

## **ICE ENFORCEMENT PREVENTING INDIVIDUAL'S ACCESS TO JUSTICE AT NEW MEXICO COURTHOUSES.**

ICE arrests of undocumented immigrants at state and local courthouses is a growing concern within New Mexico. It impacts everyone's ability to access to justice and has negative impacts on public safety. So far, there have been multiple attempts to address this problem, including appeals for rule changes to the Metro Court and New Mexico Supreme Court from the Governor's Office and from representatives of the New Mexico legal community and local organizations using a petition. To date, there has been no legislative solutions passed by the New Mexico State Legislature. This report discusses the development and impact of this issue in New Mexico, the feasibility of past attempted resolutions, and the possible legislative solutions available in New Mexico.

### **Part 1: Understanding the problem.**

#### **1. ICE authorization; Courthouses as 'sensitive locations'**

In a 2011 memo, [Enforcement Actions at or Focused on Sensitive Locations](#),<sup>1</sup> the U.S. Immigration and Customs Enforcement (ICE) defined "sensitive locations" to include schools, hospitals, institutions of worship, and sites of public demonstrations. While the list of locations was not exclusive, it specifically did not include federal, state, or local courthouses. Instead, it left searches at these unspecified locations to the discretion of ICE officers and agents. To determine the validity of a planned operation, agents are encouraged to evaluate whether the targeted location would be "viewed as being at or near a sensitive location" based on whether it would disrupt the operations of the location. While the memo encouraged the use of caution for locations involving

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<sup>1</sup> Enforcement Actions at or Focused on Sensitive Locations Memo, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

“victims of crime or abuse”, the memo failed to specify if that term referred to individuals accessing the criminal justice system through a court appearance.

On March 14, 2017, ICE released a second memo, [ICE Sensitive Locations Policy](#),<sup>2</sup> indicating that the sensitive location policy was still in effect, however there was still no specific mention of courthouses as a sensitive location. It was not until January 10, 2018 that this was addressed in a separate clarifying memo, [Civil Immigration Enforcement Actions Inside Courthouses](#),<sup>3</sup> which specifically discussed conducting operations inside or near federal, state, and local courthouses, but failed to designate them as sensitive locations. Instead, the 2018 memo justified ICE’s enforcement activities inside courthouses as “wholly consistent with longstanding law enforcement practices” and necessitated by lack of cooperation between ICE and certain unspecified jurisdictions. The memo then described the official ICE policy for *civil* immigration enforcement within or near courthouses. Unless the individuals pose a threat to public safety or interfere with ICE enforcement actions, ICE will not pursue enforcement action. However, “[t]his policy does not apply to *criminal* immigration enforcement actions inside courthouses, nor does it *prohibit* civil immigration enforcement actions inside courthouses.” (emphasis added). The memo applies different standard for enforcement and appears to do little to curtail ICE at courthouses beyond merely encouraging caution for the officers.

## 2. ICE Authorization under VAWA

The 2011 ICE memo recognized specific protections for undocumented female immigrants seeking protections under the Federal Violence Against Women Act (VAWA), citing a prior memo published on January 22, 2007, titled [Interim Guidance Relating to Officer Procedure Following](#)

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<sup>2</sup> ICE Sensitive Locations Policy Memo, <https://www.ice.gov/doclib/sevis/pdf/bcm1703-05.pdf>.

<sup>3</sup>Civil Immigration Enforcement Actions Inside Courthouses Memo, <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>.

Enactment of VAWA 2005. The 2007 memo “prevents ICE employees from making an adverse determination of admissibility or deportability of an alien using information furnished *solely* by certain people associated with the battery or extreme cruelty, such as the abuser or a member of the abuser's family living in the same household as the victim.”<sup>4</sup> It also requires the completion of a certificate of compliance for enforcement actions occurring at several locations, *including courthouses*, where the undocumented immigrant would be appearing cases related to their self-petition<sup>5</sup>.

