

IN THE NEW MEXICO SUPREME COURT

In the Matter of:

**PETITION FOR ADOPTION OF
NEW RULES 23-116 and 23-117,
NEW MEXICO SUPREME COURT
GENERAL RULES**

S. Ct. No. _____

PETITION FOR ADOPTION OF NEW RULES

COMES NOW, sixty-one (61) legal associations and community advocacy organizations, two hundred forty-three (243) members of the State Bar of New Mexico, forty-one (41) law firms, and five (5) retired members of the judiciary, pursuant to Rule 23-106.1 NMRA, and hereby request adoption of proposed new Rules 23-116 and 23-117, New Mexico Rules of Supreme Court General Rules, as provided in **Appendix A**, which prohibit non-judicial administrative “civil arrests” in New Mexico’s state courthouses and set forth procedures for petitioning the courts for “writs of protection” as long established in common law.

There has been a significant uptick in the number of administrative “civil arrests” in and around New Mexico state courthouses by immigration enforcement officers (ICE agents). These “civil arrests” are non-judicial administrative warrants that have not been reviewed by a judicial officer for probable cause. These “civil arrests” have created fear within the community and deter individuals from using court services and appearing for court proceedings. Recognizing that

denied access is denied justice, Petitioners present two proposed rules, Rule 23-116 and 23-117 which are intended to protect a meaningful right to equal access to New Mexico's state courthouses and dignity in state court proceedings.

In support of this request, Petitioners state:

1. Statement of Reasons: Why the Rule Change Request is Needed

“The fair administration of justice requires equal access to our courthouses. People are at their most vulnerable when they seek out the assistance of local authorities, and we are all less safe if individuals who need help do not feel safe to come forward.”

Chair Catherine E. Lhamon, U.S. Commission on Civil Rights, Statement: U.S. Commission on Civil Rights Expresses Concern with Immigrants' Access to Justice (Apr. 24, 2017).

In April 2017, the Department of Homeland Security (DHS) made clear that it intended to continue to pursue, enforce, and execute civil administrative warrants in civil and criminal courthouses, even against victims of or witnesses to crime.¹ Nationally, DHS has detained individuals as they access the courthouses to attend court proceedings as plaintiffs, defendants, and victims when seeking protection from the court in domestic violence proceedings. These “civil arrests,”² which are executed without a judicial warrant or any showing of probable cause, have sent

¹ Devlin Barret, DHS: Immigration agents may arrest crime victims, witnesses, at courthouses, WASH POST. (April 4, 2017), http://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crimevictims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html?utm_term=.976562fa9d9b.

² See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)(“Removal is a civil, not criminal, matter.”); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)(“A deportation proceeding is a purely civil action to determine eligibility to remain in this country.”).

shockwaves of fear throughout the community, undermining public safety and discouraging persons from seeking protection of the laws. Associate Professor Christopher Lasch of the University of Denver Sturm College of Law noted in his October 2017 article in the Yale Law Journal, *A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis*, the fears of state-court judges nation-wide:

State-court judges primarily feared that civil immigration arrests would cause witnesses, criminal defendants, and civil litigants to avoid the courthouse. Deterring people from coming to court, they argued, in turn interferes with the state and local courts' administration of justice, deprives them of their ability to adjudicate cases effectively, and threatens to cut off access to justice. In sum, state-court judges believed their "fundamental mission and "ability to function" were undermined by courthouse arrests.³

In the spring of 2017, the U.S. Commission on Civil Rights and the Chief Justices of California, New Jersey, and Oregon wrote to DHS urging that courthouses receive "sensitive locations" status⁴ and that continued enforcement in and around the courthouses was disruptive of the judicial process.⁵ Prosecutorial offices, legal associations, and non-profit organizations across the country also

³ Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J. F. 410, 420-21 (2017), <http://www.yalelawjournal.org/forum/a-common-law-privilege-to-protect-state-and-local-courts-during-the-crimmigration-crisis> (see **Appendix L**).

⁴ U.S. Immigrations and Customs Enforcement Directive No. 10029.2 (Oct. 24, 2011)(hereinafter "2011 Directive") (see **Appendix C**).

⁵ See Letter from Hon. Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal., to Jeff Sessions, Attorney General, and John F. Kelly, Sec'y of DHS (Mar. 16, 2017), https://newsroom.courts.ca.gov/gallery/get_file/?file_id=58caba3aa1383525625a54c2&file_ext=.pdf (see **Appendix D**); Letter from Hon. Thomas A. Balmer, Chief Justice, Oregon Supreme Court, to Jeff Sessions, Attorney General, and John F. Kelly, Sec'y of DHS (Apr. 6, 2017), <https://www.opb.org/news/article/oregon-supreme-court-justice-ice-courthouse-letter/> (see **Appendix F**); Letter from Hon. Stuart Rabner, Chief Justice, Supreme Court of New Jersey, to John F. Kelly, Sec'y of DHS (Apr. 19, 2017), <https://www.judiciary.state.nj.us/pressrel/2017/Kelly.ICE.ltr.041917.pdf> (see **Appendix I**).

submitted letters requesting that courthouses be treated as “sensitive locations” with the same status of churches and schools.⁶ In New Mexico, representatives of the American Civil Liberties Union of New Mexico, the New Mexico Criminal Defense Lawyers Association, New Mexico Faith Coalition for Immigrant Justice, El Centro de Igualdad y Derechos, Encuentro, Enlace, New Mexico Immigration Law Center, Somos Un Pueblo Unido, New Mexico Asian Family Center, and several other advocacy organizations, as well as representatives from United States Senators Tom Udall and Martin Heinrich of New Mexico, attended a meeting on May 16, 2017, with ICE Assistant Field Office Director for the State of New Mexico, William M. Jepsen, and Deputy Field Office Director of New Mexico and West Texas, Diane L. Witte, seeking, among other things, to address their mounting concerns with ICE’s enforcement activities in state courthouses. Nothing changed with respect to ICE enforcement activities in New Mexico courts as a result of that meeting.

⁶ See Letter from Mike Feuer, Los Angeles City Attorney, et al., to Jeffrey Sessions, Attorney General, and John F. Kelly, Sec’y of DHS (April 4, 2017), <http://freepdfhosting.com/440f19bdf7.pdf> (see **Appendix E**); Letter from Michael B. Hancock, Mayor, et. al., to Jeffrey D. Lynch, Acting Field Officer Director (Apr. 6, 2017), https://www.denvergov.org/content/dam/denvergov/Portals/728/documents/Documents/Denver_Letter_to_Immigration_and_Customs_Enforcement.pdf (see **Appendix G**); Letter from American Civil Liberties Union of Maine to Jefferson B. Sessions, Attorney General, and John F. Kelly, Sec’y of DHS (Apr. 10, 2017), https://www.aclumaine.org/sites/default/files/ice_arrests_attorney_letter_fin.pdf (see **Appendix H**); Letter from Ivan Espinoza-Madrigal, Executive Director of the Lawyers Committee for Civil Rights and Economic Justice to Hon. Ralph D. Gants, Chief Justice, Supreme Judicial Court, Hon. Paula M. Carey, Chief Justice of the Trial Court, and Jonathan S. Williams, Court Administrator (Jun. 16, 2017)(Boston, MA), <http://lawyerscom.org/wp-content/uploads/2017/06/Letter-Regarding-ICE-in-Courthouses.pdf>; Letter from the Michigan Legal Community to Jefferson B. Sessions, Attorney General, John F. Kelly, Sec’y of DHS, and Rebecca Adducci, ICE Field Office Director (Jun. 1, 2017), http://www.aclumich.org/sites/default/files/Open_Letter_ICE_Courthouse_Enforcement_Practices.pdf.

