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**WRITTEN TESTIMONY OF
THE IMMIGRATION AND NATIONALITY LAW COMMITTEE,
THE CRIMINAL COURTS COMMITTEE,
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE, AND
THE COMMITTEE ON CORRECTIONS AND COMMUNITY REENTRY**

OF THE NEW YORK CITY BAR ASSOCIATION

**NEW YORK CITY COUNCIL
COMMITTEE ON IMMIGRATION HEARING**

October 15, 2014

My name is Farrin Anello, and I am a member of the Immigration and Nationality Law Committee of the New York City Bar Association and chair of the Detention Subcommittee. I am testifying today on behalf of the Immigration and Nationality Law Committee, the Criminal Courts Committee, the Criminal Justice Operations Committee, and the Committee on Corrections and Community Reentry. Our Committees collectively represent a broad cross-section of the legal community, including defense attorneys and prosecutors, professors, immigration lawyers, and lawyers with expertise in civil rights, community reentry, and corrections law. Our testimony today is based on the expertise of our members and the experiences of their clients.

Our Committees commend the City Council for once again taking action on the critical issue of detainer reform. We support Int. 0486-2014 and Int. 0487-2014. These bills would limit the constitutional violations arising from current detainer practices. They would improve the NYPD's ability to keep all New Yorkers safe by building trust between police and immigrant communities, while relieving the City of potential liability and of detention costs that will not be reimbursed by the federal government. Under current law, the City complies with 63 percent of ICE detainers, which are non-binding requests to hold individuals for investigation.¹ To more fully address the concerns that I will discuss today, our Committees urge the City to end compliance with all ICE detainers.

The City Council's action on detainer reform is timely and justified. This reform comes at a critical time. The federal government is increasingly embedding itself in state and local criminal justice systems with programs such as Secure Communities. In response, localities around the country have taken action. As of October 2014, over 250 localities, including major cities, have limited or ended their compliance with immigration detainer

¹ Kirk Semple, *New York City Increases its Resistance to Federal Entreaties on Foreign-Born Detainees*, N.Y. Times, Dec. 5, 2013, www.nytimes.com/2013/12/06/nyregion/city-increases-its-resistance-to-federal-entreaties-on-foreign-born-detainees.html.

requests.² This summer, the New York State Sheriffs' Association recommended that its members refuse all ICE detainer requests.³ Suffolk and Nassau Counties, among many others, have followed this recommendation.⁴

On May 15, 2012, ICE implemented the Secure Communities program in New York City, despite opposition from the City Council and the Governor. Under Secure Communities, fingerprint information collected at arrest and booking is automatically shared with U.S. Immigration and Customs Enforcement (ICE). Based on this information, ICE will lodge a detainer on anyone it believes is removable, regardless of whether that person has a substantial defense to the removal charges, is eligible for discretionary relief, or may even be a derivative United States Citizen. As a result, ICE is not only issuing detainers for thousands of people in DOC custody, but it is also issuing detainers at the time of booking and arraignments, increasing detention throughout the criminal justice system.

Accepting ICE detainer requests violates the Due Process and Fourth Amendment rights of immigrant residents, and exposes New York City to financial liability. New Yorkers subjected to ICE detainers are generally placed in detention during removal proceedings,⁵ which often results in denial of access to counsel and other due process concerns. People in immigration detention are separated from their families and homes in the City, often transferred to remote facilities, and typically forced to defend themselves without access to counsel, evidence, or witnesses.⁶ Perhaps unsurprisingly given these circumstances, detained

² Amanda Peterson Beadle, Why 250 Counties Have Stopped Honoring Local ICE Detainers, Sept. 22, 2014, <http://immigrationimpact.com/2014/09/22/why-250-counties-have-stopped-honoring-local-ice-detainers/>. Access to all local laws or policies that currently limit compliance with detainers is available on the website of the Immigrant Legal Resource Center, at www.ilrc.org/resources/detainer-policies. An interactive map of these localities is available at www.ilrc.org/enforcement. A list of jurisdictions with anti-detainer laws or policies is also available on the website of Catholic Legal Immigration Network, Inc., at <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014>.

³ Kirk Semple, *New York State Sheriffs Shying Away from Immigration Detention*, N.Y. Times, July 30, 2014, <http://nyti.ms/1ocMul0>.

⁴ Beadle, *supra* n.2.

⁵ A recent study found that 80 percent of people in immigration detention are denied bond, while only one percent of individuals in New York City criminal custody are denied bail entirely. NYU Immigrant Rights Clinic & Families for Freedom, *Insecure Communities, Devastated Families: New Data on Immigration Detention and Deportation Practices in New York City* 10 (July 23, 2012), <http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf>. Moreover, even when ICE sets bond, it is often prohibitively high. 75% of immigration bond settings are \$5,000 and up, with 35% \$10,000 and up. This contrasts with New York criminal pretrial detention, in which context 80% of bond settings are \$1,000 or below. *Id.* at 11.

⁶ Nationally, only 22% of detained immigrants had counsel, with much lower rates of representation in some detention centers. See Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* Appendix 3 (2012), <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* (2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (2009); York City Bar Association, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings*, New (2009), <http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf>.

individuals have a much lower success rate in removal proceedings compared with the success rate of non-detained individuals.⁷

ICE detainers also raise serious Fourth Amendment concerns. When the City continues to detain an individual on an ICE detainer after he or she otherwise should have been released, this detention constitutes a new arrest, which must meet Fourth Amendment requirements.⁸ The Fourth Amendment prohibits unreasonable seizures and generally requires a showing of probable cause to justify an arrest.