VAWA, originally enacted in 1994, protects female undocumented immigrants experiencing domestic violence or human trafficking by providing access to U and T visas<sup>6</sup>, which are available through the self-petition process. To be eligible for self-petition,<sup>7</sup> you must be a victim of domestic violence or a similar crime committed by a US citizen or Lawful Permanent Resident. You must also be of “good moral character”, and adequately demonstrate a relationship to the abuser, in addition to other factors. While VAWA provides needed path to citizenship for certain vulnerable immigrants, it does not protect those merely reporting the crime, appearing in court as a witness, or victims whose abusers were also undocumented immigrants.

In recent years, VAWA has struggled to maintain authorization in an increasingly partisan Congress. Just as further action is needed from Congress to implement comprehensive immigration reform, VAWA also requires reauthorization in order to maintain courthouse protections for these vulnerable immigrants. As of February 15, 2019, VAWA has expired and is currently awaiting reauthorization in the Senate.

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<sup>4</sup> See 8 U.S. Code § 1367. Penalties for disclosure of information.

<sup>5</sup> 8 U.S. Code § 1229(e). Initiation of removal proceedings.

<sup>6</sup> T visas are available to immigrant victims of "severe forms of trafficking". U visas are available to immigrant victims of “substantial physical or mental abuse” as a result of the crime.

<sup>7</sup> Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime; <https://www.americanimmigrationcouncil.org/sites/default/files/research/vawa.pdf>

### 3. Results of ICE Policy

The presence of ICE officers and agents at courthouses has had a chilling effect on undocumented immigrants' ability to access justice. In a 2018 report by the ACLU, [Freezing Out Justice](#),<sup>8</sup> a survey of police officers showed that from 2016 to 2017 there was a 22 percent increase in reports that immigrant populations were less likely to make police reports and a 20 percent increase in reports that survivors were less likely to help with post-crime scene investigations.

This correlates with increased arrests and detentions by ICE agents at state and local courthouses across the country. In New York alone, the [Immigration Defense Project](#)<sup>9</sup> reported a significant [1,200 percent increase](#)<sup>10</sup> in arrests and attempted arrests by ICE agents at courthouses from 2016 to 2017. This upward trend is reflected across the country, with a 37.6 percent increase<sup>11</sup> in arrests made by ICE on civil immigration charges from January 24 to April 30, 2017, compared to the similar period in the prior year.

The increase in ICE arrests at courthouses nationally has led to an erosion of trust between victims of crime and police departments and prosecutors. Specifically, it has had a negative impact on the effective investigation domestic violence, human trafficking, and sexual assault<sup>12</sup>. These crimes rely on victims and witnesses to report the crime to police to initiate further investigation, however many fail to report due to fears that they may be deported as a result.

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<sup>8</sup> Freezing Out Justice ACLU Report; [https://www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf)

<sup>9</sup> Immigrant Defense Fund Website; <https://www.immigrantdefenseproject.org/>

<sup>10</sup> IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017; <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf>

<sup>11</sup> ICE ERO immigration arrests climb nearly 40% <https://www.ice.gov/features/100-days>

<sup>12</sup> Freezing Out Justice ACLU Report; [https://www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf)

## Part 2: Scope of the problem in New Mexico.

### 1. Effects of ICE Policy

New Mexico has also dealt with an increase of ICE arrest and detentions occurring at state and local courthouses. Notably, the Bernalillo County Metropolitan Court (“Metro Court”) in downtown Albuquerque has seen dozens of ICE arrests and detentions, as [reported by the Albuquerque Journal](#)<sup>13</sup> in May, 2019. In response to these arrests and detentions, there has been public outcry by numerous groups, detailed in a petition to the Supreme Court of New Mexico<sup>14</sup>, sent on August 29, 2018. The petition was signed by nearly 250 New Mexico attorneys and by representatives from sixty-one legal associations and community organizations<sup>15</sup>. It advocated for a rule change which would require arrests made in or near courthouses to use judicial warrants instead of administrative warrants. Judicial warrants require a higher burden of proof and an additional authorization that could prevent the arrests from taking place at courthouses. The petition also requested a rule allowing courts to issue writs of protection for individuals fearing deportation during a court appearance. The Supreme Court of New Mexico responded to the petition with a letter dated April 18, 2019, which rejected the request. The Court “determined that public access to New Mexico courts is being provided as required by law and there will not be an adoption of new statewide rules”.