Rather than elevate courthouses to “sensitive location” status, the U.S. Immigration and Customs Enforcement issued a directive on January 10, 2018, providing guidance on when and how it will continue to conduct civil immigration enforcement actions in courthouses.⁷ In the directive, DHS revealed its reasons for using courthouses as its enforcement grounds:

- (1) “Individuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband. Accordingly, civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents.”
- (2) “And, courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.”

Rather than stating an exigent need to use state courthouses as a staging ground for civil immigration enforcement, it appears ICE is retaliating against uncooperative jurisdictions and exploiting the especially vulnerable situation of those who come to the court to seek access to the justice system.

On March 16, 2018, the U.S. Commission on Civil Rights (“Commission”) issued a letter to ICE Deputy Director Thomas D. Homan expressing continuing concern with ICE policy “allowing immigration enforcement actions inside

⁷ ICE, Directive No. 110721.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> (see Appendix M).

courthouses and its dangerous consequences that undermine our judicial system.”⁸

The Commission emphasized that failure to consider courthouses “sensitive locations” similar to schools, hospitals, and places of worship, “prevents victims of violent crime, domestic abuse, and work exploitation from seeking justice” and “unnecessarily increases the disruptive presence of ICE agents in courthouses, sowing fear and mistrust of our justice system among immigrant and vulnerable communities[.]” The Commission also pointed out that the policy “does not apply only to criminal immigration enforcement actions and does not further distinguish which immigrants would be targeted for criminal enforcement actions.”

New Mexico attorneys have documented at least twenty-five (25) instances in New Mexico where plain-clothed ICE agents have entered state courthouses to target individuals for arrest and actually carried out twenty-two (22) “civil arrests” of individuals in the courthouse, handcuffing, detaining, and removing individuals from the courthouse.⁹ In some instances, the agents sought and obtained the assistance of court staff and security to locate and detain individuals who were present in good faith to attend court proceedings. In all instances, the individuals were detained immediately following a hearing, either inside the courthouse or outside the courthouse, but prior to the conclusion of the court proceedings which remain pending further litigation. In at least two (2) instances, when asked for

⁸ Letter from U.S. Commission on Civil Rights to Thomas D. Homan, ICE Deputy Director (Mar. 16, 2018), <http://www.usccr.gov/press/2018/03-16-statement-ICE.pdf> (see **Appendix N**).

⁹ See **Appendix B**, entitled, “*ICE Courthouse Arrests in New Mexico 2017-2018 (as of August 15, 2018)*.”

identification and presentation of a warrant, ICE agents refused to present identification, claimed the warrants were in their vehicle (therefore not immediately available), and refused to respect the detainee's right to remain silent. In all instances, ICE did not return the individuals to the court even after issuance of summons, writs, and transport orders pursuant to state legal proceedings. These individuals were involuntarily removed from the court proceedings preventing the court from resolving the matter. New Mexico communities have experienced the same widespread reports of ICE agent misconduct during courthouse arrests and the detrimental impact on the safety of mixed communities as other jurisdictions have experienced.

To ensure equal access to the courts, equal protection of the laws, and full protection of victims' rights as required by the United States Constitution and the New Mexico Constitution, the New Mexico Supreme Court must adopt a rule protecting a meaningful right to equal access to the courthouses and dignity in court proceedings. Petitioners seek adoption of a rule recognizing the privilege against "civil arrests" both as applied to persons attending court and as applied to the courthouse and its environs.¹⁰ The rule should prohibit "civil arrest" of individuals who are utilizing the services of the courts in good faith and attending court proceedings. The rule's prohibitions should include civil arrests inside the

¹⁰ See Lasch, 127 YALE L.J. F. at 423-430 (discussing common-law privilege from arrest pertaining to both persons, "privilege from arrest *eundo et redeundo*, provided they came *bona fide*," and places); *Id.*, at 424, n. 75 ("Eundo et redundo" meaning, "going and returning")(see **Appendix L**).

courthouse and courtrooms as well as outside the courthouse while individuals are *en route* to or from the proceedings. Additionally, Petitioners seek adoption of a rule permitting the courts to issue “writs of protection” under the common law privilege against arrest on civil process while within the confines of the courthouse and its environs, for all those having business before the court while coming to and leaving court proceedings.

