



December 22, 2016

The Honorable Andrew M. Cuomo
Governor of New York State
NYS Capitol Building
Albany, NY 12224

Re: Post-election Policy Reforms to Protect Immigrant New Yorkers

Dear Governor Cuomo:

As the Executive Director of Brooklyn Defender Services (BDS), I write to offer recommendations for protecting immigrant New Yorkers from any expanded detention and deportation efforts that the incoming federal administration may implement. BDS provides innovative, multidisciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for tens of thousands of clients in Brooklyn every year. Our immigration practice includes a multi-disciplinary unit dedicated to helping immigrant New Yorkers fight deportation proceedings; secure lawful permanent residency, asylum, or citizenship; and remain in their homes and communities. We also have a *Padilla* team and a Youth and Communities Project, which represents immigrants pursuing Special Immigrant Juvenile Status (SIJS), Deferred Action for Childhood Arrivals (DACA), U visas, employment authorization, and other immigration benefits or removal defense. We are grateful for your commitment to standing up for immigrant New Yorkers.

First, I must thank you for developing a public/private legal defense fund for immigrants. The importance of ensuring representation for all immigrants in this state—and hopefully, following New York's example, across the country—cannot be overstated. Here in New York City, deportation defense provided by our office and others under the New York Immigrant Family Unity Project (NYIFUP) improves the likelihood of defendants remaining in their communities *by a factor of ten*. As a NYIFUP provider with years of experience, we stand ready to assist in any way possible with the development and implementation of this plan. For example, we believe that providing post-conviction relief assistance and assigned counsel for people in DOCCS custody are important first steps. Ultimately, all New Yorkers in removal proceedings should be provided with a qualified attorney, if they cannot afford one.

Below are some additional recommendations:

Expand the Use of Pardons to Protect Immigrant New Yorkers

One proven way to protect immigrant New Yorkers with conviction histories from deportation is the executive pardon. You successfully used this tool in 2014 to prevent the removals of two individuals, citing their positive contributions to society. Many hardworking New Yorkers who are active and engaged in our communities face deportation due to decades-old convictions. Moreover, immigrants living in communities of color are disproportionately impacted by the criminal legal system and they would benefit enormously from an expanded pardon initiative. You can issue pardons en masse without adversely impacting public safety; in fact, erasing many of the disabilities of criminal convictions in marginalized communities would make New York safer.

Establish Detainer Discretion at NYSP and Local Law Enforcement Agencies

The New York State Police (NYSP) and local law enforcement agencies should reject U.S. Immigration and Customs Enforcement (ICE) detainer requests, except in cases with judicial warrants. New York City's Detainer Discretion Law could serve as model for the state. A more relevant statewide model for this policy (and others recommended below) is the California Values Act (SB 54), a bill recently introduced by the Senate President Pro Tempore in California. I have attached a copy of the bill for your reference. This bill aims to prevent the use of state and local public resources to aid federal ICE agents in deportation actions, including by requiring denials of ICE detainer requests without judicial warrants; prohibiting law enforcement from performing the duties of ICE agents; creating "safe zones" in schools, hospitals and courthouses; and limiting information sharing with federal agencies and others. As San Francisco District Attorney George Gascón recently said about the detainer discretion provision of this bill, "a warrant requirement will ensure the government confirms a person's identity and whether they are subject to deportation before they can be detained, thereby preventing citizens, authorized immigrants and victims of crime from being jailed." Thus, detainer discretion is not simply a matter of good policy, but one of due process. Such a policy would spare countless New Yorkers from being funneled into immigration detention. The expansion of the use of immigration detention in recent years is a burgeoning new iteration of mass incarceration, with tens of thousands of people—including many asylum-seekers—locked in subcontracted county jails and private prisons and suffering well-documented abuses. New York should not be contributing to the growth of this odious practice.

Deny ICE Access to Sensitive Locations

In response to complaints from advocates and local governments, ICE issued a memorandum in 2011 setting forth guidelines restricting enforcement actions at sensitive locations, such as schools, hospitals, houses of worship, and public protests. ICE has also indicated it would limit courthouse arrests to individuals meeting the agency's broadly defined public safety priorities. In practice, our clients continue to be arrested in courthouses, chilling their right to access to justice. We also represent clients arrested by ICE at homeless shelters during the coldest nights, infringing on their rights to shelter under *Callahan v. Carey*. Moreover, we are concerned that

the incoming administration may withdraw the sensitive locations guidelines altogether. New York State must develop alternate strategies to resist this punitive encroachment upon the rights and well-being of our immigrant communities, including by ensuring all sensitive locations are ICE-free. We offer our assistance in developing these strategies, though they will require participation by various stakeholders, including the Office of Court Administration. Again, the California Values Act could serve as a model. It states: “The Attorney General, in consultation with the appropriate stakeholders, shall publish model policies for public schools, hospitals, and courthouses to ensure that all public schools, hospitals, and courthouses remain safe and accessible to all California residents, regardless of immigration status. All public schools, hospitals, and courthouses shall establish and make public policies that limit immigration enforcement on their premises to the fullest extent possible consistent with federal and state law.”

Restrict Data Sharing with Federal Agencies

Relatedly, New York should develop creative strategies to end or restrict information-sharing with federal agencies. The California Values Act directs agencies to promulgate policies to ensure that “information collected from individuals is limited to that necessary to perform agency duties and is not used or disclosed for any other purpose.” Similar policies should be implemented by New York State and local agencies, including, to the greatest extent possible, agencies handling matters of criminal justice. Under the Priority Enforcement Program (PEP-Comm), a federal mass deportation regime, all fingerprints taken by the state and local law enforcement officers are automatically sent to the FBI and ICE. To truly make New York a safe place for immigrants to live and work, and to prevent a total breakdown in police-community relations, the Division of Criminal Justice Services, the Office of Court Administration, the NYSP and local law enforcement agencies across the state should work with civil rights organizations to develop systems to limit the information on people who are stopped or arrested that is shared with federal agencies.

Reduce the size and scope of the criminal legal system.

Ultimately, the surest way to limit the impact of immigration enforcement is to reduce the size and scope of the criminal legal system. The high-arrest policies that exist in communities of color throughout the state effectively provide the federal government with a ready-made list of thousands of immigrant New Yorkers whose humanity, family and community ties, and even lawful residency can be undermined simply because they have been saddled with state criminal records or RAP sheets that meet the criteria of “criminal alien” under extremely broad federal enforcement classifications. ICE gathers and often acts on the information collected through arrests, even when the local District Attorney declines to prosecute the case, the case is still pending, all charges are dismissed or the case ends in a non-criminal violation. Indeed, these arrests often trigger double-punishment: ICE arrests, months of detention, and deportation proceedings *after* a person has already paid their dues under our criminal legal system. Some legislative steps that you can spearhead are:

1. Sign S.6483A/A.9042A, which would narrow the definition of a gravity knife--which is prohibited as a per se weapon--to exclude ordinary folding knives sold in hardware stores and used peacefully in many professions.
2. Enact 'One Day to Protect New Yorkers' legislation to reduce the maximum sentence of A Misdemeanors by one day, thereby helping to protect lawful permanent residents convicted of these low-level offenses from exposure to mandatory detention and deportation. This is a very simple way in which you can make a critical difference in the lives of thousands of lawful New York residents.
3. Help trafficking victims by ending the criminalization of sex work, or at least repealing Penal Law § 240.37 - Loitering for the purpose of engaging in a prostitution offense. This law, which is currently being challenged in court by the Legal Aid Society of New York, encourages discriminatory policing by giving law enforcement the discretion to profile and arrest those whom officers deem likely to engage in sex work in the future with a low standard of proof. The vast majority of people arrested for this offense are Black women, including trans women, even though the sex industry is as diverse as our city. Many are immigrants with or without legal status. At least in New York City, the most common argument in favor of arresting people for prostitution-related offenses is that our criminal legal system can "rescue" them by compelling them toward diversionary services. Among other serious flaws with this argument, New York must now recognize that these arrests will fast-track immigrants in over-policed communities for deportation to countries whose conditions may have made them vulnerable to trafficking or becoming otherwise involved in sex work in the first place. T visas are a critical resource, but many are ineligible or otherwise denied such relief and few if any can obtain one without an attorney.
4. End the criminalization of poverty in fare evasion arrests. In 2015, Theft of Services was the top arrest charge in New York City, with the majority of those arrests for fare evasion. New Yorkers are arrested and prosecuted at great expense and, in many cases, detained on Rikers Island for approximately \$460 per day simply because they likely could not afford the fares, which are currently slated to increase in the near future. Removing Theft of Services as it relates to public transit fare evasion from the penal law, making it punishable only with a civil penalty, and devoting resources to making public transit affordable to low-income New Yorkers who will have greater access to their city and its opportunities for economic mobility may actually save the government money and, at the very least, will significantly decrease the likelihood of immigrant New Yorkers being deported for a crime of poverty. While we are not well-versed in other public transit systems around the state, we believe low-income New Yorkers in areas such as Buffalo, Ithaca and Syracuse would benefit from this change. Already, those who board commuter rails without tickets are able to buy onboard fares at a relatively modest penalty and, if they cannot pay, exit the train at the next stop or sign a promise-to-pay form.
5. End New York's War on Drugs. I understand that drug policies remain a source of controversy in New York, but you were able to shepherd into law a comprehensive

package of bills to address the opioid epidemic that did not include more punitive criminal statutes. There is a growing recognition among policymakers of all parties, many of whom may have family members or other acquaintances who struggle with addiction, that incarceration is ineffective and, in fact, incredibly dangerous, as a response to drug use. Our state has taken many important steps in the right direction, but thousands of New Yorkers continue to be criminalized for drug-related offenses, including low-level possession, every year, despite all evidence pointing to the failure of this approach. Under existing policies and practices in New York, immigrants convicted of even low-level drug possession are funneled into the federal government's registry of so-called "criminal aliens." (One of our current clients—a devoted husband and father and pillar in his church and community—is facing likely deportation due to a 20 year-old cocaine possession conviction, despite the well-publicized fact that our current and previous presidents used the drug recreationally in their youths.) In fact, it is precisely the aggressive drug enforcement on the international stage that has created much of the violence and trauma that send waves of asylum-seekers north across the border. New York can set an example for the rest of the country by fully committing to a public health approach to drug use. One immediate action step New York can take is to authorize Safe Injection Facilities, which would reduce the harm of substance use, encourage treatment and recovery, and reduce public disorder. As our state subsidizes the growth of its craft alcoholic beverage industry, it can surely find ways to regulate other drugs with a focus on harm reduction.

I understand many of these recommendations require legislative action and may encounter resistance in the Legislature, but your leadership would be critical in making them a reality. Please consider Brooklyn Defender Services an ally in the fight to protect immigrant communities. We share your belief that all New Yorkers—and all Americans—benefit when our diverse communities can thrive together. Immigrants, regardless of their status, are the backbone of our City and State, our culture and our economy. Together, and with immigrant community leaders and our many allies across the state, I believe we can mount a strong defense against destructive federal immigration practices.

Thank you for your consideration of our comments.

Sincerely,

Lisa Schreibersdorf
Executive Director
Brooklyn Defender Services

Cc:
New York State Attorney General Eric Schneiderman
New York State Chief Justice Janet DiFiore
Counsel to the Governor Alphonso David
DCJS Deputy Executive Commissioner Michael C. Green
Deputy Secretary for Public Safety Rachel Small