

Memorandum Urging Enactment

COMMITTEE ON IMMIGRATION REPRESENTATION

Immigration #2-GOV

October 13, 2020

S. 425-A
A. 2176-A

By: Senator Hoylman

By: M. of A. Solages

Senate Committee: Rules

Assembly Committee: Codes

Effective Date: Immediately

AN ACT to amend the civil rights law and the judiciary law, in relation to protecting certain interested parties or people from civil arrest while going to, remaining at, or returning from the place of such court proceeding.

LAW & SECTION REFERRED TO: Section 28 of the Civil Rights Law.

THE COMMITTEE ON IMMIGRATION REPRESENTATION SUPPORTS THIS LEGISLATION AND URGES ITS ENACTMENT

The NYSBA's Committee on Immigration Representation urges you to sign the Protect Our Courts Act (POCA, S425A/A2176), a bill that will ensure equal access to state court proceedings regardless of immigration status. As courts begin to resume operations and people seek access to vital resources, relief, and rights, equal access to courts is imperative. COVID-19 has disproportionately impacted Black and brown immigrant New Yorkers. All individuals, and especially those most in need due to the pandemic, must feel safe defending themselves against charges, fighting for their homes in court, and reporting harm committed against them. This legislation shields the most vulnerable New Yorkers seeking access to our state courts by protecting them from ICE operations at the courthouse.

Among the core objectives of the New York State Bar Association is facilitating the administration of justice. We are therefore very concerned that federal civil authorities are undermining the integrity of New York's justice system.

Prior to the pandemic, we had seen an unprecedented escalation in Immigration and Customs Enforcement (ICE) using the New York State courts to effectuate civil immigration arrests—an increase of 1,700% over the past three years.¹ Those disappeared from court have been survivors of violence, youth, people who are mentally ill or homeless, guardians to U.S. citizen children, people who are LGBT, victims of human trafficking, and asylum seekers. In and around

¹ Immigrant Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018* (January 2019). See <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>

courthouses, ICE agents have physically separated attorneys from clients, thrown individuals to the ground, and refused to display warrants or share any information. In recent weeks, ICE arrests have increased again, inflicting further pain on immigrant communities already disproportionately suffering the effects of the COVID-19 pandemic.

These arrests mark the resurgence of a long-defunct practice of civil arrests in courthouses—a practice legislatures and courts have regulated for more than a century. ICE enforcement activity in and around New York courts violates the long-standing common law privilege against such arrests, undermines the effective functioning and constitutional foundations of New York’s legal system, and threatens the health and safety of all New Yorkers. As Judge Jed Rakoff recently wrote in his opinion² ordering an injunction against courthouse arrests in New York:

“[I]t is one thing for the state courts to try to deal with the impediments brought on by a pandemic, and quite another for them to have to grapple with disruptions and intimidations artificially imposed by an agency of the federal government in violation of long-standing privileges and fundamental principles of federalism and of separation of powers.”

Attorneys, judges, law enforcement, and court officers are in agreement that New York’s courts must be protected from ICE overreach. The New York State Bar Association has previously made a call for reform³, as have many other legal professional organizations. We have come to this consensus after witnessing first-hand the many deleterious effects of ICE arrests: district attorneys unable to investigate and prosecute crimes, victims of gender-based violence and trafficking unable to access justice, parties unable to avail themselves of remedies in family court, as well as confusion and conflict among court officers.⁴ The Unified Court System directive issued by the Office of Court Administration on April 17, 2019 is a step in the right direction, but it is not enough. The directive applies only to courts under OCA’s jurisdiction, which leaves town and village courts, many of which are located in rural areas with large numbers of immigrant agricultural workers, vulnerable to ICE abuse.

POCA will restore courthouse access across New York State, by codifying the Unified Court System’s directive and making it unlawful for ICE to make a civil arrest while someone is going to, attending or leaving court without a judicial warrant or court order. In July 2020, the New York State Legislature passed POCA with bipartisan support. Although there is currently an injunction in place barring ICE arrests in and around New York State courthouses⁵, that case is

² *The State of New York et al. v. U.S. Immigration and Customs Enforcement*, SDNY 1:19-cv-08876-JSR, June 10, 2020.

³ NYSBA Committee on Immigration Representation, Resolution Adopted by House of Delegates, January 28, 2018. See <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Immigration%20Report%20and%20Resolution.pdf>

⁴ *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in Our State*, ICE Out of Courts Coalition, 2019. See <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf>

⁵ <https://www.law.com/newyorklawjournal/2020/06/10/rakoff-bars-ice-from-conducting-civil-immigration-arrests-at-state-courthouses/>

now pending before the Second Circuit (*New York v. ICE* 20-2622). We need a legislative solution to this problem, rather than relying on a court injunction. This point was underscored recently when the First Circuit Court of Appeals vacated and remanded to the District Court of Massachusetts a similar injunction that had been in place in that state.⁶ The First Circuit was not convinced that the common law privilege applied in cases of civil immigration arrests, nor was the court convinced that federal immigration law implicitly incorporated the privilege in its provisions regarding enforcement. It is quite possible that the Second Circuit will agree. Given the well documented, serious harms that ICE's civil arrests cause to the proper functioning of New York's legal system, we must not rely on federal courts to protect it.

Here in New York, legislation is needed to clearly and unequivocally codify the State's intention to protect all of its residents coming to, attending, or leaving from its courthouses. POCA is that legislation. Once our statutes provide this protection against ICE depredations, New Yorkers would no longer need to rely on the common law privilege at all, and the currently-pending litigation would be obviated. NYSBA's Committee on Immigration Representation urges enactment of the Protect Our Courts Act into law.

For the foregoing reasons, the NYSBA's Committee on Immigration Representation **SUPPORTS** this legislation and **URGES ITS ENACTMENT** by the Governor.

⁶ *Ryan et al. v. U.S. Immigration and Customs Enforcement et al.*, (1st Cir. Case No. 19-1838, Sept. 1, 2020, <http://media.ca1.uscourts.gov/pdf/opinions/19-1838P-01A.pdf>)