2. Legal Authority

A. ICE’s “civil arrests” in New Mexican courts violate the common law protection from civil arrests in courthouses.

The New Mexico Supreme Court’s authority to adopt a rule prohibiting “civil arrests” within the confines of the courthouse and its environs, as well as those coming to and leaving court proceedings, is found in the common law doctrine “privilege from arrest” which was necessary to promulgate and enforce constitutional rights.

The earliest instance of the common law doctrine “privilege from arrest” was in 1791 when, in *Meekins v. Smith*, 126 Eng. Rep. 363, the “general rule” was stated that “all persons who had relation to a suit which called for the attendance, whether they were compelled to attend by process or not...were entitled to privilege from arrest [while going to or coming from court proceedings], provided they came bona fide.” *See also* 3 William Blackstone, Commentaries on the Laws of England 289 (1769)(“*Suitors, witnesses, and other persons, necessarily*

attending any courts of record upon business, *are not to be arrested* during their actual attendance, which includes their necessary coming and returning”)(emphasis added). This right has remained a fundamental right within American jurisprudence. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932)(noting, “the general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another”); *Long v. Ansell*, 293 U.S. 76, 83 (1934); *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916)(“[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them.”).

The primary concern of the rule against civil arrests is to encourage the attendance of necessary parties and to thereby ensure that courts are able to effectively administer justice. *See Person v. Grier*, 66 N.Y. 124, 125 (1876)(“This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done.”). Historically, courts have been more aggressive in asserting the privilege to grant individuals immunity from civil arrests than civil service of process. *See Netograph Mfg. Co. v. Scrungham*,

197 N.Y. 377, 382 (1910); *Long*, 293 U.S. at 82; *Carl v. Ferrell*, 109 F.2d 351, 352 (D. C. Cir. 1940).

B. *ICE's "civil arrests" in New Mexican courthouses and their environs violate the fundamental rights of citizens and non-citizens*

Petitioners point to five critical provisions of the United States and New Mexico Constitutions which are violated when “civil arrests” are permitted in the confines and environs of the courthouse and to those coming to and leaving the court proceedings: the right to petition the government, the right to be treated equally before the law, the due process right to be treated fairly, the rights of victims, and the right to seek and obtain safety and happiness. U.S. Const., amends. I, IV, V, VI, X, XIV; N.M. Const., art. II, §§ 4, 18, 24.

i. **Constitutional Right to Access the Courts.**

Both the United States Supreme Court and the New Mexico Supreme Court have long recognized the fundamental right to access the courts. The Due Process and Equal Protection Clauses protect the right of persons to equal access to the courthouse and to a meaningful opportunity to be heard; where a condition, rather than a complete bar to access, effectively forecloses access to the courts, it is impermissible. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956)(“[A]t all stages of the proceedings Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.”); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)(“Due process requires, at a minimum, that absent a countervailing state

interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”); *Burns v. Ohio*, 360 U.S. 252, 257 (1959)(holding that indigent prisoners must be allowed to file appeals without payment of docket fees). Access to the courts is not the literal availability of “a day in court”; it requires that “access to the courts is adequate, effective, and meaningful.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

The right of access to the courts is one aspect of the right to petition the government for redress of wrongs. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)(“The right of access to the courts is indeed but one aspect of the right of petition.”); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897(1984)(“[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.”); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011)(“This Court’s precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”). Equal access to the courts prevents individuals from being singled out and denied access to the court. *Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2005)(“A person singled out for exclusion from the courtroom, who is thereby barred from first-

hand knowledge of what is happening there...is placed at an extraordinary disadvantage.”).