The Governor’s Office has also responded this issue. In support of reducing ICE arrests at courthouses, Governor Lujan Grisham directed her General Counsel to submit a [letter to Chief](#)

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<sup>13</sup> Elise Kaplan, *Migrant Advocates Say ICE Arrests Continue At Court*, Albuquerque Journal, May 21, 2019, <https://www.abqjournal.com/1318815/advocates-protest-continued-ice-arrests-at-metro-court.html>.

<sup>14</sup> Petition For Adoption Of New Rules, (August, 2018) [https://www.aclu-nm.org/sites/default/files/field\\_documents/petition\\_for\\_adoption\\_of\\_new\\_rules\\_23-116\\_23-117.signed.pdf](https://www.aclu-nm.org/sites/default/files/field_documents/petition_for_adoption_of_new_rules_23-116_23-117.signed.pdf)

<sup>15</sup> Elise Kaplan, *Migrant Advocates Say ICE Arrests Continue At Court*, Albuquerque Journal, May 21, 2019, <https://www.abqjournal.com/1318815/advocates-protest-continued-ice-arrests-at-metro-court.html>.

[Judge Sandra Engel](#)<sup>16</sup> of the Metro Court in February, 2019. The letter requested that the Metro Court adequately enforce its [Courthouse Access Policy](#),<sup>17</sup> which “prohibits local, state, or federal law enforcement officers or agents from arresting, detaining, interrogating, or otherwise restricting the freedom of individuals in the [Metro Court] Courthouse”. The Court Executive Officer for Metro Court responded to the Governor’s letter in [a public statement](#)<sup>18</sup> which denied the request. The response stated that “The [Metro Court] is committed that courts of law should remain open and accessible to the public. As a Court, we cannot prohibit law enforcement from making arrests in our courthouse.” This is supported by the Courthouse Access Policy, which allows arrests by outside Law Enforcement Officers if they present and display appropriate badges to On-Site Law Enforcement. Officers should have a valid reason for arresting the individual, such as a lawful court order, a judicial arrest warrant, or the existence of a valid and immediate public safety concern. However, there is no restrictions on the arrests that take place outside of the courthouse, The policy does state that this is where “arrests should generally occur”, but these arrests can still have a negative impact on individual’s ability to access justice and should be curtained if possible with additional rules or legislation.

## **2. New Mexico Field Research**

Based on a discussion with a Public Defender in Albuquerque who regularly appears in the Metro Court, ICE arrests are a serious issue that presents a significant barrier to the community’s ability to access justice. ICE officers and agents will often wear plain clothes with no visible badge or identification. The officers will witness court appearances of a targeted individual to establish

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<sup>16</sup> *Letter from the Governor to Chief Judge Sandra Engel*, Feb. 20, 2019, [https://www.kob.com/kobtvimages/repository/cs/files/Gov\\_Engel\\_Letter.pdf](https://www.kob.com/kobtvimages/repository/cs/files/Gov_Engel_Letter.pdf)

<sup>17</sup> Court Access Policy; <https://www.kob.com/kobtvimages/repository/cs/files/Courthouse%20Access%20Policy.pdf>

<sup>18</sup> Brittany Costello, *Governor wants ICE to stop detaining people at Metro Court*, KOB 4, Feb. 22, 2019, <https://www.kob.com/albuquerque-news/gov-wants-ice-to-stop-detaining-people-at-metro-court/5254800/>

probable cause, and then arrest the individual using an administrative warrant<sup>19</sup>. The arrests can occur inside or outside the courthouse in the nearby parking lot. Arrests outside the building are increasingly frequent since they can more easily comply with the Courthouse Access Policy and reduce the public visibility of the arrest.

On the afternoon of June 11, 2019, I visited the First Judicial District State Court<sup>20</sup> in Santa Fe and asked the security at the front entrance about their experiences with ICE officers. One particular security officer said he was not aware of ICE arrests or detentions occurring at this Courthouse, however he had only worked at this location for 6 months. According to the security officer, ICE officers attempting to enter the courthouse would need to leave their weapons at the security checkpoint at the front entrance unless there was an exception, such as a public safety concern. If ICE was there to arrest or detain someone inside the courthouse, the on-site security would actually execute the arrest. The arrested individual would then be brought to the front entrance and be taken into federal custody.

Based on the low traffic at the First Judicial District Court, it seems unlikely that ICE officer would be targeting people at this location. However, ICE arrests can still occur here. If ICE officers had advanced knowledge about the person or persons arriving for a court appearance, they could likely arrest the person in a similar manner to how the arrests are conducted at the Metro Court.

On July 2, 2019, I spoke with a representative at the Administrative Office of the Courts (AOC). The clerk said that there is no consistent approach to security at the different courts.

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<sup>19</sup> See *The Basics On Ice Warrants And Ice Detainers*, Offices In San Francisco And Washington D.C, May 2017, [https://www.ilrc.org/sites/default/files/resources/ice\\_warrants\\_summary.pdf](https://www.ilrc.org/sites/default/files/resources/ice_warrants_summary.pdf).

<sup>20</sup> The New Mexico First Judicial District Court consists of Santa Fe, Rio Arriba, and Los Alamos counties.

This information was confirmed during my visit to the Metro Court on July 5<sup>th</sup>, 2019. I spoke with individuals, a security officer at the front entrance, and Mr. Robert Padilla, the Court Executive Officer for the Metro Court Administrative Office of the Court. The security officer indicated that ICE officers can appear at the Court without showing a badge or ID, and can enter with their equipment (weapons, etc.). The security at the front entrance cannot take any action preventing ICE from entering or from arresting an individual within the courthouse.

Mr. Padilla also confirmed this information, stating that ICE officers may enter the court both in their capacity as federal officers and generally as members of the public. Additionally, their entrance into the courthouse to enforce federal law is consistent with the Courthouse Access Policy. The Court cannot prevent ICE officers from arresting individuals; in fact, they can face legal consequences if the security or judges try to interfere with an ICE arrest. Furthermore, they do not have the resources to properly track the ICE arrests that occur on the premises or to confirm that the officers are using the proper warrant to execute the arrest.

## Part 3: Possible solutions.

### 1. Legislative and Executive Branch

ICE's conduct in courthouses has [impacted courts nationally](#),<sup>21</sup> as acknowledged by a letter<sup>22</sup> sent on December 12, 2018 from 70 former judges from 23 states to the Acting U.S. ICE

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<sup>21</sup> Vinita Singh, *List of Methods Used to Stop ICE Courthouse Arrests*, Chicago Appleseed, Aug. 15, 2018, <http://www.chicagoappleseed.org/wp-content/uploads/2018/12/List-of-Actions-Against-ICE-Courthouse-Arrests.pdf>.

<sup>22</sup> Letter From Former Judges - Courthouse Immigration Arrests, Dec. 12, 2018, <https://www.scribd.com/document/395488473/Letter-From-Former-Judges-Courthouse-Immigration-Arrests>; Alanna Durkin Richer, *Ex-Judges to ICE: End Immigration Arrests at Courthouses*, AP News, Dec. 12, 2018, <https://www.apnews.com/e401e85400ee44ab9dd51ace042be399>.

Director Ronald Vitiello. States legislatures have responded to this issue with varying solutions, with some states like New York and California being most vocal and active in their opposition.

In the 2017-2018 Legislative Session, the New York State Assembly introduced [Assembly Bill A11013A](#),<sup>23</sup> which “[e]xempts certain interested parties or people from civil arrest while going to, remaining at, or returning from the place of such court proceeding.” This bill is still being considered by the New York State Senate but will likely be signed by Governor Cuomo upon passage through both houses. In the meantime, the bill has been supplemented by [Executive Order 170](#)<sup>24</sup>, issued by Governor Cuomo on September 15, 2017. The Executive Order states that “civil arrests by federal immigration authorities may only be executed within state facilities when accompanied by a judicial warrant or judicial order”.

An alternative statutory solution comes from the California State Legislature. [SB-785 Evidence: immigration status](#)<sup>25</sup>, enacted on May 17, 2018, which restricts the release of information about an individual’s immigration status while appearing at court. This release of information is seen as a contributing factor to the occurrence of ICE arrests at courthouses. The California law states that “in civil actions for personal injury or wrongful death, evidence of a person’s immigration status is *not admissible* and discovery of a person’s immigration status is *not permitted*.” (emphasis added). This restriction also applies to the credibility of witnesses. It can be overridden if a “party requests an in camera hearing and the presiding judge determines that the evidence is admissible.”

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<sup>23</sup> A.B. A11013A, Reg. Sess. (N.Y. 2017) <https://legislation.nysenate.gov/pdf/bills/2017/a11013a>.

<sup>24</sup> Exec. Order No. 170 – State Policy Concerning Immigrant Access to State Services and Buildings (N.Y. 2017) [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files//EO\\_170.1.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files//EO_170.1.pdf).

<sup>25</sup> S.B. 785, Reg. Sess. (Cal. 2018)

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB785](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB785).

This law has not faced any legal challenges in the California court system to date. It also seems consistent with the California Constitution's language regarding the rules for court administration, practice and procedure. Under Cal. Con. Art. VI, § 6(d), the Judicial Council shall "adopt rules [-], and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute." This indicates that statutes can preempt conflicting judicial rules, but there has been no challenge of this interpretation to date.

Another recent bill introduced in California would give judicial officers the ability to "prevent activities that threaten access to courthouses, including by protecting the privilege from arrest at a courthouse." This addition to Section 43.54 to the California Civil Code, and amendment of Section 177 of the California Code of Civil Procedure is necessary to offer protections to individuals appearing in California courthouses.

## **2. Lawsuits/Legal Challenges**

Other states have turned to non-legislative solutions for ICE arrests at state and local courthouses. Prosecutors in Massachusetts from the Middlesex County District Attorney Office and the Suffolk County District Attorney Office filed a [complaint](#)<sup>26</sup> in U.S. District Court for the District Of Massachusetts on April 29, 2019. The complaint challenged "the federal government's appropriation of the Massachusetts state courts to carry out federal civil immigration policy." The complaint also contests the use of civil offenses, such as remaining in the US or participating civil proceedings, as a justification for ICE arrests at courthouses<sup>27</sup>.

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<sup>26</sup> Complaint for Petitioner, *Ryan et al v. U.S. Immigration and Customs Enforcement et al*, (D. Mass. 2019) (19-11003-IT), <http://cdn.cnn.com/cnn/2019/images/04/29/complaint.pdf>.

<sup>27</sup> *Arizona v. United States*, 567 U.S. 387, 407 (2012). "As a general rule, it is not a crime for a removable alien to remain present in the United States"

On June 20<sup>th</sup>, 2019, the U.S. District Court granted a preliminary injunction, recognizing “that [the Plaintiffs] are likely to suffer irreparable harm in the absence of preliminary relief...”<sup>28</sup> This directly restricted the ICE memo from January 10, 2018, indicating that “Defendants are enjoined from implementing the Courthouse Civil Arrest Directive and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.”

While this particular case is not binding precedent in New Mexico, it cites several cases in Federal court that “recognize [-] a privilege against civil arrests for those attending court on official business”.<sup>29</sup>

#### **a. Federal Caselaw**

There are two main issues addressed by Federal Courts related to the arrest of undocumented immigrants appearing at state and local courthouses: Preemption Clause restrictions on State’s ability to legislate on immigration, and the Anti-Commandeering Doctrine, indicating that the U.S. Government’s cannot force States to adopt and enforce federal immigration laws. Additional issues addressed in Federal court include the discovery of the immigration status of an individual during the course of a trial, and the service of an individual while they are appearing at court.

#### **i. Federal Preemption of State and Local Immigration Laws**

Under the preemption doctrine and the supremacy clause, states have a limited ability to regulate issues that fall under Federal jurisdiction. This includes immigration law, demonstrated

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<sup>28</sup>Memorandum & Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Ryan et al v. U.S. Immigration and Customs Enforcement et al*, (D. Mass. 2019) (19-11003-IT), <https://www.courthousenews.com/wp-content/uploads/2019/06/ice-arrests.pdf>

<sup>29</sup> Complaint for Petitioner, *Ryan et al v. U.S. Immigration and Customs Enforcement et al*, (D. Mass. 2019) (19-11003-IT), <http://cdn.cnn.com/cnn/2019/images/04/29/complaint.pdf>.

by several cases where state legislatures have attempted to extend the authority of state law enforcement officers by “allowing them to investigate the immigration status of any lawfully seized individual whom the officer had reasonable suspicion to believe was unlawfully present in the United States.”<sup>30</sup>

In response to the S.B. 1070 controversy in Arizona, the U.S. brought an action on July 28, 2010. This lawsuit challenged the constitutionality of the law’s requirement that state and local law enforcement investigate a person’s immigration status<sup>31</sup>. This immigration policy directly conflicted with Federal immigration policy at the time, raising an issue under the preemption clause.<sup>32</sup> In the subsequent trial, the U.S. Supreme Court held that the key provisions in the Arizona legislation were not valid because Congress has expressed preemption over immigration under the Constitution<sup>33</sup>:

“Government of United States has broad, undoubted power over subject of immigration and status of aliens, resting, in part, on its constitutional power to “establish a uniform Rule of Naturalization,” and its inherent power as sovereign to control and conduct relations with foreign nations.”

## **ii. Federal use of States resources to enforce Immigration law**

Congress is prohibited by the Tenth Amendment from passing laws requiring States to administer civil immigration law.<sup>34</sup> Given that immigration law specifically falls under Federal Jurisdiction and there is no interim exception requiring state action in the U.S. Constitution<sup>35</sup>, Congress cannot require or request that state agents enforce federal immigration law. However,

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<sup>30</sup> Eric M. Larsson, *Preemption of State Statute, Law, Ordinance, or Policy with Respect to Law Enforcement or Criminal Prosecution as to Aliens*, 75 A.L.R.6th 541. (2012).

<sup>31</sup> *U.S. v Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010).

<sup>32</sup> *Arizona v. U.S.*, 132 S.Ct. 2492 (2012)

<sup>33</sup> U.S. Const. art. I, § 8, cl. 4. “The Congress shall have power ... To establish a uniform rule of naturalization...”

<sup>34</sup> U.S. Const. amend. X.

<sup>35</sup> *Printz v. United States*, 521 U.S. 898 (1997).

this is what Congress required based on 8 USCA § 1373, which prevented states from restricting the exchange, collection, or recording of a person's citizenship or immigration status<sup>36</sup>. This statute was ruled unconstitutional in *City and County of San Francisco v. Sessions*<sup>37</sup>, where the court held that the "Statute prohibiting state and local governments from restricting information-sharing with Department of Homeland Security (DHS) as to citizenship or immigration status of any individual violated Tenth Amendment's anti-commandeering principles".

### iii. Discovery

Regarding the discovery of an individual's immigration status, Federal courts have expanded the protections offered to non-citizens appearing in court. In *Rengifo v. Erevos Enterprises*<sup>38</sup>, the United States District Court for the Southern District of New York granted a protective order against the discovery of the plaintiff's immigration status. This holding in this case limited the discovery of someone's citizenship status when it not at issue in the case. The court argued that that denying the protective order would likely result in the litigant withdrawing the suit or otherwise face deportation. The opinion cited 26(b)(1) of the Federal Rules of Civil Procedure<sup>39</sup> and Rule 26(c) which states "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". The purpose of this Rule is to protect the individual's due process, including when there is a threat of detention to parties or witnesses arriving for a court appearance. While this holding is not binding precedent for New Mexico State Courts and there is no New Mexico caselaw yet to support it, the

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<sup>36</sup> 8 U.S.C.A. § 1373 (1996).

<sup>37</sup> *City and County of San Francisco v. Sessions*, 372 F.Supp.3d 928 (N.D. Cal. 2019).

<sup>38</sup> *Rengifo v. Erevos Enterprises, Inc.*, 2007 WL 894376 (S.D. N.Y. March 20, 2007).

<sup>39</sup> Fed. R. Civ. P. 26.

Local Rules Of Civil Procedure Of The United States District Court’s civil procedure rules also appear to follow this standard.<sup>40</sup>

#### **iv. Service of Process**

The U.S. Supreme Court has long recognized the restriction of service at a courthouse in *Stewart v. Ramsay*<sup>41</sup>, stating:

“The true rule, well founded in reason and sustained by the greater weight of authority, is that suitors, [-] as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going.”

This established binding precedent protecting the individual’s ability to access the justice system. The holding was somewhat qualified by *Vega v. Davila*<sup>42</sup>, where the court upheld the service of a non-citizen with a subpoena while they were on their way home from giving a deposition in a malpractice suit. In that case, the rule established in *Stewart v. Ramsey* was valid “unless the process is issued in the very cause for which they entered the jurisdiction, or in another cause which is in aid of, or incidental to, or connected with, the original suit.” The nonresident in *Vega v. Davila* was served with a document directly connected to the case that they were appearing in the jurisdiction for, therefore they did not have the immunity protection.

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<sup>40</sup>N.M. Local Rules of Civ. P., R. 37, [https://www.nmd.uscourts.gov/sites/nmd/files/local\\_rules/2014-December-01\\_Local%20Rules%20of%20Civil%20Procedure\\_Amended%2012.1.2014\\_Appendix%20A.pdf](https://www.nmd.uscourts.gov/sites/nmd/files/local_rules/2014-December-01_Local%20Rules%20of%20Civil%20Procedure_Amended%2012.1.2014_Appendix%20A.pdf).

<sup>41</sup> *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916).

<sup>42</sup> *Vega v. Davila*, 31 S.W.3d 376, 376 (Tex. App. 2000).

## Part 4: Recommendations for legislative solutions.

Based on the discussion above, several legislative options exist for restricting ICE arrests at state and local courthouses in New Mexico. First, proposed legislation could update New Mexico Statute of Criminal Procedure, for Out-of-State Witness<sup>43</sup>, which states:

“If a person comes into this state in obedience to a summons 'directing him to attend and testify in this state **he shall not** while in this state pursuant to such summons **be subject to arrest or the service of process, civil or criminal, in connection with matters** which arose before his entrance into this state under the summons.” (emphasis added)

This law has been in effective since 1978, although it unclear if it offers protections to undocumented immigrants who may reside in the state. Future legislation could repeal and replace the statute or amend the statute to introduce language prohibiting arrests or the service of process at state and local courthouses or specify that undocumented immigrants are included under the term “person”.

Another legislative solution is the authorization for courts to document ICE arrests at courthouses. By allowing for video surveillance of ICE arrests, and encouraging the courts to record and document them, the public could get a clear sense of the scope of the problem. It would help to increase accountability for ICE’s actions and help the public to make an informed choice about whether or not it is safe for them to make a court appearance.

Lastly, the state legislature could allocate resources to the courts to allow individuals to, whenever possible, appear remotely for court appearances. This option would be more

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<sup>43</sup> N. M. S. A. 1978, § 31-8-4

applicable in civil cases, as it might violate the right to confrontation in criminal trials, but it would provide a critical option for individuals who otherwise would not feel safe to appear.

When determining which approach the legislature should take, there should be an evaluation of the hostility of the law against ICE's, and the chance of having the law be challenged in court.

There are some limitations to these legislative options that should be evaluated. New Mexico is restricted from using legislation to regulate the courthouse rules based on three New Mexico Supreme Court cases, and N.M. Con. Art. 3, § 1 and Art. 6, § 3.<sup>44</sup> These cases support the interpretation that the New Mexico Supreme Court has the inherent power to set its own rules. This restriction on the New Mexico legislature has prevented any effort to impose additional requirements on courts, such as the adoption of a rule change or an additional regulation to the court's procedure. It would also prevent the New Mexico Legislature from adopting the model legislation from California, since the rule change proposed in that bill would not be permissible.

Additional restrictions come from the supremacy of federal immigration law over state immigration law. Based on the binding precedent set by *Arizona v U.S.*, legislation from New Mexico attempting to create a separate or conflicting immigration policy will likely be preempted. Therefore, the proposed legislation would need apply broadly to all civil arrest at courthouses in order to fall under the State's legislative jurisdiction. The model legislation from New York could likely be used as a basis for this approach. There is also an immunity privilege permitted to Federal officers to negate state laws that are violated during the course of their work

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<sup>44</sup> *Southwest Underwriters v. Montoya*, 80 N. M. 107 (1969), *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307 (1976), and *Southwest Community Health Services v. Smith Eyeglasses*, 107 N.M. 196 (1988).

authorized by federal law, provided that it is necessary and proper within the scope of the officer's federal duties<sup>45</sup>. "Necessary and proper" has been interpreted broadly, without regard for the severity of the charge. In *Johnson v. Maryland*, Justice Holmes stated that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."<sup>46</sup> Thus, any passage of a law that conflicts with actions authorized by federal law is likely to be challenged on these grounds.

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<sup>45</sup> *Commonwealth of Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988); U.S.C.A. Const. Art. 6, cl. 2.; <https://poracldf.org/news/detail/408>

<sup>46</sup> *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920).

Examples of legislative language:

State	Bill # & Date	Language from the Bill/ Link
CA	A.B. 668  2/15/19	<p>SEC. 2. Section 43.54 is added to the Civil Code, to read:</p> <p>43.54. (a) A person shall not be subject to civil arrest of any type in a courthouse while attending a court proceeding or having legal business in the courthouse.</p> <p>(b) This section does not narrow, or in any way lessen, any existing common law privilege.</p> <p>(c) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief if the Attorney General has reasonable cause to believe that a violation of this section has occurred.</p> <p>(d) A party in a successful action to enforce liability for a violation of this section may recover court costs and reasonable attorney's fees.</p> <p><a href="https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB668">https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB668</a></p>
NY	A.B. A11013A  5/30/18	<p>Section 1. This act shall be known and may be cited as the "protect our courts act".</p> <p>§ 2. The civil rights law is amended by adding a new section 28 to read as follows:</p> <p>§ 28. Civil arrest; certain locations. 1. A person duly and in good faith attending a court proceeding in which such person is a party or potential witness, or a family or household member is a party or potential witness, is privileged from civil arrest while going to, remaining at, and returning from, the place of such court proceeding, unless such civil arrest is supported by a judicial warrant or judicial order authorizing such civil arrest.</p> <p>12 2. It is a contempt of the court and false imprisonment for any person to willfully violate subdivision one of this section, or an order of the court issued pursuant to section four-a of the judiciary law, by executing an arrest prohibited by subdivision one of this section or section four-a of the judiciary law, or willfully assisting or willfully facilitating an arrest prohibited by subdivision one of this section or section four-a of the judiciary law; provided, however, that nothing in this subdivision shall affect any right or defense of any person, police officer, peace officer or public officer pursuant to article thirty-five of the penal law.</p> <p><a href="https://www.nysenate.gov/legislation/bills/2017/a11013">https://www.nysenate.gov/legislation/bills/2017/a11013</a></p>

<https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=196&year=19>