For these reasons, federal courts have found that localities can be financially liable for wrongfully holding an individual on the basis of an ICE detainer.⁹ As the federal Third Circuit Court of Appeals recently held, the fact that a locality is detaining someone pursuant to an ICE detainer – which is not legally binding – does not cure the underlying constitutional violation.¹⁰

Complying with ICE detainers creates new, unreimbursed costs for City taxpayers. Individuals with ICE detainers are kept in detention 73 days longer, on average, than similarly situated individuals without ICE detainers.¹¹ ICE detainers can cause judges to deny bond during pretrial proceedings, and at sentencing they can prevent individuals from receiving access to less expensive alternative to incarceration programs in lieu of jail sentences. At \$76 per day of detention, the average cost of each ICE detainer honored by New York City is approximately \$5,546.¹² The current policy results in the detention in DOC custody of approximately 2,400 individuals beyond the time they would normally be held.¹³ Thus, a conservative estimate suggests that New York City is subsidizing ICE activities at a cost of over \$13.3 million per year.

Finally, the City's compliance with ICE detainers undermines community trust in local law enforcement. The perception that a criminal arrest will lead automatically to deportation has a chilling effect on immigrant New Yorkers. Immigrant residents who are victims or witnesses of criminal activity often fear that any interaction with police will place

⁷ *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part I*, 33 Cardozo L. Rev. 357, 363-64 (2011).

⁸ *Illinois v. Caballes*, 543 U.S. 405, 406 (2004); *Morales v. Chadbourne*, No. 12-0301, at *28 (D. R.I. Feb. 12, 2014) (holding that detention pursuant to an immigration detainer is a seizure must comport with the Fourth Amendment); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, No. 3:12-cv-02317-ST, at *9 (D. Or. Apr. 11, 2014) (same); *Villars v. Kubiowski*, No. 12-cv-4586, --- F. Supp. 2d. ---, 2014 WL 1795631, at *10-12 (N.D. Ill. May 5, 2014) (same); see also *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2013) (holding that detainers are not mandatory and therefore cannot be used as a defense to a Fourth Amendment claim).

⁹ See, e.g., *Miranda-Olivares*, 2014 WL 1414305; *Morales*, 2014 WL 554478; see also *Galarza*, 745 F.3d 634.

¹⁰ See *Galarza*, 745 F.3d 634.

¹¹ See Aarti Shahani, *New York City Enforcement of Immigration Detainers Preliminary Findings*, Justice Strategies (Oct. 2010) (using data collected from detainees with top charges of drug related offenses), www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf.

¹² See Timothy Rudd et al., *Financing Promising Evidence-Based Programs*, MDRC, December 2013 (using \$28,000 as the marginal cost per year of detention for a person in DOC custody, or about \$76 per day, to evaluate financial savings of ABLE program for adolescents in DOC custody), available at www.mdrc.org/sites/default/files/Financing_Promising_evidence-Based_Programs_FR.pdf.

¹³ This figure comes from the NYC DOC's reported data mandated under Local Law 2013/022. The report for the period spanning July 2013 to September 2013 reflected that 600 detainers were honored over three months; for the purpose of an estimate, this figure can be extrapolated to 2400 detainers over twelve months.

them or family members at risk of deportation. As a result, ICE detainers undermine public safety. They also encourage racial profiling by creating incentives to conduct arrests based upon perceived immigration status.

Our Committees commend the City Council for introducing the pending legislation, and also encourage the Council to consider several additional steps.

First, our Committees encourage the City Council to adopt a clear rule that the NYPD and DOC will not accept ICE detainers. The City Council should consider expanding the legislation to cover all individuals in NYPD and ICE custody, not only those with certain records. Under current law, the City still honors 63 percent of ICE detainer requests.¹⁴ The proposed bills would address some of these cases, and its warrant requirement provides a critical protection. But further action is needed. Our Committees emphasize that all people are entitled to due process and Fourth Amendment protections. Likewise, detention costs and potential financial liability accrue regardless of the records of those being detained. Finally, because the current and proposed rules are complex, they do not provide a sense of security that someone may report a crime without fear that that person or a family member will be deported. A bright-line rule would make clear that all residents may safely communicate with the police.¹⁵

Second, we encourage the City Council to clarify that the City will not expend its resources on non-mandatory immigration enforcement, and will not permit ICE to interview detainees without access to immigration counsel. Our committees support the City Council's decision to remove ICE offices from City property. They encourage the City to take at least two additional steps: first, to stop expending any local resources on federal immigration enforcement, except as required by law; and second, to protect detainees in City custody from being interviewed by ICE until they have had an opportunity to speak with immigration counsel. These rules would conserve City resources for protecting public safety, build trust, and protect the right to retain counsel in immigration proceedings.

In conclusion, the proposed bills significantly improve upon the present detainer policies. A bright-line rule that the City will not accept immigration detainers would go even further to address the constitutional, fiscal, and public safety concerns raised by ICE detainers.

Respectfully Submitted,

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¹⁴ Kirk Semple, *New York City Increases its Resistance to Federal Entreaties on Foreign-Born Detainees*, N.Y. Times, Dec. 5, 2013, www.nytimes.com/2013/12/06/nyregion/city-increases-its-resistance-to-federal-entreaties-on-foreign-born-detainees.html.

¹⁵ See Nik Theodor, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, University of Illinois at Chicago (May 2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.