



**Testimony for the Senate Judicial Proceedings Committee
February 26, 2020**

**SB 903 – Immigration Enforcement – Public Schools, Hospitals, and
Courthouses – Policies**

FAVORABLE WITH AMENDMENT

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The ACLU of Maryland supports with amendment SB 903, which would require the Attorney General to develop guidelines that would assist public schools, hospitals, and courthouses in drafting policies to limit civil immigration enforcement on their premises, and allow these locations to issue their own policies based on the guidelines.

All Marylanders, regardless of immigration status, must have safe access to these sensitive locations, and we therefore urge an amendment to *require* these locations to issue policies based on the Attorney General's guidance.

This testimony focuses on the constitutional arguments against immigration enforcement in courthouses.

It is important to distinguish arrests made by police officers from arrests by immigration agents. A police officer arrests someone because there is probable cause that the person has committed a crime. A federal immigration agent arrests someone because they suspect the person has violated civil immigration law. Immigration arrests for the purpose of starting deportation proceedings are therefore civil arrests.¹

Civil immigration arrests violate common law tradition.

There is a longstanding common law tradition against civil arrests at courthouses, dating back to 18th Century England, which was extended not just to parties and witnesses in a case, but to all people "necessarily attending" the courts on business, including coming to and returning from the courthouse.² The Supreme Court has explicitly held up the tradition as well.³ Civil arrests in courthouses, therefore, violate the common law tradition, and in fact the practice of civil arrests entirely had ended until resurrected by ICE.

¹ See also ICE Directive 11072.1: Civil Immigration Enforcement Inside Courthouses; *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action.")

² William Blackstone, *Commentaries on the Laws of England* 289 (1769)

³ See *Lamb v. Schmitt*, 283 U.S. 222, 225 (1932) ("witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another.")



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Civil immigration arrests are not made pursuant to the Fourth Amendment.

For a criminal arrest to adhere to the Fourth Amendment, there must be probable cause. ICE arrests, on the other hand, do not follow this constitutionally mandated procedure. Instead, ICE arrests are typically pursuant to an “administrative warrant,” which is issued by ICE officers without judicial review. They do not satisfy Fourth Amendment requirements because there is no neutral finding of probable cause for arrest.

Civil immigration arrests violate due process and equal protection under the Fifth Amendment.

The Supreme Court has upheld the right to access court as a constitutional right rooted in the Fifth Amendment.⁴ The Court further held clearly that the common law tradition against civil courthouse arrests, cited earlier here, protects the administration of justice by ensuring that individuals are not afraid of attending court and show up when needed for court proceedings.⁵ The threat of civil arrests, therefore, interferes with the right to access court, because without necessary parties in attendance, administration of justice is impossible. It is necessary to issue a reminder that the right to access court applies to noncitizens as well.⁶

Civil immigration arrests violate the principle of the Tenth Amendment.

Independent state government, including courts, embodies the principle of federalism under the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the States respectively, or to the people.”). Individuals can freely challenge federal laws that may contravene principles of federalism, even when a state interest is implicated.⁷ State governments also cannot consent to federal infringement of their authority, even when they argue it is in their best interests.⁸ Therefore, individuals may argue that civil courthouse arrests and subsequent deportation proceedings represent a fundamental deprivation of

⁴ See e.g. *United States v. Kras*, 409 U.S. 434, 440 (1973).

⁵ *Lamb v. Schmitt*, 283 U.S. 222, 225 (1932) (“As commonly stated and applied, [the privilege] proceeds upon the ground that the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation.”)

⁶ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁷ *Bond v. United States*, 564 U.S. 211, 220-22 (2011) (“[F]ederalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.”)

⁸ *New York v. United States*, 505 U.S. 144 (1992).



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individual rights under the Tenth Amendment, regardless of whether state actors are implicated.

State courts must particularly be protected by federal encroachment. Courthouses should rightfully be considered sacrosanct to maintain equal justice under the law, and ensure that justice is administered fairly and efficiently. Civil immigration arrests at courthouses violate both the Constitution and longstanding common law tradition. These facilities must remain safe and accessible to all Marylanders, regardless of immigration status, to ensure they receive the full rights and protections the law affords them, and that our justice system does not further split into separate tiers, for the powerful and powerless in our state.

For the foregoing reasons, we urge a favorable report on SB 903.