The right to equal access to the courts applies both to citizens and non-citizens, as long established by the United States Supreme Court. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Graham v. Depart. of Pub. Welfare*, 403 U.S. 365, 372 (1971)(applying a strict scrutiny equal protection analysis to distinctions based on alienage); *Wong Wing v. United States*, 163 U.S. 228 (1896)(holding non-citizens are guaranteed Fifth and Sixth Amendment rights); *Padilla v. Kentucky*, 559 U.S. 356 (2010)(recognizing non-citizen’s Sixth Amendment right to include the right to be informed of immigration-related consequences of entering a guilty plea).

Article II, Section 18 of the New Mexico Constitution provides that “No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.” The right implicated and threatened by ICE’s “civil arrests” in New Mexican courthouses is the right to equal protection of the laws and the implied constitutional right of equal access to the courts. Civil arrests deny a victim the opportunity to apply for an order of protection. Civil arrests deny a defendant the right to challenge his accusers and persist in a claim of innocence. Civil arrests deny a plaintiff the right to seek redress from the court when harmed.

ii. **The Rights of Victims.**

Article II, Section 24 of the New Mexico Constitution provides victims “the right to be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process”, “the right to attend all public court proceedings the accused has the right to attend”, and “the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused.” N.M. Const. art. II, § 24. These rights are implicated and threatened by “civil arrests” when the victim is not secure from retaliatory use of the individual’s immigration status, when the victim is denied the right to attend public court proceedings, and when denied the right to make a statement at sentencing and post-sentencing hearings.

iii. **Natural, Inherent, and Inalienable Rights.**

Article II, Section 4 of the New Mexico Constitution provides that “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoyment and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.” In order to realize these rights, all persons must have equal access to the courts.

C. *ICE’s “civil arrests” in the New Mexican courthouses constitute undue federal interference in state courts in contravention of the Tenth Amendment*

When civil arrests are conducted in the courthouse and its surrounding environs, immigration enforcement agents are interfering with the state courts in violation of the Tenth Amendment to the United States Constitution. The federalist system requires that “the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Younger v. Harris*, 401 U.S. 37, 44-45 (1971); *see also Texas v. White*, 7 Wall 700, 725 (1869)(“The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”). Since 1995, with the opinions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and most recently in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the United States Supreme Court “revived the importance of state sovereignty and, in particular, the ability of states to exercise their police powers without federal interference...” George Bach, *Federalism and the State Police Power: Why Immigration and Customs Enforcement Must Stay Away From State Courthouses*, 54 Willamette L. Rev. 323, 324-325 (Spring, 2018).

These civil arrests in the courthouse interfere with the administration of justice in state courts in at least two ways: (1) by disrupting the court proceedings and (2) by deterring immigrants from attending proceedings.

On April 21, 2018, the National Association of Criminal Defense Lawyers issued a resolution calling for the immediate and complete halt to the implementation of Directive Number 11072.1, noting, “[T]here have been documented cases of ICE arrests in, immediately outside, and *en route* to courthouses resulting in detention that have caused residents to miss parole obligations, drug treatment services, mental health evaluations, court hearings, and other critical services and obligations.”¹¹ This has certainly been the impact felt in New Mexico. Defendants’ families report their loved ones being detained in the hallways and bathrooms of the courthouse, and still others have been detained when they leave the courthouse *en route* to their vehicles. To ensure the effectiveness of our system of justice, courthouses must be viewed as a safe forum. Federal interference with the institution of the independent state court violates the deeply entrenched national tradition of federalism and deprives individuals of their fundamental rights. *See Bond v. United States*, 564 U.S. 211, 222 (2011)(“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When

¹¹ The NACDL Resolution can be accessed online: <https://www.nacdl.org/resolutions/2018sm02/> (last accessed May 31, 2018)(*see Appendix O*).

government acts in excess of its lawful powers, that liberty is at stake.”); *New York v. United States*, 505 U.S. 144, 181 (1992)(“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”)(quoting *Coleman v. Thompson*, 501 U.S. 722, 758 (1991)(Blackmun, J., dissenting)).

