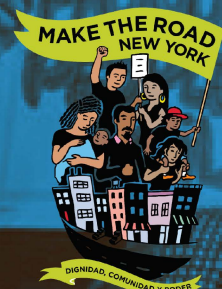


**Immigrant Protest:
A Guide for Attorneys
Advising Noncitizen
Activists in NYC**



Make the Road New York

Make the Road New York (MRNY) builds the power of immigrant and working-class communities to achieve dignity and justice through community organizing, survival services, and transformative education. MRNY has over 23,000 members who are predominately low-income, Latinx immigrants, and its five storefront offices are second homes to hundreds of community members daily.

Authors:

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Disclaimer:

This memorandum does not constitute legal advice. It incorporates and reflects legal research and interviews with organizers and attorneys. Readers should examine issues addressed here based on the context and facts of each situation, organizational policies and practices, geographical and political context, and on their own counsel's interpretation of applicable law. This is an ever-changing environment and topic, with potential for changes in current law, interpretations of current law, or current enforcement practices.

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Introduction and Primary Issues Addressed

Actions are a powerful tool to build community, demonstrate power through a show of numbers, and bring attention to demands. However, engagement in protest often comes with personal risk, including for noncitizens¹ who could face immigration enforcement as a result of contact with local law enforcement. Lawyers providing guidance to noncitizens often overgeneralize through statements such as “all action participation is dangerous,” which can feel disempowering to noncitizens who may want to engage in protest and is disrespectful to the long history of immigrant, including undocumented, activism. Through this project, we seek to assist attorneys in providing more detailed advice so that noncitizens can make informed choices about whether the reward is worth the risk.

This memo provides an overview of the potential consequences of action participation in New York City. **This memo is intended primarily for attorneys and advocates advising clients or facilitating know-your-rights presentations.**

The memo is organized into six parts:

- Glossary
- [Part I](#). Processed into The System. An explanation of what happens in the typical case in New York City when a participant has police contact.
- [Part II](#). Offenses and their Associated Conduct. A list of commonly charged and less commonly charged offenses. A series of hypotheticals illustrating when certain charges are more or less likely, depending on the type of action.
- [Part III](#). Possible Immigration Consequences. A brief explanation of how law enforcement or court contact can differently impact noncitizens.
- [Part IV](#). On-The-Ground Risks and Strategies During an Action. Organized by level of risk, a list of ways in which participants can mitigate police contact and what to do if contact occurs.
- [Part V](#). Special Considerations for Actions on Federal Property/Land
- [Part VI](#). Conclusion.

Additionally, short appendices include the following:

- [Appendix A](#). Sample Summons and Desk Appearance Ticket
- [Appendix B](#). Ways to Prepare for an Action
- [Appendix C](#). Chart of New York offenses that may be charged at protests with information on immigration consequences, courtesy of the Immigrant Defense Project, and information on associated conduct.

¹ For purposes of this memorandum, the term noncitizen includes anyone who was not born in the United States who has not naturalized or acquired/derived citizenship.

GLOSSARY

Adjournment in Contemplation of Dismissal (“ACD”): Allows a court to put off judgment in a case for a set period with an eye towards dismissal. As long as the case is not restored to the court’s calendar during that period (for example, because of a new arrest), the charge is typically dismissed after six months or a year (though an attorney may sometimes seek early dismissal on a client’s behalf). Once a court agrees to an ACD, the court must release a defendant on their own recognizance. The corresponding part of New York State law is New York Criminal Procedure Law § 170.55.

Aggravated Felony: A broad category of criminal offenses that can subject someone to mandatory detention and deportation, prevent them from entering the United States, and/or prevent them from becoming a U.S. citizen. Aggravated felonies are listed at 8 U.S.C. § 1101(a)(43). It is critical to consult an immigration attorney to determine whether a specific conviction is an aggravated felony, as the law is constantly in flux on this issue.²

Civil Disobedience (“CD”): In the action context, civil disobedience is a strategy in which participants choose to disobey a law as a sign of protest, understanding the likelihood of contact with the criminal legal system. Because CD usually involves putting participants on law enforcement’s radar, organizers and participants should take special care in assessing the risks of noncitizen participation.

Conviction: For purposes of immigration law, a conviction exists if a formal judgment of guilt is entered by the court, there has been a plea of guilty or no contest, or there has been an admission to an offense, *and* the court ordered some form of punishment, penalty, or restraint on liberty (whether or not any jail time was served). This definition differs from the way conviction is defined both in criminal law and colloquially.

Crime Involving Moral Turpitude (“CIMT”): A broad category of criminal offenses that can prevent someone from entering the United States or can subject them to deportation. There is no statutory definition of CIMT. It is, therefore, critical to consult an immigration attorney about a specific offense to determine whether it falls into this category.

Deportability: Being deportable means that the Government believes it can exile someone from the country. This could be for a variety of reasons, including that the Government alleges they never had permission to enter, had permission to enter but have been convicted of certain crimes,

² Note that an aggravated felony is not a separate ground of inadmissibility, but many crimes categorized as an aggravated felony can prevent someone from entering the United States. Note also that an aggravated felony conviction that became final on or after November 29, 1990 is a permanent bar to U.S. citizenship because it prevents a finding that someone has good moral character. *See* 8 USC § 1101(f)(8); 8 CFR § 316.10(b)(1)(ii).

or have abandoned their immigration status. Categories of deportability are listed at 8 U.S.C. § 1227.

Desk Appearance Ticket (“DAT”): An order, issued to someone who has been arrested, but is then released by police instead of being held for arraignments. An individual issued a DAT is instructed to appear in court at a specific date and time to respond to an accusation that they have committed a crime, usually a misdemeanor or violation. The judge will issue a warrant for their arrest if they fail to appear.

Documented (“Has Status”): Being documented (or having status) means that you have citizenship, permanent residence (a green card), or some other type of immigration status. An arrest and/or conviction can cause a documented person to lose their status and may make them inadmissible or deportable.

Immigration Consequences: Immigration consequences refer to the ways in which an event or act can make it more difficult for someone to enter or stay in the United States. These consequences could be, for example, that a person becomes ineligible to obtain immigration status, becomes at risk of losing immigration status, or that a person’s information may be shared with the federal government.

U.S. Immigration and Customs Enforcement (“ICE”): The enforcement agency under the Department of Homeland Security that is responsible for surveillance, raids, arrest, detention, and removal of noncitizens.

Inadmissibility: Being inadmissible means that the Government believes someone cannot enter the country (or, if they are already in the country, that it can make them leave or refuse to grant them a form of immigration status they would otherwise be eligible for). This could be for a variety of reasons, including that the Government alleges someone has become reliant on government assistance, has been convicted of certain crimes, or was previously deported. Categories of inadmissibility are listed at 8 U.S.C. § 1182.

Removability: Being removable means that the Government can prevent someone from entering the United States or obtaining lawful status despite already being inside the United States (inadmissibility); or that the Government can deport them if they are in the United States (deportability). Both inadmissibility and deportability can lead to someone’s permanent exile from the United States and separation from their family and community.

Secure Communities (S-Comm): S-Comm is a federal enforcement program implemented ICE. Any time someone is fingerprinted by local law enforcement, their fingerprints are cross-referenced in DHS’s immigration databases.

Strategic Response Group (“SRG”): The New York Police Department (“NYPD”) unit that responds to citywide mobilizations, civil disorders, and major events. SRG officers are often present at large actions, especially in Manhattan.

Summons: Also known as a “pink ticket,” a summons is an order to appear in a special summons court at a specific date and time to respond to an accusation that someone has committed a low-level offense, usually a violation.

Undocumented: Being undocumented means that a noncitizen does not have a lawful permanent or temporary immigration status in the United States. Although there are sometimes defenses they can present in immigration court, undocumented people may already be removable. An arrest and/or conviction can both bring an undocumented person to ICE’s attention *and/or* add a new ground for deporting them from the United States.

Violation: In New York, a violation is any minor offense that can be punished by up to fifteen days in jail. Even though violations seem minor, violations can have significant immigration consequences, and an individual should consult an immigration attorney to determine whether to plead guilty to a violation.

PART I. PROCESSED INTO THE SYSTEM

When deciding whether to participate in an action, community members benefit from knowing what can happen if they come into contact with law enforcement.

Below, we describe some of the law enforcement agencies to be on the lookout for, potential processes that can result from police contact (e.g., fingerprinting, a summons, Desk Appearance Ticket (“DAT”), or being booked and arraigned), and then explore three possible scenarios related to police contact.

A. Law Enforcement Presence at Actions

It is important for organizers to assess which law enforcement agency is likely to be present at the chosen location for an action. For example, if an action is planned at John F. Kennedy International Airport, organizers should expect to encounter the Port Authority Police.³ If an action is planned in front of a federal building, the Federal Protective Service will likely be present. The Federal Protective Service is not to be confused with Immigration and Customs Enforcement (“ICE”), even though they both wear Department of Homeland Security uniforms.

The New York Police Department (“NYPD”) Strategic Response Group (“SRG”) often manages action response in New York City, primarily in Manhattan and especially for large protests, but organizers should also be prepared for regular NYPD forces. The SRG specializes in policing terrorism, active shooting incidents, and protests. They have highly sophisticated equipment that allows them to scramble communication networks and use military grade Long Range Acoustic Device (“LRAD”) noise cannons to announce possible arrests and as “sonic weapons” for crowd control.⁴ SRG also utilizes Stingray cell site simulator devices that enable police to track cellphone users’ locations and collect phone numbers that people call or text. Some Stingrays are even able to collect the content of calls or texts.⁵ The SRG is often more highly trained regarding protest than the regular police force that participants may encounter at smaller actions or outside of Manhattan. Anecdotally, movement lawyers and legal observers have witnessed regular NYPD forces resorting more quickly to violence.

On June 1, 2020, it was reported that ICE would begin deploying forces, not to make immigration arrests, but rather to assist other law enforcement in responding to the uprising

³ Eli Rosenberg, *Protest Grows ‘Out of Nowhere’ at Kennedy Airport After Iraqi’s are Detained*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/nyregion/jfk-protests-trump-refugee-ban.html>.

⁴ Nathan Tempey, *The NYPD Claimed Its LRAD Sound Cannon Isn’t a Weapon. Judge Disagreed*, GOTHAMIST. (June 1, 2017), http://gothamist.com/2017/06/01/lrad_lawsuit_nypd.php.

⁵ New York Civil Liberties Union, *Stingrays*, (May 2016), <https://www.nyclu.org/en/stingrays>.

caused by the killing of George Floyd.⁶ Only time will tell what that means, but noncitizens may want to be particularly cautious until additional information comes to light.

B. Procedures for Processing (Summons, Desk Appearance Ticket (“DAT”), or Being Booked and Arraigned)

Summons:

One possible consequence resulting from police contact is receipt of a summons. A summons is a pink ticket issued for a lower-level offense (including a charge of disorderly conduct, under N.Y.P.L. § 240.20) and requires an appearance in summons court at a later date to respond to the charge. For a sample New York City summons, please see [Appendix A](#). A summons is almost always preferable to a DAT, described below. There is a lower risk of encountering ICE when issued a summons because:

1. a person issued a summons in the field, as opposed to at a precinct, is unlikely to be fingerprinted, in which case police contact will not be immediately shared with ICE via S-Comm, *see infra* Part III.A; and
2. summons court is different than criminal court. Summons court is located in a distinct location, separate from the criminal court, and a person who has been issued a summons is allowed to show up in person on the date of the summons or up to one week in advance of the appearance date between 9:30 a.m. and 3:00 p.m.⁷ Because there is no precise date and time to appear on a summons, ICE will not know exactly when someone is going to show up to summons court, *see infra* Part III.B.⁸

However, in New York City, summonses related to action participation are most often issued at the precinct, as opposed to in the field, so such participants are likely to be fingerprinted and thus be flagged to ICE. In addition, failing to appear on or up to one week before the date on the summons will result in the court issuing an arrest warrant.⁹

In summons court, as in criminal court, there are court-appointed attorneys for those who cannot afford one. On the day of the summons, there are several ways a case may resolve:

1. The individual can plead not guilty and proceed to trial to contest the charges. (Notably, pleading not guilty can lead the summons court to transfer a case to criminal court.)

⁶ CBS News, *ICE deploying agents to help local authorities* (Jun. 1, 2020), <https://www.cbsnews.com/live-updates/george-floyd-death-protests-unrest-disorder-2020-06-02/#post-update-69fd9d5f>.

⁷ N.Y. State Unified Court System, SUMMONS FAQ, <https://www.nycourts.gov/mysummons-nyc/faqs.shtml>.

⁸ There are two exceptions for the in-person requirement: Public Consumption of Alcohol A.C. 10-125 or Public Urination A.C. 16-118(6), *see id.* In those cases, it is possible to plea by mail. *Id.*

⁹ *Id.*

2. The individual can plead guilty and pay a fine to the clerk.
3. A judge can issue an Adjournment in Contemplation of Dismissal (“ACD”) or dismiss the charges if the summons is facially insufficient, in which case no pleadings are necessary.

Generally, a summons issued in the field (without fingerprints), which again, is not common in an action context, that does not result in a criminal conviction will not be listed on a person’s record of arrests and prosecutions (known colloquially as a “RAP sheet”).

Stay Tuned – A New “Appearance Ticket”?

In April 2019, New York State, through the budget process, amended Criminal Procedure Law § 150.20(1) to reduce police officers’ discretion to make custodial arrests for certain charges.¹⁰ The relevant charges include most E felonies and all misdemeanors and violations, which encompasses most of the commonly occurring charges associated with protest in NYC.¹¹ Instead of arresting, officers are supposed to issue an “appearance ticket” in the field.¹² The change became effective in January 2020, but there are still many unknowns about how the law is being or will be implemented. For example, the NYPD might use summons or create a new type of appearance ticket in order to comply with its obligations. Furthermore, the law includes exceptions, such as allowing for arrest if the participant is unable or unwilling to verify their identity and method of contact, after having been given a “reasonable opportunity” to do so.¹³ The fact remains that as of today’s date, most protestors are arrested.

Desk Appearance Ticket or “DAT”:

A second possible consequence from police contact is receipt of a DAT. A DAT is a white, 8½” x 11” piece of paper that is an order to return to criminal court to respond to the accusations of an offense. For a sample NYC DAT, see [Appendix A](#). A DAT is most likely to be issued for a misdemeanor or a violation. A protester who has received a DAT has been arrested and will be taken to a precinct, but instead of spending hours in jail and then seeing a judge (often referred to as being “booked and arraigned”), the DAT pauses the process and doesn’t subject someone to time in jail at the outset. Instead, they are released from the precinct and told to come back to

¹⁰ Martha Rayner and Alex Garber, *How an Unheralded Change to Criminal Procedure Law § 150.20 Will Overhaul Arrest Procedures in New York*, N. Y. LAW JOURNAL, Feb. 21, 2020, <https://www.law.com/newyorklawjournal/2020/02/21/how-an-unheralded-change-to-criminal-procedure-law-%C2%A7150-20-will-overhaul-arrest-procedures-in-new-york>.

¹¹ CPL § 150.20(1)(a).

¹² *Id.*

¹³ CPL § 150.20(1)(b)(iii).

criminal court for arraignment on the date listed on the DAT. On the arraignment date, a judge will likely release a defendant who returns on a DAT for low-level charges, like disorderly conduct, instead of setting bail. However, if a defendant fails to appear on the return date, the judge will likely issue a bench warrant for their arrest.¹⁴

Being Booked and Arraigned:

If the police decline to issue a summons or DAT, then the person will be booked and arraigned, meaning that the police write up the recommended charges and the participant is taken to central booking, usually in the borough where the arrest took place. If the offense is considered a felony or a misdemeanor, rather than a violation, the participant is more likely to be booked and arraigned. Additionally, anyone with an open criminal warrant in New York or any other state must be booked and arraigned, regardless of the level of the charge.

At the precinct, the participant will be held in a large pen and will have a mugshot taken. There will be a Criminal Justice Agency (“CJA”) interview to generate a “score” which recommends to the judge and prosecutor whether or not the person arrested is considered a flight risk and thus whether bail should be set.¹⁵ This score is based on “pedigree information” and takes into account, among other things, how long someone has lived in the same place, previous contact with law enforcement, employment history, prior warrant history, and if they have a reliable contact number. Then, the participant waits to speak with their own private attorney or a public defender who may be assigned to their case. Once the attorney understands the protester’s priorities, they may negotiate with the prosecutor about possible plea deals. The judge then decides whether to set bail or release the participant “on their own recognizance” (also referred to as “ROR”) without bail. The arraigning judge may also offer an ACD at this stage.

Prior to the arraignment, if the defense attorney knows the prosecutor is requesting bail, they may also have the participant screened by a program entitled “Supervised Release,” which takes the place of bail and monitors the participant in the community. This avoids the gamble of arguing against bail and allows the participant, if eligible, to be released under the supervision of the program into the community. Then, during arraignment, the judge may accept the participant into the Supervised Release program and may not even need to address the issue of whether to set bail. If the judge rejects the person for Supervised Release, then some bail will be set.

As of January 1, 2020, cash bail was eliminated for most misdemeanors and non-violent felonies in New York State. This remains true despite some roll-backs during the 2020 budget process.

¹⁴ Nat’l Lawyers Guild, *If You Got a Desk Appearance Ticket (DAT): What to Expect at Your First Court Appearance* (2018), https://nlgnyc.org/wp-content/uploads/2018/04/NLGNYC_WhattoExpectSUMMONS.pdf.

¹⁵ The CJA is a nonprofit contracted by the City of New York to provide pretrial services. See <http://www.nycja.org/about-cja/>.

Noncitizens should always consult with an immigration attorney, or have their defense attorney speak with immigration experts, like the Immigrant Defense Project,¹⁶ before they negotiate with the prosecutor and go before a judge.

C. Police Interactions in Practice

The chart below presents three possible scenarios that may occur during police interactions at an action. It lists the details of what could happen, the risks that a certain form of interaction entails, and strategies to prevent harm to participants.

Scenario 1: A Police Officer Stops a Participant
<p>The encounter: An officer begins talking to a participant, asking them questions, tells them to stop, or physically stops them.</p>
<p>Risks: Once an officer has stopped a participant, there is a risk that something the participant says could be used against them or against other people at the action. There is also a risk that the officer will detain the participant. However, just being stopped by a police officer alone should not carry risks if the person exercises their right to remain silent after answering basic identifying questions.¹⁷</p>
<p>Strategy: The participant should keep their hands where the officer can see them and do as instructed. The participant should calmly ask, “Am I under arrest?” If the officer says no, then they should ask, “Am I free to go?” If the officer says yes, they can go. The participant should walk (NOT RUN!) slowly away and go to a safe space outside of the action if they no longer want to have further police contact. Officers have significant discretion when it comes to who gets arrested and what the initial charges will be. Police officers have been known to lash out if they perceive someone as uncooperative or rude and later justify the use of force by claiming that the participant was resisting arrest or assaulting the police officer.</p>
Scenario 2: A Police Officer Detains a Participant in the Field
<p>The encounter: The officer says a participant is not free to go (an officer can only prevent someone from leaving—i.e. detain them— with reasonable suspicion that they have committed, are committing, or are about to commit a crime). The officer will then likely ask for the participant’s identifying information, including name, date of birth, and address. They may also ask to see an ID, and may run the person’s information through a database to look for an open warrant. An officer may issue a summons on-site for a low-level charge as long as they do not have an open warrant, or release the person without issuing a summons.</p>

¹⁶ Call (212) 725-6422 for legal support from Immigrant Defense Project.

¹⁷ Initiating contact with a police officer is especially risky because anything said can be used against the participant and the officer may begin asking questions.

Risks: While not as risky as being fingerprinted, officers taking the initial identifying information from a participant may enter that information into an NYPD database and run it nationally to look for open warrants. Officers may issue a summons and release the participant.

Strategy: The participant should not run away, but should remain where they are. Every person has the right to remain silent, regardless of immigration status.¹⁸ However, not providing any information upon a police officer's request can lead to further problems, including being fingerprinted.¹⁹

It is best to show a form of identification if the officer asks for one. Never carry another person's identification or claim someone else's identity when interacting with police, because this could lead to additional charges²⁰ and will ensure that police take fingerprints. For noncitizens, the best identification is a state driver's license or a municipal ID, like IDNYC. Keep in mind that municipal IDs will likely only be accepted in the city they are from. If a participant has no official form of ID, anything with a photo and name—like a school or work ID or a municipal ID from another city—is better than nothing and will sometimes be accepted by police. However, no foreign identification should be brought to a protest. If a protester has no form of ID, they are more likely to be booked and arraigned.

At no time should an NYPD officer ask for immigration status. If they do, participants should politely decline to answer and ask to speak with a lawyer, no matter their status.

Participants should be sure to CLEAR ALL CRIMINAL WARRANTS before attending a protest, especially out-of- state warrants (see [Appendix B](#)).

Scenario 3: Police Arrest a Participant and Take Them to the Precinct

The encounter: If an officer decides that a participant is going to be criminally charged in connection with a protest, they are generally taken to the precinct, even if the police decide merely to issue a summons.

At the precinct, the police will search a participant and inventory their belongings. Then, a sergeant will interview the participant, asking for their name, date of birth, and address.

The sergeant will enter the participant's name into a database and go through a checklist to determine whether they will release them with a summons or a Desk Appearance Ticket ("DAT"), or book and hold them for arraignment. It is often completely within the officer's discretion to issue a summons or DAT, but they almost never do so for a felony. They are supposed to consider any open warrants,

¹⁸ Nat'l Lawyers Guild, *You Have the Right to Remain Silent: A Know Your Rights Guide for Law Enforcement Encounters* (2015), <https://www.nlg.org/wp-content/uploads/2016/04/kyrpamphlet-Eng-May-2015-FINAL.pdf>.

¹⁹ NYCPL § 160.10(2) (providing that a police officer who makes an arrest for any offense, either with or without a warrant, may take or cause to be taken the fingerprints of the arrested person if such police officer is unable to ascertain a person's identity, among other things).

²⁰ NYPL § 190.23, False Personation, a class B misdemeanor that involves knowingly misrepresenting your name, date of birth, or address to a police officer. This can be considered a CIMT for immigration purposes. See IMMIGRANT DEFENSE PROJECT, UPDATED NEW YORK QUICK REFERENCE CHART, <https://www.immigrantdefenseproject.org/product/new-york-quick-reference-chart-2020-edition/>.

unanswered summonses, severity of charges, criminal record, history of coming back to court, or having an open case.

Once taken to the precinct, the participant will very likely be fingerprinted, even if they are released with a summons or a DAT.

Risks: Being taken to a precinct heightens the risks of being fingerprinted as well as booked and arraigned. And being fingerprinted facilitates immigration enforcement because it triggers an automatic check across FBI and DHS databases.²¹ Also, the more extensive the police interview, the greater the chances that a participant says something that can later be used against them in a criminal proceeding. Because the police will search an individual at the precinct, there is also a risk of additional charges if a participant is carrying anything illegal, such as drugs, weapons, or someone else's identification. Police consider many things a weapon, including box cutters, Swiss Army knives, or sometimes even tools for work, including gravity knives that, though legal to buy at stores like Home Depot, are *illegal* to carry.²² (See [Appendix B](#) for more ways to prepare for a protest.)

Strategy: To avoid the risk of being fingerprinted and booked and arraigned, a participant should ideally carry a valid form of identification, such as a state driver's license or IDNYC. It is not advisable to present a foreign passport to a law enforcement officer. While a foreign passport may mitigate the chance of being detained, if it gets into the hands of ICE, it could make it easier for them to deport a participant. First, a passport could be used as independent evidence to show that someone is not a U.S. citizen. In immigration court, the burden is on ICE to "establish alienage," so giving them a passport makes their job easier. Additionally, ICE must have a travel document, like a passport, to deport someone. Therefore, it is best to have a U.S.-issued document at an action. Aside from immigration risks, a participant also does not want to accidentally lose their passport at an action.

Participants should provide honest answers to the basic identifying questions, which the police call "pedigree information," but should never discuss any details about what happened at the action, even with other participants. They should only discuss details about what led up to the arrest with their lawyer, outside of the earshot of the police or prosecutor.

At no time should any police officer ask about immigration status. If anyone asks about immigration status, participants should politely decline to answer and ask to speak with a lawyer, no matter their immigration status. The only piece of paper they should sign is a DAT. The amount of time varies between the issuance of a DAT and the date that a participant has to return to court to see a judge, but generally a participant will have to show up on the date listed on the DAT between four to six weeks after the arrest.

²¹ Through S-Comm, the fingerprints of an arrested person may be checked against the FBI's Next Generation Identification ("NGI") database and DHS's Automated Biometric Identification System ("IDENT"). ICE is, then, notified of any "hit" against its database. See Nat'l Immigration Law Center, "Untangling the Immigration Enforcement Web: Basic Information for Advocates About Databases and Information-Sharing Among Federal, State, and Local Agencies," at 3-4 (Sept. 2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf>.

²² For example, possession of a gravity knife is a Class A misdemeanor under NYPL § 265.01. Gravity knives are any knives that can be snapped open with a flick of the wrist and are commonly used by electricians, construction workers, and in other industries. Recent New York legislation to legalize gravity knives was vetoed by Governor Cuomo. The Legal Aid Society reported that 84% of charges they saw related to gravity knives were made against people of color. See Daniel Victor, *Cuomo Vetoes Bill to Overhaul 'Gravity Knife' Law for Second Straight Year*, THE NEW YORK TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/nyregion/gravity-knife-cuomo-veto.html>.

PART II: OFFENSES AND THEIR ASSOCIATED CONDUCT

A. Commonly Charged Offenses – Violations and Misdemeanors

The vast majority of people who attend actions and do not participate in civil disobedience (“CD”) can avoid contact with police. For purposes of this memo, we define **CD** as any “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”²³ This might take the form of marching or participating in a rally without the requisite permissions or occupying prohibited spaces. But, it’s not only those who engage in CD who are at heightened risk for contact with the police. While attending low-risk actions and using strategies to avoid police contact can minimize the risk of arrest, these risks are always present. This is particularly true because, in an action, just as in everyday life, police often target marginalized people first.²⁴

There is a wide range of possible charges that can result from political action. In New York City, a class of state infractions known as “violations” make up the vast majority of charges stemming from an NYPD arrest during a protest.²⁵ While New York State does not consider violations criminal, they are considered criminal for immigration purposes. (Note that almost all criminal offenses brought in New York City are pursuant to New York *State* law; the small number of offenses that are brought pursuant to New York *City* law are still analyzed under state law.)

New York Penal Law (“NYPL”) defines a **violation** as “any offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.”²⁶ Even though they are low-level charges considered non-criminal at the state level, the Department of Homeland Security (“DHS”) argues that for immigration purposes, New York State violations are criminal because they carry a maximum term of imprisonment of 15 days,²⁷ long enough to trigger the federal definition of a misdemeanor.²⁸

The most common charge during an action is NYPL § 240.20, Disorderly Conduct, which is a violation. NYPL § 240.20 covers an array of conduct, from obstructing pedestrian traffic to failing to follow police orders after being told to disperse or get on the sidewalk (rather than the street). This is often what more serious charges, discussed below, are pled down to. In December 2017, New York City created a new city law (N.Y. City Admin. Code § 10-177) that prohibits essentially the same conduct as the state law, but imposes a lower maximum sentence (5 days in

²³ See JOHN RAWLES, A THEORY OF JUSTICE, 319 (1971).

²⁴ Nat’l Lawyers Guild, *Defending Protesters in Criminal Court CLE* (Oct. 2, 2017).

²⁵ *Id.*

²⁶ NYPL § 55.10(3).

²⁷ NYPL § 55.10(3).

²⁸ 18 U.S.C. § 3559(a).

jail or a \$200 fine) and also includes the option of a civil penalty.²⁹ The rationale behind the law was to minimize the immigration consequences of a “disorderly conduct,” but it is still up to the officer which to charge.³⁰

For actions inside buildings or on private property, NYPL § 140.05, Trespass, a violation, is also common.

More serious commonly charged offenses are NYPL § 120.20, Reckless Endangerment in the Second Degree; NYPL § 195.05, Obstructing Governmental Administration in the Second Degree; and NYPL § 205.30, Resisting Arrest. All three are New York misdemeanors and are associated with participation in CD.

See [Appendix C](#), *infra*, for a more comprehensive list of commonly charged offenses, their associated conduct, and possible immigration consequences.

B. Less Commonly Charged Offenses – Outside the Penal Code

Although attorneys agree that the violations and misdemeanors described in Part I.A, *supra*, comprise the majority of action-related charges, police have also charged participants with offenses from outside the Penal Code.

New York Vehicle and Traffic Law § 1156(a):

The NYPD has more frequently charged participants with New York Vehicle and Traffic Law (“NYVTL”) § 1156(a), Pedestrians on Roadways, in response to Black Lives Matter actions—which focused on “taking” streets and roadways. Courts have ruled that arrests for NYVTL § 1156(a), if otherwise lawful, are constitutionally valid.³¹ Keep in mind that for people who are undocumented, any arrest could result in being put into removal proceedings.

New York City Ordinances:

Participants in actions may also be charged under municipal law. In New York City, this includes Parks Department ordinances, sanitation-related ordinances, and the Metropolitan Transportation Authority (“MTA”) rules, all of which may carry criminal penalties. For the most

²⁹ See Samar Khurshid, *New York City Now Has Its Own Legal Parameters for ‘Disorderly Conduct’*, GOTHAM GAZETTE, Dec. 5, 2017, <http://www.gothamgazette.com/city/7350-new-york-city-now-has-its-own-legal-parameters-for-disorderly-conduct>.

³⁰ *Id.*

³¹ See *Gonzalez v. City of New York*, 2017 WL 149985, at *2 (S.D.N.Y. Jan. 13, 2017) (“The constitutionality of subjecting someone who steps off the sidewalk and walks a few steps in the roadway to a full-blown custodial arrest appears dubious, but binding precedent dictates the outcome in this case.”).

part, these are violations under New York State law, but they still involve contact with law enforcement and therefore can have possible immigration consequences.

Individuals charged with these offenses generally receive a summons. However, as discussed above, in the action context, even those who ultimately receive a summons will likely be taken to the precinct. Those without ID may still receive a DAT, but are more likely to be booked and arraigned than those with an ID. (For more information on summonses and DATs, *see* Part I.B., *supra*).

C. Criminal Consequences of Specific Conduct

While there is no perfect way to predict when and why the police choose to arrest people, some conduct is more likely to lead to arrest. More serious charges occur most often under three circumstances: 1) when physical contact is made with police, 2) when property is damaged, and/or 3) when police feel personal animosity toward a participant, often if they have been yelling insults. Consequences can be harsh for the most serious charges that stem from an action.

As illustrated in the hypothetical below, increasing physical contact with police can bring increasingly serious consequences. Police officers have been known to claim that they were injured from dragging or moving participants. If in the process of moving a person, a participant's arm accidentally touches a police officer, this could be grounds for an officer to charge assault. In many circumstances, these charges will be pled down to lower offenses, but for noncitizens, simply entering the system can bring risks.

Organizers may want to give lower-risk roles to participants who feel they face particularly high immigration-related risks. For example, holding signs without obstructing traffic, handing out literature to passersby, providing food or water to other participants, or taking pictures.

The hypothetical below illustrates examples of possible consequences of various conduct. As the potential for angering and coming into physical contact with police officers increases, so does the potential for more serious charges.

Hypothetical: Anti-War Protest

Goals:

1. Stop weapons from leaving a factory
2. Bring attention to the presence of factory
3. Bring attention to war(s)

Tactics:

Sit down in the street in front of the factory and block traffic.

SCENARIOS	LIKELY CHARGES (NOT EXHAUSTIVE)	LIKELY ULTIMATE OUTCOMES (NOT EXHAUSTIVE)
<p>Scenario #1 The police arrive and order participants onto the sidewalk. The participants comply.</p>	<ul style="list-style-type: none"> - No charge - Disorderly conduct (“DisCon”)³² 	<ul style="list-style-type: none"> - No charge - A fine - Adjournment in Contemplation of Dismissal (“ACD”)³³
<p>Scenario #2 The police arrive and order protesters onto the sidewalk. The protesters remain seated in the street, until the police pull the protesters up one-by-one. The protesters walk to the sidewalk themselves, escorted by police.</p>	<ul style="list-style-type: none"> - DisCon 	<ul style="list-style-type: none"> - Charges dismissed - ACD
<p>Scenario #3³⁴ The police arrive and order protesters onto the sidewalk. The protesters remain seated in the street, until the police pull the protesters up one-by-one. The protesters go limp and force the police to drag them to the sidewalk.</p>	<ul style="list-style-type: none"> - DisCon - Obstructing Governmental Administration (“OGA”) - Resisting Arrest 	<ul style="list-style-type: none"> - Charges dismissed - ACD - DisCon - Trial
<p>Scenario #4 The police arrive and order protesters onto the sidewalk. The protesters remain seated in the street and lock arms. The protesters force the police to pull them apart and drag them to the sidewalk.</p>	<ul style="list-style-type: none"> - DisCon - OGA - Resisting Arrest - Assault 	<ul style="list-style-type: none"> - More likely to be booked and arraigned - Less likely to get ACD - DisCon - Trial
<p>Scenario #5 The police arrive and order protesters onto the sidewalk. The protesters remain</p>	<ul style="list-style-type: none"> - DisCon - OGA - Resisting Arrest 	<ul style="list-style-type: none"> - Likely to be booked and arraigned

³² The most likely types of Disorderly Conduct (“DisCon”) charges for this type of activity include § 240.20(5) for obstructing vehicular or pedestrian traffic or § 240.20(6) for failure to disperse.

³³ An Adjournment in Contemplation of Dismissal (“ACD”) allows the court to ultimately dismiss charges after six months if the defendant complies with certain conditions, such as community service and no subsequent arrests. *See* Part I.B., *supra*.

seated and use PVC pipe to lock arms. The police must cut the pipe from around their arms, pull them apart, and drag them to the sidewalk.	- Assault	- ACD and reduced plea offer less likely - Very likely OGA if police cut pipe - Trial
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Participants and organizers must weigh the value of participating in these kinds of actions against the risks that could result. Scenario #1 could meet the goals of the action, but the longer the protesters block traffic, the more effective their protest will likely be. Actions in Scenario #1 delay weapons shipments (even symbolically) and bring increased attention to the factory and the war itself, but the more tactics (like #3-#5) that are used to cause delay and attention will increase the likelihood of police contact because the police will work harder to move the protesters from the street. This also may agitate the police, making arrests more likely, and increase the risk of injury for participants.

PART III. POSSIBLE IMMIGRATION CONSEQUENCES

All noncitizens are more easily detected by immigration officials as a consequence of police contact. Mere detection may be especially, but not uniquely, problematic for undocumented people (both those who have had no prior contact with immigration and those who fell out of status). In addition to detection, possible immigration consequences include, but are not limited to, immigration detention, mandatory immigration detention, deportability, ineligibility for a benefit or defense to deportation, delay in benefit adjudication, or denial of an immigration application on discretion. This section will cover the broad strokes of potential immigration consequences to be sensitive to when advising action participants.

A. Immigration Consequences Flowing from Information Sharing and Collaboration Between the NYPD and ICE

General Restrictions on NYPD Communication/Collaboration with ICE:

Local Law 228, passed in 2017, expands protections for immigrants by prohibiting employees of city agencies—including NYPD—from performing immigration enforcement.³⁵ On its face, this law should dramatically limit NYPD collaboration with ICE, but there are a few potential holes, especially when accounting for how it was implemented. Notably:

- It leaves the detainer law untouched, including the circumstances in which the NYPD can notify ICE about when an individual will be released from NYPD custody.³⁶ See *infra* Part III.A. Fingerprints and S-Comm.
- The NYPD can collaborate with ICE if it is within the context of a cooperative agreement, such as a task force, not primarily intended to further immigration enforcement.³⁷

Warrant Check – National Crime Information Center:

First, after detaining someone in the field, the police generally run the individual's name through various warrant databases, including the FBI's National Crime Information Center ("NCIC") database. NCIC is an electronic database of various files of criminal data. As of late 2016, (the latest date for which we could find specific information), the NCIC database consisted of 21

³⁵ Local Law No. 228 (2017), N.Y. City Council, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3022098&GUID=D0BFA473-FA7C-4FA6-83C4-216E9706EE7A>; N.Y. CITY, *De Blasio Administration Announces Citywide Guidance and NYPD Protocol to Codify Restrictions on Assistance with Federal Immigration Enforcement*, Jan. 31, 2018, <https://www1.nyc.gov/office-of-the-mayor/news/075-18/de-blasio-administration-citywide-guidance-nypd-protocol-codify-restrictions-on>.

³⁶ NYPD PATROL GUIDE, Procedure No. 212-126 (Jun. 13, 2019).

³⁷ *Id.*

files. Relevant here, the database includes (1) an Immigration Violator File (“IVF”), which provides records “on criminal aliens whom immigration authorities have deported and aliens with outstanding administrative [i.e., civil] warrants of removal,”³⁸ (2) a Gang File, and (3) a Wanted Persons File, which includes records on individuals (including juveniles who will be tried as adults) for whom a federal warrant or a felony or misdemeanor warrant is outstanding.³⁹ The Wanted Persons File seems to mirror much of the data in the IVF file.⁴⁰

Broadly, the civil immigration information in NCIC has long been criticized as inaccurate. Using FOIA data, the Migration Policy Institute found in 2005 that 42 percent of all NCIC immigration hits in response to a police query were “false positives,” where DHS was unable to confirm that the individual was an actual “immigration violator.”⁴¹

Additionally, as noted by the FBI itself on its NCIC information page, “a positive response from NCIC is *not probable cause for an officer to take action.*”⁴² NCIC policy requires that the inquiring agency make contact with the entering agency to verify that the information is accurate.⁴³

Since 2014, NYPD officers have been instructed to bring an individual who has an IVF “hit” to the precinct for further investigation.⁴⁴ If the IVF is an administrative warrant issued “solely in connection with an immigration violation”⁴⁵ (as would be the case where the hit read, “Outstanding Administrative Warrant of Removal”⁴⁶), then the NYPD should not honor the

³⁸ This term includes records regarding (1) persons previously convicted of a felony and deported; (2) persons allegedly subject to a final deportation, exclusion, or removal order (“absconders”) but who remain in the country; and (3) persons allegedly in violation of the National Security Entry-Exit Registration System (“NSEERS”) program. See Michael Wishnie and Annie Lai, “Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using NCIC Database” at 3, MIGRATION POLICY INSTITUTE (Dec. 2005), www.migrationpolicy.org/research/blurring-lines-profile-state-and-local-police-enforcementimmigration-law-using-ncic.

³⁹ Federal Bureau of Investigation, *National Crime Information Center (NCIC)*, <https://www.fbi.gov/services/cjis/ncic>.

⁴⁰ National Crime Information Center (NCIC), *NCIC 2000 Operating Manual: Immigration Violator File*, §§ 2-5, (undated), <https://www.chesterfield.gov/DocumentCenter/View/490/NCIC-Operating-Manual-PDF?bidId=>

⁴¹ See Michael Wishnie and Annie Lai, “Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using NCIC Database” at 3, MIGRATION POLICY INSTITUTE (Dec. 2005), www.migrationpolicy.org/research/blurring-lines-profile-state-and-local-police-enforcementimmigration-law-using-ncic.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Immigrant Defense Project, *Ending ICE/Police Entanglement: From Street Encounter to Custody*, <https://www.immdefense.org/ending-ice-police-entanglement/#custody>.

⁴⁵ NYPD, RE: ADMINISTRATIVE WARRANTS ISSUED BY OR FOR IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 11, 2014), <https://www.immigrantdefenseproject.org/wp-content/uploads/2016/02/Finest-Message-Imm-Warrants.pdf>.

⁴⁶ Other possible hits may read, “Immigration violation – Failure to appear for removal” or “Alien unlawfully present due to order of removal or exclusion from the USA.” See National Crime Information Center (NCIC), *NCIC 2000 Operating Manual: Immigration Violator File*, § 5.2 (undated), <https://www.chesterfield.gov/DocumentCenter/View/490/NCIC-Operating-Manual-PDF?bidId=>

warrant. Instead, it should issue a summons and release the individual, as long as a summons is “otherwise appropriate.”⁴⁷

Fingerprints and S-Comm:

Whenever an arrest is made, the arresting officer may take fingerprints, a step that substantially increases the chances that identifying information will be shared with ICE. NYPD officers are authorized to take fingerprints under a broad range of circumstances. New York Criminal Procedure Law (“NYCPL”) § 160.10 states a police officer or agency *must* take an individual’s fingerprints upon arrest if they are charged with (1) a felony, (2) a misdemeanor under New York Penal Law (“NYPL”), (3) a misdemeanor that would constitute a felony if the individual was previously convicted of a crime, or (4) loitering for the purposes of prostitution.⁴⁸ However, officers still have discretion to take fingerprints in other cases if they are (1) unable to ascertain an arrestee’s identity, (2) they reasonably suspect that the identification provided is inaccurate, or (3) they reasonably suspect the individual is being sought by law enforcement for the commission of another offense.⁴⁹ This is why having some form of photo ID at an action is important, although if the person is a noncitizen, it is best to not have identification issued by a foreign country. See *supra* Part I.C, Scenarios 2-3.

Once fingerprints are taken by the NYPD, they are automatically shared with the FBI for statistical and criminal justice purposes. Under S-Comm, these fingerprints are also shared with DHS.⁵⁰ DHS then uses information related to the individual’s immigration history to assess whether they may be removable. If DHS suspects removability, then ICE may lodge a “detainer” against the individual, which is a request that the NYPD either (1) notify ICE at least 48 hours before a detained person is being released from custody or (2) hold the detained person in the jail in which they were booked for 48 hours longer than they would otherwise hold the person in order to allow ICE to pick them up. In NYC, Local Laws 58 and 59 of 2014 prevent the DOC and NYPD from honoring detainer requests unless the individual meets certain criteria, including having been convicted of certain enumerated offenses labeled “violent or serious”.⁵¹ In recent

⁴⁷ NYPD, RE: ADMINISTRATIVE WARRANTS ISSUED BY OR FOR IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 11, 2014), <https://www.immigrantdefenseproject.org/wp-content/uploads/2016/02/Finest-Message-Imm-Warrants.pdf>.

⁴⁸ *Id.*

⁴⁹ NYCPL § 160.10(2).

⁵⁰ *Statement on Secure Communities*, ACLU (June 23, 2010), <https://www.aclu.org/other/aclu-statement-secure-communities>.

⁵¹ Int. No. 468, L.L. 2014/058, codified at N.Y.C. Admin. Code § 9-131; Int. No. 487, L.L. 2014/059, codified at N.Y.C. Admin. Code § 14-154; see also CARDOZO LAW/IMMIGRANT DEFENSE PROJECT, NEW YORK CITY NEW DETAINER DISCRETION LAW CHART AND PRACTICE ADVISORY (2015), <https://www.immigrantdefenseproject.org/wp-content/uploads/2013/09/Practice-Advisory-2014-Detainer-Discretion-Law-PEP.pdf>.

years, the NYPD has not honored any detainer requests and only communicated with ICE regarding the timing of release a handful of times.⁵²

This data sharing is especially dangerous in the wake of an Executive Order called “Enhancing Public Safety in the Interior of the United States,” which greatly expands interior immigration enforcement, placing most noncitizens at increased risk of deportation. The Executive Order mandates that the DHS’s enforcement priorities include individuals who have “committed acts that constitute a chargeable criminal offense.”⁵³ This phrase is vague and extremely broad, but in practice it means that any undocumented person becomes a priority for deportation as soon as they are charged by local law enforcement, even if the charges are eventually dropped.⁵⁴ Moreover, under the current administration, ICE has stated that its officers will “take enforcement action against all removable aliens encountered in the course of their duties.” Therefore, a heightened risk for one individual can lead to consequences for others present during an ICE arrest (referred to as “collateral” arrests).⁵⁵

Fingerprints and Department of Criminal Justice Services:

Another risk related to fingerprinting is the sharing of information between the Department of Criminal Justice Services (“DCJS”) and ICE. DCJS is an agency of New York State that prepares a RAP sheet using the fingerprints taken by the NYPD. ICE occasionally notifies DCJS when an individual has been ordered deported. DCJS then adds a “deported alien” banner to an individual’s RAP sheet if the individual (1) has been ordered deported *and* (2) has been convicted of a New York offense for which they were fingerprinted when arrested.⁵⁶ In the past, DCJS sometimes contacted ICE as soon as it received prints from the NYPD and provided identifying information if an existing RAP sheet featured the “deported alien” banner.⁵⁷ In 2017, Governor Cuomo signed an executive order prohibiting state officers and employees from disclosing information to federal information authorities for the purpose of federal civil

⁵² *Civil Immigration Detainers*, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/civil_immigration_detainers/summary-civil-immigration-detainers-2017-2018.pdf.

⁵³ EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES. JAN. 25, 2017. <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

⁵⁴ Nat’l Lawyers Guild, *Defending Protesters in Criminal Court CLE* (Oct. 2, 2017).

⁵⁵ ICE, *Memorandum Regarding Implementing the President’s Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017), <https://assets.documentcloud.org/documents/3889695/doc00801320170630123624.pdf>.

⁵⁶ Immigrant Defense Project and New York Civil Liberties Union, *When Does Fingerprinting Put Your Client at Risk with ICE* (Jul. 27, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/DCJS-advisory-7-27-17-6-PM-updated1.pdf>.

⁵⁷ *Id.*

immigration enforcement, unless required by law.⁵⁸ The executive order, however, contains an exception for “illegal activity,”⁵⁹ and it is not clear how DCJS interprets the provision. Thus, individuals with prior deportation orders and prior convictions, for an offense for which they were fingerprinted, may still be at special risk of coming to ICE’s attention because of an arrest.

B. Immigration Consequences Related to Likelihood of ICE Presence

ICE Presence at an Action:

ICE’s list of “sensitive locations” in which enforcement actions are circumscribed includes “a site during the occurrence of a public demonstration, such as a march, rally or parade.”⁶⁰ While nothing prevents ICE from rescinding this policy or disregarding it, the existence of the policy indicates that, for the time being, it is unlikely for ICE to detain someone at a protest. There have been reported cases, however, of ICE detaining a participant immediately following a public rally.⁶¹ And of course, in some jurisdictions, arrest by local law enforcement at a protest is the equivalent of being detained by ICE as it results in transfer to ICE custody.⁶²

As mentioned above, on June 1, 2020, it was reported that ICE would begin deploying forces, not to make immigration arrests, but rather to assist other law enforcement in responding to the uprising caused by the killing of George Floyd.⁶³ Only time will tell what that means, but noncitizens may want to be particularly cautious until additional information comes to light.

ICE Presence at Criminal Court:

Since 2017, with the change in federal administrations, there has been a well-publicized and dramatic increase in the frequency of ICE agents being present and detaining individuals at and around criminal courts, causing understandable fear among many noncitizens with court

⁵⁸ Exec. Order. No. 170, State Policy Concerning Immigrant Access to State Services, Gov. Andrew Cuomo, Sept. 25, 2017, <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-prohibiting-state-agencies-inquiring-about-immigration>.

⁵⁹ *Id.*

⁶⁰ U.S. Immigration and Customs Enforcement, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011).

⁶¹ See, e.g., Oliver Laughland, *Dreamer detained by ICE agents while in the process of DACA status renewal*, The Guardian, Mar. 1, 2017, available at <https://www.theguardian.com/us-news/2017/mar/01/dreamer-detained-ice-agents-daca-immigration-status>.

⁶² *Meet the Activist Sent to ICE Despite Being Citizen After Blocking Arizona Highway to Trump Rally*, Democracy Now, Mar. 22, 2016, available at https://www.democracynow.org/2016/3/22/meet_the_activist_sent_to_ice.

⁶³ CBS News, *ICE deploying agents to help local authorities* (Jun. 1, 2020), <https://www.cbsnews.com/live-updates/george-floyd-death-protests-unrest-disorder-2020-06-02/#post-update-69fd9d5f>.

appearances.⁶⁴ ICE does not view courthouses as sensitive locations, like schools and places of worship, where it generally does not make immigration arrests.⁶⁵

However, in April 2019, the New York State Office of Court Administration (“OCA”) announced new rules prohibiting ICE from arresting individuals inside state courthouses without a judicial warrant or a judicial order.⁶⁶ Advocacy efforts to pass legislation preventing ICE courthouse arrests are ongoing, and emphasize the chilling effect they have on court appearances and the ways in which they undermine public safety.⁶⁷ Related litigation is also ongoing.⁶⁸

There is always a risk of ICE presence outside of criminal courts. Because of ICE’s access to criminal and court databases, ICE may find out when a noncitizen has a court appearance and attempt to detain them en route.⁶⁹ A summons, then, is preferable to a DAT because the return date for a court appearance is not fixed.

C. Immigration Consequences Flowing from Criminal Charges

The presence and degree of negative immigration consequences depends on the facts in a given case. To illustrate, noncitizens charged with low-level offenses may seek an **adjournment in contemplation of dismissal (“ACD”)**. An ACD, once closed, is likely to have very few immigration consequences, especially for those with some form of immigration status, as it does not result in a conviction. However, since ACDs remain open for a period of typically six months, individuals with upcoming adjustment or naturalization interviews may prefer to immediately plea to a violation, oftentimes to a Disorderly Conduct violation, so as to obtain a disposition and close the case in time for their immigration application to be adjudicated. In contrast, individuals with Deferred Action for Childhood Arrivals (“DACA”) may have different strategic considerations, because a Disorderly Conduct is likely to be considered a misdemeanor

⁶⁴ See generally, Immigrant Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York’s Courts in 2018* (Jan. 2019).

⁶⁵ See Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrests* (Jan. 31, 2018), <https://www.ice.gov/ero/enforcement/sensitive-loc>

⁶⁶ See State of New York Unified Court System Office of the Chief Administrative Judge, DIRECTIVE NO. 1-2019, PROTOCOL GOVERNING ACTIVITIES IN COURTHOUSES BY LAW ENFORCEMENT AGENCIES (Apr. 17, 2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf>

⁶⁷ See e.g., Letter from Hon. Wallace B. Jefferson (ret.) et al., to Ronald D. Vitiello, Acting Director, U.S. Immigration and Customs Enforcement (Dec. 12, 2018), <https://www.scribd.com/document/395488473/Letter-From-Former-Judges-Courthouse-Immigration-Arrests>; see also Immigrant Defense Project, *The New York Protect Our Courts Act: Model Legislation to Regulate ICE Arrests at State Courts* (2018), <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Model-Guide.pdf>

⁶⁸ The Legal Aid Society, *LAS, Attorney General and District Attorney Sue to Halt ICE Arrests in Courthouses* (Sept. 25, 2019), <https://www.legalaidnyc.org/news/attorney-general-district-attorney-legal-aid-halt-ice-arrests-courthouses/>.

⁶⁹ National Immigration Law Center, *Untangling the Immigration Enforcement Web* (Sept. 2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf>.

for purposes of DACA and so may not be a safe plea, depending on the person’s priors.⁷⁰ For more information on Disorderly Conduct violations, *see* Part II.A, *supra*. In some instances, a criminal court may grant immediate dismissal and sealing of an ACD upon request, as opposed to waiting the typical six months. This section is designed to identify the types of consequences to consider when advising a noncitizen regarding the risk of being criminally charged or how to respond to existing charges. It is the advocate’s job to advise regarding these nuances.

Bars from Relief:

Some charges resulting from actions can be considered **aggravated felonies** or **crimes involving moral turpitude (CIMTs)**, which may prevent individuals from being granted certain types of relief. In this regard, the riskiest offense among those included here is **Assault on a Police Officer (NYPL § 120.08)**, which may be argued to be a crime of violence aggravated felony if the sentence imposed is at least one year,⁷¹ or a CIMT.⁷² Furthermore, this charge will be viewed negatively in discretionary determinations. The Immigrant Defense Project (“IDP”) has collected information on how defense attorneys can argue against bars from relief for convictions under these statutes. *See* [Appendix C](#). Note that, for discretionary purposes and because of significant variability among immigration judges, noncitizens should always consult with an immigration attorney before taking a plea. The information here is not intended to suggest that all other pleas are “safe.”

Discretion:

Many forms of immigration relief are granted based on discretion. For discretionary forms of relief, a judge or immigration official may take into account any contact with the criminal legal system that the applicant may have had.⁷³ However, this may cut both ways, since participation in social justice activities may show that the protester has deep ties to their community and is invested in positive change.⁷⁴

Mandatory Detention or Deportation:

The same convictions that may result in a bar to relief may also result in **mandatory detention and/or deportation**. Federal law states that, under certain circumstances, noncitizens “shall” be detained and/or deported – meaning that if detained, they will be ineligible for a bond hearing,

⁷⁰ *See, e.g., People v. Tendilla*, 50 Misc.3d 869 (N.Y. Crim. Ct. 2015).

⁷¹ *See* INA § 101(a)(43)(F), providing that a crime of violence for which the term of imprisonment is at least one year constitutes an aggravated felony; IMMIGRANT DEFENSE PROJECT, UPDATED NEW YORK QUICK REFERENCE CHART, <https://www.immigrantdefenseproject.org/product/new-york-quick-reference-chart-2020-edition/>.

⁷² *See* IMMIGRANT DEFENSE PROJECT, UPDATED NEW YORK QUICK REFERENCE CHART, <https://www.immigrantdefenseproject.org/product/new-york-quick-reference-chart-2020-edition/>.

⁷³ Nat’l Lawyers Guild, *Defending Protesters in Criminal Court CLE* (Oct. 2, 2017).

⁷⁴ Make the Road New York, Member/Organizer Interview (Oct. 13, 2017).

and if put into removal proceedings, they will be ineligible for most forms of relief.⁷⁵ These circumstances usually involve convictions for certain offenses.⁷⁶ Despite the use of the term mandatory, there is significant variability in the interpretation of the mandatory detention statute, and some of the requirements are subject to ongoing litigation.⁷⁷ For these reasons, the best practice is to consult an immigration attorney if you are negotiating a plea.

Delays in Relief:

While some contact with the criminal legal system may not bar an individual from immigration relief, contact with the criminal legal system may cause delays in the granting of an application. For example, an LPR who applies for naturalization may have to wait longer for citizenship than if they had never had contact with the criminal legal system. An unresolved case will cause delays as immigration officials will not issue decisions until receiving proof of the case's final disposition. A criminal history may trigger a higher-level review of an application, which may cause delays (although there should generally not be any issues for a conviction for disorderly conduct stemming from civil disobedience).⁷⁸

⁷⁵ See INA § 236(c).

⁷⁶ See IMMIGRANT DEFENSE PROJECT, DETENTION LITIGATION (2017), <https://www.immigrantdefenseproject.org/detention-litigation/>.

⁷⁷ *Id.*

⁷⁸ Nat'l Lawyers Guild, *Defending Protesters in Criminal Court CLE* (Oct. 2, 2017).

PART IV. ON-THE-GROUND RISKS AND STRATEGIES DURING AN ACTION

While Part I covers the immediate consequences of an action in which police make arrests, it is important to note that each type of action entails its own specific risks, which in turn require different strategies. This part describes various concerns and risks associated with low-risk, medium-risk, and high-risk actions and provides brief strategies to address them. These strategies build off one another as the level of risk increases. The strategies for low-risk actions should be the baseline for all actions.

A. Low-Risk Actions

LOW-RISK ACTIONS	
Examples: Press conference or small, permitted marches or rallies with no planned civil disobedience. These are often smaller events with elected officials present.	
Concern: Police/immigration contact	Strategy: Organizers should alert participants about the level of risk at an action. Organizers can help create a buffer between people who would face the most serious consequences from police contact and any potential risk source, like the police or rowdy participants. Following permit rules like staying on the sidewalk, staying away from conflict, counter-protesters and agitators, and avoiding addressing or engaging with the police directly can help to avoid police contact. Respect police barricades and obey traffic signals. Also, participants should trust their instincts! If things seem to be getting tense, they should try to walk to a different place. If the police start making announcements that they are going to arrest people, people who do not want police contact should try to safely move far away from where the potential arrests will happen (i.e. away from the police, barricades, and very thick crowds). However, while there are often announcements when CD is involved, the police rarely make announcements about arrests when it is not. Announcements happen more often at spontaneous actions than permitted ones. ⁷⁹ Police negotiators from the organizing group can also explain at the beginning of the action that participants want to peacefully protest, and that they are separate from agitators. ⁸⁰

⁷⁹ Make the Road New York, Member/Organizer Interview (Oct. 13, 2017).

⁸⁰ *Id.*

<p>Concern: Being photographed or interviewed by the press</p>	<p>Strategy: If someone is uncomfortable being interviewed by the press, they can politely decline to answer questions or give their name. Organizers can practice different ways to interact with the press, including how to decline an interview. If someone is photographed without their permission, they can ask an organizer to request that the photographer not post the picture publicly. However, the photographer is free to take pictures of people in public.</p> <p>The press can photograph anyone in public, but there is a collective responsibility among participants to ensure that the press do not post photographs online that could negatively impact someone.</p> <p>Police can look at social media posts of the action and use video against someone in court, especially of conduct leading up to an arrest. If someone is filming an arrest, organizers can ask them not to post the footage on social media and also ask for their contact information in case the footage could be used to help the participant. However, depending on the number of smart phones that are recording, this tactic may not be successful.</p> <p>Organizers and participants should exercise caution in advising a noncitizen to go before the press – this does not mean that folks should be silenced, it just means that preparation is helpful. If someone wants to speak to the press and/or share their story, there are certain precautions they can take. This is especially important to consider if someone has an open immigration case. For example, if someone is applying for asylum, the government attorney or the immigration judge may conduct an internet search and raise credibility issues if details in the press account do not match what is in the asylum application. Thus, one strategy is to keep the story more general when talking to the press, rather than talking about very specific facts.</p>
<p>Concern: Because DHS and the Trump administration have been tracking immigrants through social media, information can be shared via social media that could put noncitizens at risk.</p>	<p>Strategy: In September 2017, DHS proposed expanding its records on noncitizens, as well as on naturalized U.S. citizens, to include “social media handles and aliases” and “publicly available information obtained from the internet.”⁸¹ This surveillance has the potential to discourage immigrants’ free speech and assembly rights, since “their beliefs and opinions,” “social networks,” and “movements” may be permanently stored and “used...against them [in] decisions about their immigration status...”⁸² ICE has publicly stated that it is investigating social media.⁸³</p>

⁸¹ Notice of Modified Privacy Act System of Records, 82 Fed. Register 43556 (proposed Sept. 18, 2017), <https://www.federalregister.gov/documents/2017/09/18/2017-19365/privacy-act-of-1974-system-of-records>.

⁸² ELECTRONIC FRONTIERS FOUNDATION, *DHS Should Stop the Social Media Surveillance of Immigrants* (Oct. 3, 2017), <https://www.eff.org/deeplinks/2017/10/dhs-should-stop-social-media-surveillance-immigrants>.

⁸³ See e.g., Thomas Fox-Brewster, *Trump’s Immigration Cops Just Spent \$3 Million on These Ex-DARPA Social Media Data Miners*, FORBES (Sept. 27, 2017), <https://www.forbes.com/sites/thomasbrewster/2017/09/27/trump-immigration-social-media-surveillance-giant-oak-penlink-palantir/#6d9bcfd93e3b>.

Given the risk that posts and messages may be used in targeted enforcement, organizers and participants should **be extremely cautious with their online communication**. Secure communications, like Signal, or in-person contact are always the best option to avoid government surveillance.

Concern:
Separation from the group

Strategy:
Organizers and de-escalators could **create a buddy system** for people facing harsher consequences from police contact. For actions that require coordinated travel, there should be a plan for where everyone is going to meet up at the end of the action. Also, participants should write legal support numbers on their arms, and could also include the information of a designated organizer or de-escalators in case they get separated. In addition, having a tall sign to signal to members where to gather is also helpful in a large crowd.

MEDIUM-RISK ACTIONS

Examples: Large marches or rallies (with permits), unpermitted actions, permitted events that include CD (where most people at the events are not participating in CD).

Concern:
Police/immigration contact

Strategy:
Strategies should be the same for low-risk activities. However, organizers should have a more developed plan about how to create a buffer between a risk-source and people who do not want to have any police contact. Also, stay away from rowdy participants and do not engage with counter-protesters. While every march or rally is different, often the safest zone of the march is just in front of the middle of the march. The back of a march can be rowdy, and officers can easily grab participants on the edges or front of the march. However, it's also important not to be too far in the middle of a march, so that escape is possible if things get out of control. In Figure 1, the O's are good places to be in a large march.

Figure 1.

```

  x x x x x x
  x O x x O x
  x O x x O x
  x x x x x x
  x x x x x x
  x x x x x x
  
```

Front

Back

HIGH-RISK ACTIONS

Examples: Very large marches or rallies (with permits); spontaneous actions; actions on bridges, highways, politically salient locations (Trump Tower, 26 Federal Plaza, etc.)⁸⁴; taking the streets without permits; unpermitted actions; permitted events that include CD; police brutality protests.

<p>Concern: Large actions and actions on sites like bridges can make it easier for police to “kettle” participants</p>	<p>Risk: “Kettling” is a police practice in which participants are corralled “into an area cordoned off by police,” thus making it easier to arrest large groups and preventing participants from leaving the scene.⁸⁵</p> <p>Strategy: Anytime a participant sees equipment associated with kettling—especially nets⁸⁶—they should immediately try to leave the scene if they do not want to get arrested.</p>
<p>Concern: Participation in CD</p>	<p>Background: Anyone participating in CD should expect to be arrested and run through the system. While there are strategies to attempt to avoid the most extreme charges, any contact with a police officer could bring charges, sometimes serious. The hypothetical chart, Part II.C, <i>supra</i>, is instructive. Any time CD or direct action involves physical contact with police, involves property destruction, and/or makes police angry, the charges may be more serious. Participants going limp and forcing police to physically move them are at risk of reflexively touching a police officer, who may then claim that they were injured by the participant. This is even more likely if participants lock arms and police try to pull them apart, or if participants link arms through PVC pipe or chains, which police must cut apart.</p> <p>Strategy: If a participant comes into physical contact with a police officer—if, for example, they are being dragged or moved—they should try not to initiate any contact themselves. Even if movement that touches a police officer is involuntary (e.g. an officer letting go of a pinned arm, causing it to move and touch the officer), the officer may claim that there was an assault.</p> <p>Insulting or yelling at police officers can also result in more serious charges or complaints. Police will be less likely to “punish” participants who they perceive as polite.</p>

⁸⁴ Police may be more aggressive in certain sensitive areas that have heightened national security protection, like Trump Tower, or political salience, like Wall Street. In wealthier neighborhoods and areas where there is greater economic activity, such as Midtown, there is a tendency for more aggressive policing. The subject of the action, such as police brutality, may also inspire police aggression and increase the likelihood of arrests.

⁸⁵ Tasneem Raja, *Glossary: Decoding the Police Jargon Overheard at Occupy*, MOTHER JONES (Nov. 23, 2011), <http://www.motherjones.com/politics/2011/11/glossary-police-jargon-occupy-wall-street/>.

PART V. SPECIAL CONSIDERATIONS FOR ACTIONS ON FEDERAL PROPERTY/LAND

Attorneys and organizers report that it is rare for individuals to be charged with federal crimes as a consequence of protesting on federal property. Still, such charges remain possible.⁸⁷

Examples of federal property in or around New York City include: 26 Federal Plaza and 201 Varick Street, federal courthouses, interstate bridges like the George Washington Bridge, the Statue of Liberty, and beaches like Jacob Riis and Fort Tilden. Federal charges for protests in these areas are more likely to occur when protests occur *inside* the buildings, rather than outside, as well as around the Statue of Liberty.

Federal and local law enforcement officials have joint jurisdiction over federal property that lies within state property. For example, if a crime occurs in a building like a federal courthouse or 26 Federal Plaza, NYPD or federal law enforcement officials may make an arrest, and the person can be prosecuted under federal or state law.

Additionally, an individual can be charged with a federal crime, even if the alleged conduct is not actually in the books as a *federal* offense. Under 18 U.S.C. § 13, federal prosecutors can “federalize” state statutes, thus converting state law into a federal offense. For example, let’s say participants involved in a protest on federal property located in Manhattan were wearing masks and were arrested by federal police.⁸⁸ While it is a state crime for three or more persons to wear masks if they are not going to a masquerade,⁸⁹ there is no equivalent federal crime. (Note that NYPD has interpreted masks to include bandanas.)⁹⁰ However, prosecutors can bring federal charges based on the state law.⁹¹ This process is known as reverse incorporation.

⁸⁷ Information largely based on interviews with criminal and federal defense attorneys.

⁸⁸ N.Y.P.L. § 240.35(4). Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities.

⁸⁹ On May 27, 2020, the New York State legislature passed S8415/A10446A, which would repeal NYPL § 240.35(4), a subsection of the loitering statute that criminalizes, “being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place...” Lawmakers noted that NYPL § 240.35(4) conflicted with Governor Cuomo’s executive order mandating that New Yorkers wear face masks in public to limit the spread of COVID-19. The bill is currently awaiting Governor Cuomo’s signature. Since the late 1960s, Section 240.35(4), has been enforced to police, “the working class and activists: theater troupes staging public anti-war performances, bandanna-wearing anarchists in Union Square on May Day, protesters donning Guy Fawkes masks during Occupy Wall Street.” See Melissa Gira Grant, “A Brief Criminal History of the Mask,” THE NEW REPUBLIC (Apr. 21, 2020), <https://newrepublic.com/article/157370/brief-criminal-history-mask>.

⁹⁰ Colin Moynihan, *Law Banning Masks at Protests Is to Be Challenged*, NEW YORK TIMES (Oct. 21, 2012), <https://www.nytimes.com/2012/10/22/nyregion/rule-forbidding-masks-at-protests-is-to-be-challenged.html>.

⁹¹ 18 U.S. Code § 13, Laws of States adopted for areas within Federal jurisdiction.

There are both pros and cons of federal charges compared to state charges. On the one hand, federal charges can be viewed as more serious than state charges. Immigration judges or prospective schools or employers may view federal charges more negatively than they would equivalent state charges, even if the charge involves the exact same conduct. Additionally, for immigration purposes, a federal conviction could trigger removal proceedings, even if the identical activity would not trigger removal proceedings if it were a state crime.⁹²

Moreover, judges applying the federal sentencing guidelines can consider aggravating factors at the time of the arrest, which can make the consequences of an arrest particularly serious. For example, possession of a weapon during a federal arrest can result in much harsher punishment. Avoid carrying anything that could remotely be considered a weapon, even tools for work like a screwdriver or a box-cutter (see explanation of a gravity knife, *supra* Part I, n.22). Furthermore, having previous convictions can also compound sentencing, so avoid actions on federal property if you have prior convictions, especially if they can be construed as violent (including resisting arrest or assault). Finally, magistrate courts, where low-level federal charges are adjudicated, can be unpredictable. The judge decides the level of due process for people who are charged with offenses that will not result in imprisonment. That means that a judge can decide that a participant does not get a jury trial or appointed counsel.⁹³

However, because federal law enforcement officials and federal prosecutors are accustomed to targeting large-scale criminal activity like organized crime or international drug trafficking, they often do not want to prosecute people for minor offenses. During an arrest, federal law enforcement officials not used to protest-related arrests may make mistakes in the process which may be challenged later in court. Additionally, the federal prosecutors do not hold permanent positions at the magistrate courts that adjudicate violations or misdemeanors like disorderly conduct, trespassing, or resisting arrest. Therefore, they often want to just get people out of court as quickly as possible so they can get back to their regular jobs. Therefore, compared to an assistant district attorney, they are often more willing to negotiate a less serious conviction or drop the charges altogether. Finally, for arrests in New York, charges for violations of federal statutes may actually be preferable to state violation charges, because, as discussed at Part II.A *supra*, the punishment for a violation in New York actually fits the definition of a federal misdemeanor (defined as an offense punishable by more than five days of imprisonment) whereas infraction charges do not, because they are punishable by five days or less of imprisonment.⁹⁴

⁹² For example, a conviction for the distribution of 25 grams of marijuana with no remuneration is arguably not an aggravated felony if brought under state law, but would automatically be an aggravated felony if the conviction is a federal felony.

⁹³ Rule 58(a)(2) of the Federal Rules of Criminal Procedure.

⁹⁴ 18 U.S.C. § 3559.

PART VI. CONCLUSION

While in the immediate term, the safest route to avoid contact with the criminal legal system may be to stay away from an action, as this memo demonstrates, there are strategies and best practices for those who wish to exercise their power in pursuit of movement goals. This memo can assist noncitizens in minimizing police contact and mitigating both criminal and immigration consequences that follow, which may inform their decision about whether and how to participate.

APPENDIX A. SUMMONS AND DESK APPEARANCE TICKET

CRC-3206 (5/12)

Complaint/Information

The People of the State of New York vs.

Name (Last, First, MI)									
Street Address								Apt. No.	
City				State		Zip Code			
ID License Number				State	Type/Class	Expires (mm/dd/yy)		Sex	
Date of Birth (mm/dd/yy)		Ht	Wt	Eyes	Hair	Plate/Reg			
Reg State	Expires (mm/dd/yy)	Plate Type	Veh Type	Make	Year	Color			
NY	07/31/15	COMTRK	FORD						

The Person Described Above is Charged as Follows:

Time 24 Hour (hh:mm)		Date of Offense (mm/dd/yy)		County		
0845		7/30/13		ALY		
Place of Occurrence				NY Pink Copy	Precinct	
CANAL 6					001	
In Violation of Section	Subsection	VTL	Admin. Code	Penal Law	Park Rules	Other
10.127		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

Title of Offense: MISMATCH REG (COMP NAME)

441

Bronx Criminal Court - 215 E 161st Street, Bronx, NY 10451

Kings Criminal Court - 346 Broadway, New York, NY 10013

Redhook Community Justice Center - 88-94 Visitation Place, Brooklyn, NY 11231

New York Criminal Court - 346 Broadway, New York, NY 10013

Midtown Community Court - 314 W 54th Street, New York, NY 10019

Queens Criminal Court - 120-55 Queens Boulevard, Kew Gardens, NY 11415

Richmond Criminal Court - 67 Targee Street, Staten Island, NY 10304

Defendant stated in my presence (in substance):

I personally observed the commission of the offense charged herein. False statements made herein are punishable as a Class A Misdemeanor pursuant to section 210.45 of the Penal Law. Affirmed under penalty of law.

Complainant's Full Name Printed		Rank, Full Signature of Complainant		Date Affirmed (mm/dd/yy)	
				07/30/13	
Agency	Tax Registry #		Command Code		
NYPD			0901		
The person described above is summoned to appear at NYC Criminal Court located at:				Summons Part	County
346 Broadway				SAP	NY
Date of Appearance (mm/dd/yy)				At 9:30 a.m.	

Figure 1 - Pink Summons Ticket



POLICE DEPARTMENT OF THE CITY OF NEW YORK
Desk Appearance Ticket

Precinct of Arrest: _____ DAT Serial No.: _____ OLBS Arrest-ID: _____

The People of the State of New York VS.

Defendant Name: _____ Age: _____ Date of Birth: _____
Defendant Address: _____

You are hereby summoned to appear in the Criminal Court of the City of New York, to answer a criminal charge made against you.

Top Offense Charged: _____
County: New York Arraign/Part: DAT Time: 09:30 AM Date: _____
At LOG: 100 Centre Street, New York, NY 10003 Room: _____

Instructions for Defendant

You must appear at the time and date indicated above, and present this form to the court clerk.

Should you fail to appear for the offense charged above, in addition to a warrant being issued for your arrest, you may be charged with additional violations of the penal law which upon conviction may subject you to a fine, imprisonment or both. Additionally, if you fail to comply with the directions of this Desk Appearance Ticket, any bail paid will be subject to forfeiture.

Additional Instructions: _____

Acknowledgement of Defendant:

I, the undersigned, do hereby acknowledge receipt of the above Desk Appearance Ticket, personally served upon me, and do agree to appear as indicated.

Defendant Signature: _____ Time: _____ Date: _____

Witness Signature: _____ Time: _____ Date: _____

FingerPrinted?:

Arresting Officer: _____ Shield: _____ Rank: POM Tax Reg: _____

Squad: _____ Command: NY Agency: NYPD

Address of Agency if not NYPD: _____

Was cash bail accepted?: _____ Amount: \$ _____

Signature of Issuing Officer: _____ Date: _____ Signature of Desk Officer: _____

Figure 2 - Desk Appearance Ticket

APPENDIX B. – WAYS TO PREPARE FOR AN ACTION

Assume that everything you have at a protest will end up in the hands of the police. Also assume that you will be held overnight if arrested.

What not to carry:

- Drugs
- Weapons
- Tools for work
- Another person's identification or false identification
- Foreign identity documents

What to carry:

- Urgent medications, in the original prescription bottle including your name
- Cash
- Emergency numbers
- Phone charger
- State or municipal ID (or another form of photo ID—other than a foreign ID—like a student ID or bankcard)

Things to do:

- Screen lock your phone (use a passcode not a fingerprint)
- **Clear all criminal warrants** (in state and out-of-state) and unpaid summonses, and complete any outstanding court-ordered community service obligations
 - If you have open criminal warrants, **you cannot** be issued a DAT, and **will** be held for arraignment. Most importantly, if you have an out-of-state warrant, which is called a “fugitive warrant,” and that warrant is flagged to the criminal court after you’ve been newly arrested, the court will not release you *at all* and *will not set bail*. You will likely be held in jail until the other state comes to get you—a process that can take months. *A local attorney in New York cannot fight a fugitive warrant because they do not have jurisdiction to fight them.*

APPENDIX C. – OFFENSE CHART WITH IMMIGRATION CONSEQUENCES AND ASSOCIATED CONDUCT

This chart provides a list of offenses that are known to be charged in connection with an action, along with the actual conduct typically associated with the charge, where available. The offenses and associated conduct were garnered from conversations with activists and experienced movement lawyers. Aggravated Felony (“AF”) and Crime Involving Moral Turpitude (“CIMT”) designations were taken from the Immigrant Defense Project’s Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses (January 1, 2020), unless otherwise indicated.

COMMON NEW YORK PENAL LAW OFFENSES CHARGED IN RESPONSE TO ACTIONS

Offense	NYPL Section	Classification	AF?	CIMT?	Conduct
Assault, 3rd Degree	120.00	Class A Misdemeanor	No. ⁹⁵	Subsection (1) is CIMT; (2) and (3) are probably NOT CIMTs	<ul style="list-style-type: none"> - Dropping a banner on a person during a banner drop - An accusation of physical contact that caused pain/injury with no proof necessary (e.g. counter-protester accusing a protester of hitting them) (very common) - A protester brushing/knocking into someone else with a sign

⁹⁵ The One Day to Protect New Yorkers Act, part of the Public Protection and Good Government Bill, amends New York State penal law to reduce the maximum sentence for an A misdemeanor to 364 days, *see* NYPL § 70.15(1) and (3), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2, thereby avoiding any of the disproportionately harsh immigration consequences resulting from a 365-day sentence. As a result, certain offenses that may have previously been charged as an aggravated felony pursuant to INA § 101(a)(43) because of the potential sentence imposed may no longer carry the same immigration consequences. This legislation is designed to apply retroactively. *See* NYPL § 70.15(1-a)(b), as added by the Budget Bill, Part OO, § 2. However, if an individual has a conviction that occurred before April 12, 2019, when the bill went into effect, and they received the maximum sentence of one year rather than 364 days, there is a risk that immigration authorities will not honor the law’s retroactivity and argue that the conviction is a “crime of violence” aggravated felony. Moreover, despite this substantial improvement, it remains important to speak with an immigration attorney prior to entering a plea of guilty to any offense, as not all aggravated felony categories are predicated on sentence alone and an offense may carry other immigration consequences.

Assault, 2nd Degree; (subsections involving physical injury to a police officer or public servant)	120.05(3)	Class D Felony	If term of imprisonment is one year or more, might be "COV" AF.	Subsection (3) MIGHT BE a CIMT.	<ul style="list-style-type: none"> - Brushing up against an officer - Dropping a sign on an officer - Dropping a banner on an officer during a banner drop - Being manhandled <i>by</i> the officer - Spitting on an officer - Often coupled with resisting arrest
Assault on a police officer (<i>serious</i> physical injury to a police officer)	120.08	Class C Felony	If term of imprisonment imposed is one year or more, might be "COV" AF.	Maybe.	Conduct listed under 120.05(3) could be overcharged under 120.08 (but that would be massive prosecutorial overreach)
Reckless Endangerment, 2nd Degree	120.20	Class A Misdemeanor	No. ⁹⁶	Probably. See <i>Gayle v. Sessions</i> , 719 Fed. Appx. 68 (2d Cir. 2018).	<ul style="list-style-type: none"> - Recording police after being told to back away - Often coupled with misdemeanor assault or resisting arrest
Trespass	140.05	Violation	No.	No.	<ul style="list-style-type: none"> - Usually charged for indoor as opposed to outdoor actions - Occupations or protests in public buildings, offices, or public transport after refusing a police order to leave - Can be charged for banner drops - Can include trespassing on non-public city property (e.g., NYC Housing Authority, "NYCHA")

⁹⁶ See Description of the One Day to Protect New Yorkers Act, *supra* n. 95.

Criminal Trespass, 3rd Degree	140.10	Class B Misdemeanor	No.	No.	Occupations or protests in buildings, areas, or offices that are closed to the public after refusing a police order to leave
Criminal Mischief, 4th Degree	145.00	Class A Misdemeanor	No.	Subsection (1), (2) and (4) might be CIMTs. Subsection (3) probably is NOT CIMT.	<ul style="list-style-type: none"> - Property damage during a protest - Spray painting property - Breaking windows
Criminal Mischief, 3rd Degree	145.05	Class E Felony	If term of imprisonment is one year or more, might be a COV AF.	Probably.	Major property damage of high value during a protest
Criminal Mischief, 2nd Degree	145.10	Class D Felony	If term of imprisonment is one year or more, might be a COV AF.	Probably.	
Criminal Mischief, 1st Degree	145.12	Class B Felony	If term of imprisonment is one year or more, might be a COV AF.	Probably.	Climbing on buildings
Making Graffiti	145.60	Class A Misdemeanor	Probably NOT.	Probably NOT.	
Possession of a Graffiti Instrument	145.65	Class B Misdemeanor	No.	Probably NOT.	
Obstructing Governmental Administration, 2nd Degree	195.05	Class A Misdemeanor	No. ⁹⁷	Maybe	<ul style="list-style-type: none"> - Chaining together - Linking arms - Going limp - Filming the police

⁹⁷ See Description of the One Day to Protect New Yorkers Act, *supra* n. 95.

					<ul style="list-style-type: none"> - Being close to an arrest and refusing to leave - Standing in front of police officers
Resisting Arrest	205.30	Class A Misdemeanor	No.	Probably NOT.	<ul style="list-style-type: none"> - Flailing arms around police/during arrest - Linking arms during arrest - Chaining oneself to something - Stiffening arms or making it difficult for police to put hand-cuffs on <p>Failing to follow orders to put hands behind back during an arrest</p>
Riot in the Second Degree ⁹⁸	240.05	Class A Misdemeanor	No.	Maybe.	Often used to justify “kettling” and other riot-related measures
Riot in the First Degree ⁹⁹	240.06	E Felony	If term of imprisonment is one year or more, might be “COV” AF.	Maybe.	Often used to justify “kettling” and other riot-related measures
Inciting to Riot ¹⁰⁰	240.08	Class A Misdemeanor	No.	Maybe.	<ul style="list-style-type: none"> - Protest leader in crowd yelling “go!” and pushing against police barricade - Used against protest leaders & organizers who lead a crowd to disobey police orders or move the crowd in a direction against the will of the police
Unlawful Assembly	240.10 ¹⁰¹	Class B Misdemeanor	No.	Maybe.	

⁹⁸ Analysis conducted by the NYU School of Law Immigrant Rights Clinic; ; research on file with author, if needed.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Analysis conducted by the NYU School of Law Immigrant Rights Clinic; research on file with author, if needed.

Disorderly Conduct	240.20	Violation	No.	No.	<ul style="list-style-type: none"> - Obstructing pedestrian traffic - Obstructing vehicular traffic in the roadway - Failure to disperse (if police officers say to get on the sidewalk, etc.) - Making “unreason-able” noise - Directing offensive language at police officers
Harassment, 2nd Degree	240.26	Violation	No.	Probably NOT.	<ul style="list-style-type: none"> - Directing offensive language toward a police officer or counter-protesters - Following someone around yelling slogans as they are trying to get away
Loitering	240.35	Violation	No.	Probably NOT.	
Being masked or disguised ¹⁰²	240.35(4)	Violation	No.	Probably NOT.	<ul style="list-style-type: none"> - Wearing a mask with other people - Wearing a bandana with other people

¹⁰² See Description of legislative efforts to repeal NYPL § 240.35(4), *supra* n. 89.

**COMMON NYC ADMINISTRATIVE CODE OFFENSES CHARGED
IN RESPONSE TO ACTIONS¹⁰³**

Offense	Number	AF?	CIMT?	Conduct
(Unpermitted) Sound Devices or Apparatus	10-108	Unlikely for all.	Unlikely for all.	- Using a blow-horn - Playing loud music without a permit
Posting	10-119			Posting or affixing posters, stickers, printed material anywhere on city property or the adjacent grass
Protecting City Advertisements	10-120			Tearing down ads or signs on city property
Consumption of Alcohol on Streets	10-125			
Littering	16-118			
Leaving Moveable Property on the Street	16-122			

¹⁰³ Analysis conducted by the NYU School of Law Immigrant Rights Clinic; research on file with author, if needed.

**COMMON VEHICLE AND TRAFFIC LAW OFFENSES CHARGED
IN RESPONSE TO ACTIONS¹⁰⁴**

Offense	Number	Classification	AF?	CIMT?	Conduct
Pedestrians on Roadways	Article 27 § 1156	Violation	Unlikely for all.	Unlikely for all.	Standing in the roadway
Traffic-control Signal Indications	Article 24 § 1111	Violation			Crossing the street against the light

¹⁰⁴ Analysis conducted by the NYU School of Law Immigrant Rights Clinic; research on file with author, if needed.