, civil rights, community reentry, and corrections law—we base our concerns in the real impact that the current detainer policy has in thousands of cases each year.[2]

First, we note that we support this legislation because a change in detainer policy is timely and justified. 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.

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

[1] Letter of the New York City Bar Association to Hon. Christine Quinn, Speaker, New York City Council (Jan. 9, 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072375-PersonsNottoBeDetained ICECollaboration.pdf (copy attached).
[2] Judges on our committees are non-voting and did not take part in the drafting of this testimony or our previous letter regarding this legislation.

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).[3] 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).[4] 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.[5] 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.[6]

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 to its officers, urging greater prosecutorial discretion in the issuance of detainers.[7] 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.[8] The City Council's continuing leadership is therefore needed to ensure that immigrant New Yorkers remain protected from the harms caused by detainers.

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

[4] 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 RATES, where 80% of bail settings are $1,000 or below. *Id.* at 11.

[5] 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).

[6] 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).

[7] *See supra* note 7.

[8] *See id*. at 3.

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 a misdemeanor offense within the last 10 years or whose minor misdemeanor offenses fall within certain specified categories.[9] 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.[10] These are welcome changes given the significant harms that detainers cause to our city and its residents.

Second, we respectfully ask the City Council to consider the follow changes to enhance the legislation.

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

The legislation should be expanded to cover individuals with pending criminal cases. As it stands under the proposed legislation, individuals facing certain criminal charges[11] may be subject to a detainer (and therefore transferred into ICE custody) *even if* the criminal court would otherwise release the individual on bail or on his or her own recognizance or *even if* all entities involved—prosecutors, judges, and defense attorneys—agree that the individual should participate in one of the

[9] Individuals who have misdemeanor convictions for unlicensed driving (NYVTL §§ 511(1), 511 (2)(a)(i), or 511(2)(a)(iv)), 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 convictions occurred more than ten years ago. *See supra* note 7, at 2.However, ICE's discretionary guidance is more favorable for individuals who do have certain types of misdemeanors on their record in the last ten years. For example, ICE guidance suggests that no detainer should be lodged for an individual who has a single misdemeanor conviction for petit larceny in the last ten years, but the proposed legislation would honor a detainer in such a case.

[10] Individuals who have only one pending misdemeanor charge will not trigger NYPD or DOC to honor a detainer unless the charge involves firearm possession (NYPL § 265.01); criminal contempt (NYPL § 215.50), unless the defendant is released upon failure to replace the misdemeanor complaint with an information pursuant to section 170.70 of the criminal procedure law; assault (NYPL § 120.00), unless the defendant is released upon failure to replace the misdemeanor complaint with an information pursuant to section 170.70 of the criminal procedure law; sexual offenses (NYPL art. 130); or alcohol and drug related vehicular offenses (NYVTL art. 31). Two or more of any pending misdemeanor charges will result in a detainer except where those charges are either unlicensed driving (NYVTL §§ 511(1), 511 (2)(a)(i), or 511(2)(a)(iv)), prostitution (NYPL § 230.00), and/or loitering for the purposes of prostitution (NYPL § 240.37) . In these respects, there are differences between this proposed legislation and ICE's new discretionary guidance—in some cases, ICE's new discretionary guidance is more favorable to immigrant New Yorkers. For example, the new ICE discretionary guidance suggests that a detainer should not be lodged against an immigrant facing misdemeanor charges of both simple marijuana possession and criminal trespass, whereas the proposed legislation would allow NYPD or DOC to honor such a detainer.

[11] *See* supra note 10 (explaining which pending cases will still trigger a detainer under the proposed legislation).

City's renowned alternative to incarceration programs. As a result, individuals must either face ICE detention in a far-away jail or private prison, or they must remain in criminal custody in New York without bail or release. For this reason, 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.[12] By expanding the category of people with pending cases 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

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.[13]

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 police and prosecutors have cultivated a relationship of trust with the immigrant communities.[14] 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.

[12] Justice Strategies, *New York City Enforcement of Immigration Detainers, Preliminary Findings* (October 2010).
[13] *Id.*
[14] 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).

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

Finally, we note that two of the carve-outs in the current law and proposed legislation exacerbate these concerns discussed above. First, 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. We urge that these carve-outs be eliminated, and that detainers not be honored 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 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).[15]

Second, 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.[16] 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.

In summary, the New York City Bar Association recognizes the important steps already taken by the City Council in addressing the harmful and costly detainer policy in our city, and we further urge the City Council to consider our suggestions for even stronger limitations on DOC and NYPD collaboration with ICE given detainers' adverse effects on the criminal justice system as a whole. In addressing these issues, the City would save valuable resources for which it is not reimbursed by the federal government, while ensuring that there are restraints in place that protect immigrant New Yorkers from a federal immigration enforcement policy that does not serve the ends of justice.

[15] 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. For additional explanation, please refer to our January 2, 2013 letter, attached.

[16] *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).