Further, the use of state courthouses to enforce immigration regulation violates the anti-commandeering principle of the Tenth Amendment. *See New York*, 505 U.S. at 144 (“Congress may not commandeer the State’s legislative processes by directly compelling them to enact and enforce a federal regulatory program.”); *see also*, *Galarza v. Szalczyk*, 745 F.3d 634, 643-44 (3d Cir. 2014)(anti-commandeering principle of Tenth Amendment prohibits federal government from using immigration “detainers” to compel States to prolong detention of noncitizens otherwise entitled to release). Even within the federal regulations it is recognized that States and their political subdivisions cannot be compelled to participate in immigration enforcement. *See* I.N.A. §§ 287(g)(9)-(10). Associate Professor George Bach of the University of New Mexico School of Law concluded in his article in the *Willamette Law Review* Spring 2018 edition, *Federalism and the State Police Power: Why Immigration and Customs Enforcement Must Stay Away From State Courthouses*: “By allowing state and local courthouses to serve as a ‘round-up’ point for undocumented immigrants who are compelled to be present to testify in state or local prosecutions, ICE is, in

essence, commandeering the state judicial process and the states' exercise of their police power." 54 Willamette L. Rev. at 331.

Petitioners note that there are documented instances in which ICE agents have utilized courthouse staff, security, and technology to conduct immigration enforcement operations. *See Appendix B*. New Mexican attorneys have observed courthouse security racially profiling individuals entering the courthouse to check identification. Nowhere do the rules require identification prior to admittance to a state courthouse. Proceedings within the courthouse are typically public, open proceedings and the public has a right to attend these public proceedings without prior screening and approval. Petitioners are concerned that this procedure is being used to assist the immigration enforcement operation. For all of the forgoing reasons, the use of state courthouses as the loci of federal immigration enforcement and the involvement of courthouse staff and security in the enforcement operations is a commandeering of state resources in violation of the Tenth Amendment.

3. Proposed New Rules (See Appendix A)

23-116. Civil arrests in courthouses. (NEW MATERIAL)

A. Unless made pursuant to a judicially-issued arrest warrant, no civil arrests shall be made upon any person, including witnesses, plaintiffs, defendants, counsel, petitioners, respondents, victims, or family or household members of parties or potential witnesses, on any court property in New Mexico, or *en route* to or from any court in New Mexico.¹ Execution or attempted execution of such non-judicially issued civil arrests shall constitute contempt of Court.

B. In order for a judicially-issued arrest warrant to be executed in a courthouse, such judicial warrant must first be presented to, and the execution approved by, the presiding Judge over the proceedings for which the person sought is attending. To be considered valid, the arrest warrant must be signed by a Judge.

USE NOTE:

1 This Rule does not preclude a court, in its jurisdiction, from issuing and enforcing orders pursuant to its inherent right and authority including contempt citations.

23-117. Writ of Protection. (NEW MATERIAL)

A. Any person or party in a judicial proceeding may petition the court, under seal, for the issuance of a writ of protection to secure the person from civil arrest on any court property in New Mexico, or *en route* to or from any court in New Mexico.

1. For judicial proceedings in a district court, a writ of protection shall be sought from the judge presiding over the proceeding.

2. For judicial proceedings in a magistrate, municipal, or metropolitan court, a writ of protection shall be sought from the district court of the same judicial district.

3. A writ of protection may also be sought from the New Mexico Supreme Court for a person or party in a judicial proceeding in the Court of Appeals or Supreme Court or upon denial of a petition for writ of protection from a district court.

B. The Court shall issue a writ of protection upon a showing by a preponderance of the evidence that:

1. The person or party has reason to believe that they may be subject to a civil arrest at, or *en route* to or from the courthouse; and

2. Arrest of the person would likely impede his or her access to the courts, for instance: preventing the person from participating in his or her own defense; preventing the person from attending or testifying at a hearing or trial as a witness or victim; preventing the person from filing a lawsuit; preventing the person from petitioning for divorce, custody, child support, or protection order; putting the person at risk of receiving a warrant for failing to appear in court.

C. Execution or attempted execution of such civil arrests in any court in New Mexico, or en route to or from any court in New Mexico on a person secured by a writ of protection shall constitute criminal contempt of Court.

4. Supporting Documentation

Petitioners submit the following documentation in support of this Petition:

- A. Draft Rules 23-116 and 23-117 (see above, section 3)
- B. ICE Courthouse Arrests in New Mexico 2017-2018 (as of August 15, 2018)
- C. U.S. Immigrations and Customs Enforcement Directive No. 10029.2 (Oct. 24, 2011)
- D. Letter dated March 29, 2017 to Chief Justice Tani G. Cantil-Sakauye of the Supreme Court of California from U.S. Attorney General Jefferson B. Sessions III and Secretary of Homeland Security John F. Kelly
- E. Letter dated April 4, 2017 to Attorney General Jeffrey Sessions and Secretary of Homeland Security John Kelly from California Prosecutor Offices
- F. Letter dated April 6, 2017 to Attorney General Jeffrey Sessions and Secretary of Homeland Security John Kelly from Chief Justice Thomas A. Blamer of the Oregon Supreme Court
- G. Letter dated April 6, 2017 to ICE Acting Field Office Director Jeffrey D. Lynch from the City of Denver Mayor, City Council, District Attorney, City Attorney, Superintendent of Public Schools, and County of Denver Court
- H. Letter dated April 10, 2017 to Attorney General Jefferson B. Sessions and Secretary of Homeland Security John F. Kelly from the American Civil Liberties Union of Maine
- I. Letter dated April 19, 2017 to Secretary of Homeland Security John F. Kelly from Chief Justice Stuart Rabner of the Supreme Court of New Jersey
- J. U.S. Commission on Civil Rights Statement: U.S. Commission on Civil rights Expresses Concern with Immigrants' Access to Justice (Apr. 24, 2017)
- K. Letter dated May 25, 2017 to Mayor Michael B. Hancock of the City of Denver from ICE Executive Associate Director Matthew T. Albence
- L. Christopher N. Lasch, *A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. F. 410 (2017)
- M. U.S. Immigrations and Customs Enforcement Directive No. 11072.1 (Jan. 10, 2018)
- N. Letter dated March 16, 2018 to ICE Deputy Director Thomas D. Homan from U.S. Commission on Civil Rights
- O. National Association of Criminal Defense Lawyers (NACDL), Resolution: Concerning ICE in the Courtroom (Apr. 21, 2018)
- P. George Bach, *Essay: Federalism and the State Police Power – Why Immigration and Customs Enforcement Must Stay Away from State Courthouses*, 54 Willamette L. Rev. 323 (Spring, 2018)

5. Out-Of-Cycle Rule Making – Emergency Circumstances

Recently, there has been a significant increase in the number of arrests by ICE in New Mexican courthouses, lending urgency to the need for a rule change as described above. There exists an imminent threat to the efficient administration of justice in New Mexican courts as a significant segment of our community is being denied equal access to the Courts. For these reasons Petitioners request approval of the Court that this Petition be considered for out-of-cycle rule-making pursuant to Rules 23-106.1(C)(4) and (C)(5), NMRA.

Currently, many New Mexicans are afraid to access the courts, as witnesses, victims, defendants, family members, and as members of the general public. This is causing a lack of safety in the community, and denies persons access to civil legal dispute resolution, criminal courts, and domestic relations adjudications. Even United States citizens are denied their right to access the court when witnesses in their cases are afraid to appear in court.

