beyond the jurisdictional limits of the Court in which the action is pending, and from which it issued; but the Courts of the United States, sitting in any District, are empowered by statute[1] to send *subpœnas* for witnesses into any other District, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial.[2]

§ 316. Witnesses as well as parties are *protected from arrest*, while going to the place of trial, while attending there, for the purpose of testifying in the cause, and while returning *home*, *eundo*, *morando*, *et redeundo*.[3] A *subpœna* is not necessary to protection, if the witness have consented to go without one; nor is a writ of protection essential for this purpose; its principal use being to prevent the trouble of an arrest, and an application for discharge, by showing it to the arresting officer; and sometimes, especially where a writ of protection is shown, to subject the officer to punishment for contempt.[4] Preventing, or using means to prevent a witness from attending Court, who has been duly summoned, is also

[1] Stat. 1793, ch. 22, [28] § 6; 1 U.S. p. 345, (Story's Ed.)

[2] In most of the States, there are provisions by statute, for taking the depositions of witnesses, who live more than a specified number of miles from the place of trial. But these regulations are made for the convenience of the parties, and do not absolve the witness from the obligation of personal attendance at the Court, at whatever distance it be holden, if he resides within its jurisdiction, and is duly summoned.

[3] This rule of protection was laid down, upon deliberation, in the case of Meekins v. Smith, 1 H. Bl. 636, as extending to "all persons who had relation to a suit, which called for their attendance, whether they were compelled to attend by process or not, (in which number had been included,) provided they came *bonâ fide*." Randall v. Gurney, 3 B. & Ald. 252; Hare's case, 4 Dall. 357. It extends to a witness coming from abroad, without a subpœna. 1 Tidd's Pr. 195, 196; Norris v. Beach, 2 Johns. 294.

[4] Meekins v. Smith, 1 H. Bl. 636; Arding v. Flower, 8 T. R. 534; Norris v. Beach, 2 Johns. 294; United States v. Edme, 9 S. & R. 147; Sanford v. Chase, 2 Cowen, 281; Bours v. