



TESTIMONY OF:

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Committee on Immigration
Oversight Hearing: The Impact of New Immigration
Enforcement Tactics on Access to Justice and Services
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I. Introduction

My name is Andrea Sáenz. I am the supervising attorney of the New York Immigrant Family Unity Project (NYIFUP) at Brooklyn Defender Services (BDS). NYIFUP is New York City's groundbreaking, first-in-the nation program providing quality counsel to immigrant New Yorkers who are detained and facing deportation and separation from their families and communities. I thank the City Council Committee on Immigration, and in particular Chair Menchaca, for this opportunity to testify about the impact of new immigration enforcement tactics on access to justice and services in New York City

BDS is the largest legal services provider in Brooklyn, representing nearly 40,000 low-income New Yorkers each year who are arrested, charged with abuse or neglect of their children or face deportation. Our immigration practice represents more than 1,000 immigrant New Yorkers every year by advising BDS's criminal defense attorneys and their noncitizen clients on the immigration consequences of guilty pleas through our *Padilla* Unit, providing deportation defense through the City Council-funded NYIFUP program, and providing affirmative application assistance for immigrant clients from all of BDS's practice areas through out Youth and Communities Project. I will speak today about the trends that we are seeing across all three of our Immigration units and how they affect the communities we serve.

II. In Criminal Court

Inability to counsel non-citizen criminal defense clients on pleas

In 2010, the U.S. Supreme Court held in *Padilla v. Kentucky* that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.¹ One in four of BDS's criminal defense clients are not U.S. citizens and, under the president's new enforcement priorities, they are all now priorities for deportation by virtue of having been arrested.

Trump's Executive Order upends the prior enforcement priorities for undocumented people and people with legal immigration status alike. It used to be that some immigrants who were convicted of minor crimes were not deemed enforcement priorities. In addition, non-citizens were not considered priorities just by virtue of having been accused of a crime. After the new executive order, anyone with any criminal history or open charge is a priority, as well as anyone who has committed acts that constitute a chargeable criminal offense.

This sows fear and confusion for our immigrant clients. Understandably, our criminal defense clients may see their defense attorneys as agents of the state, impacting our ability to build trusting relationships that allow us to help our clients achieve their own personal goals and the best possible outcome in the case. How can they trust us if we cannot accurately advise them? Indeed, I believe that the current state of affairs endangers our ability to provide effective counsel under the standard articulated in *Padilla v. Kentucky*. Judges, prosecutors, court-mandated service providers and other players in the court system are likewise confused about how to handle cases involving non-citizens.

NYPD fingerprinting and Broken Windows policy leads ICE directly to our clients

NYPD's policy is to fingerprint anyone who is arrested, even if only for a low-level offense like fare evasion. Some police armed with tablets are even fingerprinting people in their neighborhoods, without even making an arrest that leads to a trip to the precinct and processing at Central Booking.² Fingerprints collected by the NYPD are transmitted to the FBI, who in turn can share them with the Department of Homeland Security, potentially leading to an arrest by ICE and deportation. Even if a district attorney declines to press charges, an immigrant is put at immediate risk of being found by ICE. Broken windows policing, or the criminalization of the most minor offenses, even without a resulting conviction, thus directly sends thousands of immigrants and their fingerprints to the federal government every year.

Over the past three years, the BDS immigration practice has represented dozens of detained clients in deportation proceedings for underlying "crimes" like possession of small amounts of marijuana, turnstile jumping, and possession of "gravity knives" (really work tools carried by laborers, often required by their union contracts, and

¹ *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010).

² Tatiana Schlossberg, *New York City Police to Be Equipped with Smartphones and Tablets*, N.Y. TIMES, Oct. 24, 2014, available at <https://www.nytimes.com/2014/10/24/nyregion/new-york-city-police-to-be-equipped-with-smartphones-and-tablets.html>.

purchased legally at major retailers like Home Depot). Many of these clients are legal permanent residents who had been living in the U.S. for dozens of years with these minor convictions on their record before they were swept up by ICE.

Courthouse Arrests

Unlike attorneys in other boroughs, we have not seen an uptick in courthouse arrests by ICE in Kings County in 2017. That being said, courthouse arrests occurred throughout the past presidential administration. Our internal records indicate more than one dozen BDS clients have been arrested in Brooklyn courthouses and taken into ICE custody in the past four years. A BDS client from Guatemala had the story of her courthouse arrest chronicled in the *N.Y. Times* in 2014.³ Most recently, in November 2016, a criminal defense client who was receiving treatment services through the Brooklyn Mental Health Court was arrested by ICE in the hallway of Brooklyn Supreme Court while he waited with his attorney for his case to be called. Our client had been reporting regularly to the criminal court for the past six months in accordance with his mental health court treatment plan. Our client has mental health diagnoses and had been hospitalized just prior to his ICE arrest in relation to his diagnoses.

Recommendations:

1. **End Broken Windows Policing.** The City Council must be a leader, calling upon the Mayor and the NYPD to end broken windows policing, a policy that, in criminalizing even the smallest of offenses, puts thousands of immigrants in danger.
2. **Pass legislation banning ICE from city buildings, including our courthouses.**
3. **Monitor the Implementation of the Criminal Justice Reform Act.** You must also ensure that the implementing language of the Criminal Justice Reform Act, passed by City Council last year, is very restrictive to require civil summonses in all but the narrowest group of well-defined cases.
4. **Work with District Attorneys to develop practices to protect immigrants.** We offer our thanks to Speaker Mark-Viverito for working with the DA's Offices to implement programs for warrant amnesties. We also ask the council to urge DA's to expand the use of the criminal case disposition Adjournment in Contemplation of Dismissal (ACD) and allow defendants to enter into diversion programs without first entering a guilty plea, similar to the procedure provided by CPL § 216.05(4).
5. **Urge Governor Cuomo to exercise his pardon power to protect immigrants from deportation.** The City could fund community organizations or partner with *pro bono* law firms to file pardon applications and do pardon advocacy.
6. **Work with city agencies and community organizations to ensure that information that is disseminated to the public is accurate, especially**

³ Kirk Semple, *Advocates Seek to Make Courthouses Off Limits for Immigration Officials*, N.Y. TIMES, May 26, 2014, available at <https://www.nytimes.com/2014/05/27/nyregion/advocates-seek-to-make-courthouses-off-limits-for-immigration-officials.html>.

as it relates to the immigration consequences of criminal court involvement.

III. In Federal Immigration Court

Rising caseloads

This month, the immigration docket at the federal courthouse at Varick Street added a third intake day. The courts are moving so quickly with cases that we cannot pick up cases fast enough. And so far, these are cases that were brought into the system during the Obama administration. We have not yet even seen the people who were arrested by ICE after President Trump took over. The third intake day is already exceeding our capacity to serve our existing clients, yet we expect further increased caseloads as we begin to see the results of the new enforcement priorities.

To make matters worse, not only are we seeing more cases, but we are seeing that ICE has become harsher towards our clients than they were even just last year.

Asylum seekers no longer being released on bond

For existing cases, we are seeing decreases in the use of prosecutorial discretion and discretionary release. Before last week, we had not had an asylum seeker released on bond in more than six weeks. It appears that the White House's January 25 executive order on border enforcement had the effect of ICE refusing to release detained asylum seekers even where they had passed an initial screening interview and had a sponsor or family member with lawful status ready to house and support them. We have had a few releases since starting to file federal habeas corpus litigation against this practice, but remain concerned that going forward ICE's default will be to detain everyone, including asylum seekers, parents, and victims of violence and trauma, and to fight release however we seek it.

ICE targeting people who won relief but have not yet received their visas or green cards

We are also seeing that NYIFUP clients who have been granted relief but have not yet received their green cards are being sought out by ICE and re-arrested. For example, we represent a 16-year-old client from Central America who has an approved Special Immigrant Juvenile Status (SIJS) application who was arrested by the ICE gang unit and is now in secure detention. While his SIJS application was approved, he has not yet received his visa number from USCIS. It is unclear to us why he was taken into detention by ICE, as he was not arrested by the NYPD or did not try to re-enter the U.S., two reasons that people are sometimes re-detained after release.

Arrests in the courthouses

Our immigration clients, like our criminal defense clients, are scared to go to court. ICE agents now roam the hallways and last fall we often observed ICE agents arresting people in the courts. This was uncommon in recent years.

ICE OSUP check-ins

In some cases, ICE may decide not to execute a final removal order and might instead issue an “Order of Supervision,” or OSUP. A “post-order-of-removal” Order of Supervision may be issued under limited circumstances, such as when ICE determines the individual cannot be removed due to his or her country’s refusal to accept them, or when it is otherwise impracticable or contrary to the public interest to remove the individual. An Order of Supervision is considered to be a “humanitarian act” on the part of ICE, and may be available if the non-citizen is the primary care giver to a child with a medical condition, or if they themselves are receiving medical treatment for a serious condition, etc. The Order of Supervision will direct the non-citizen to appear at regular ICE check-ins, usually every few months and at least once a year.

Our clients who have been attending regular OSUP check-ins for years are now terrified to appear before ICE. One of our NYIFUP clients who was released from detention because he had a heart attack while in custody was recently hospitalized because of the stress and fear of deportation. Clients who previously checked in once or twice a year are now being asked to return in a couple of weeks or a month with their passports, ostensibly to facilitate deportation.

Our attorneys and office staff who are already overworked are doing their best to accompany our clients to these check-ins, but we simply do not have the capacity to meet the need and quell the fears of our clients.

The Need for NYIFUP

NYIFUP attorneys have never been more important. We are a human shield for our clients, doing everything in our power to show them compassion in a system that increasingly views our clients as deportable others – “criminals” or “aliens” with rights that can and are regularly trampled on. Even when we lose our client’s case, we provide them with the opportunity to share their story with the prosecutor and judge and make the case why they deserve to remain in this city with their family and community.

The Council’s commitment of universal representation for every detained person who meets the income requirements of NYIFUP is critical to ensure that every person who comes before immigration court in New York City is afforded the right to make their case, no matter their background. We have had cases with clients convicted of crimes that we later successfully vacated because they were innocent or wrongly charged. By building trust and rapport with our clients, many of whom are survivors of incredible violence and trauma back in their home countries, we investigate and present evidence about why our clients’ “criminal acts” are often the direct result of the trauma they have suffered. We have uncovered that many clients were actually U.S. citizens, but often

never had the resources or tools to find the evidence to prove their citizenship until they were appointed a NYIFUP attorney. NYIFUP is the strongest example of our City's commitment to immigrant New Yorkers, made stronger still by your commitment to universal representation – the belief that all people are worthy of representation.

Recommendations:

- 1. We ask that the City double current funding levels for the New York Immigrant Family Unity Project to ensure that every detained New Yorker has access to representation when facing deportation.**
- 2. The city should increase funding on complex cases, whether in removal defense, affirmative applications, motions to reopen and stay of removal, or even for accompaniment of people to their OSUP check-ins.**

In the Community

Clamoring for Know Your Rights

Since the presidential election last fall, our office has received increasing requests from the community to present Know Your Rights trainings to the community. Since the first immigration Executive Order was announced we are now receiving near daily requests for assistance from elected officials, community-based organizations, city agencies, religious institutions and the press. We are doing our best to meet the demand, but regularly have to turn down requests because we do not have the capacity.

Daily Calls from Current and Former Clients

All of our attorneys and paralegals have seen a huge increase of panicked calls from our clients, current and former, about what to do if ICE is at their door, whether or not they can travel, what they should be doing with their US citizen children, whether they should appear in court, requesting immigration legal services for their loved ones, and more.

In short, our communities are panicked and need the support of legal service providers more than ever. We want to continue to support all of our former and current clients, as well as serve more people, but our capacity is limited by the resources currently available to us.

Recommendations:

- 1. We ask that the Council fund legal service providers to perform community outreach, do know your rights presentations, conduct free legal screenings, and handle both straightforward and complex cases.**

Conclusion

The New York City Council has demonstrated its leadership and support for immigrants through funding to legal service providers and the creation of NYIFUP. The way to help protect the rights of New Yorkers is by providing them education, legal counsel and support, and ending Broken Windows policing. BDS works to support immigrants and their families and communities every day, but the need for our services and the services provided by the dozens of other legal service providers and grassroots organizations is more acute than ever. We look forward to keeping you abreast of what we see every day on the ground and working together to craft policy responses that will help protect immigrant New Yorkers, strengthen families and stabilize communities.