This Petition is the result of recent well-documented reports of a serious escalation of incidents which persons have been arrested by DHS/ICE enforcement officers in courthouses in New Mexico. With each day that passes, individual rights are being violated, the orderly business of the courts is disrupted, and the community fear and distrust grows.

This partnership of legal associations, community advocacy organizations and members of the State Bar of New Mexico, urge this Court not to defer this Petition until the normal course of the rule making cycle, but to act immediately because of the current threat to public safety posed by courthouse arrests.

CONCLUSION

To ensure equal access to the courts, equal protection of the laws, and full protection of victims' rights as required by the United States Constitution and the New Mexico Constitution, the New Mexico Supreme Court must adopt a rule protecting a meaningful right to equal access to the courthouses and dignity in court proceedings. Petitioners respectfully request the New Mexico Supreme Court adopt proposed Rules 23-116 and 23-117 which (1) prohibit "civil arrests" of individuals inside the courthouse and *en route* to and from the proceedings, and (2) provide a procedural mechanism for the issuance of "writs of protection" as established under the common law.

Dated: August 29, 2018

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Legal Associations, Agencies & Organizations

American Immigration Lawyers Association - TX, NM, and OK Chapter
Immigration Law Section of the State Bar of New Mexico *(This position is strictly that of the Immigration Law Section. It is neither endorsed nor approved by the State Bar of New Mexico)*
New Mexico Criminal Defense Lawyers Association
New Mexico Hispanic Bar Association
New Mexico Law Offices of the Public Defenders
New Mexico Trial Lawyers

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Atkins & Walker Law
Ben Sherman Law LLC
Bencoe & LaCour Law P.C.
Burgess & Porter Law
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Community Organizations

American Civil Liberties Union of New Mexico
Albuquerque Center for Peace and Justice
Albuquerque Mennonite Church
Albuquerque Monthly Meeting of the Religious Society of Friends (Quakers)
Archdiocese of Santa Fe
Bosque Center for Spiritual Living
Casa de las Comunidades Catholic Worker Community
Casa de Salud
Catholic Charities
Catholic Charities of Southern New Mexico
Center for Civic Policy
Centro Savila
Congregation Nahalat Shalom, Albuquerque
East Central Ministries, Inc.
El CENTRO de Igualdad y Derechos
Encuentro
Equality New Mexico
First Congregational United Church of Christ, Albuquerque
First United Presbyterian Church Mission & Peacemaking Committee, Las Vegas, NM
Forward Together / Strong Families
Immigrant Justice Action Team of Albuquerque Interfaith
Immigrant and Refugee Resource Village of Albuquerque/NMWGP
Islamic Center of New Mexico
Lutheran Advocacy Ministry-New Mexico
Muslims and Jews United
National Immigration Law Center
A New Awakening Counseling Agency
New Mexico Asian Family Center
New Mexico Coalition Against Domestic Violence
New Mexico Comunidades en Accion y de Fe (CAFe)
New Mexico Center on Law and Poverty

New Mexico Conference of Churches
NM Dream Team / United We Dream
New Mexico Faith Coalition for Immigrant Justice
New Mexico Immigrant Law Center
New Mexico Interfaith Power and Light
New Mexico Voices for Children
OLÉ, Organizers in the Land of Enchantment
Peacemakers Consulting
St. Andrew Presbyterian Church
St. Bede's Episcopal Church, Santa Fe
Santa Fe Dreamers Project
Santa Fe Faith Network for Immigrant Justice
Santa Fe Safe
Somos Un Pueblo Unido
Southwest Women's Law Center
South West Organizing Project (SWOP)
Street Safe New Mexico
Strong Families NM of Forward Together.
Transgender Resource Center of New Mexico
United Church of Santa Fe
Unitarian Universalist Congregation of Santa Fe, New Mexico
UNM Sanctuary Campus Working Group
Young Women United
Zia Church, Santa Fe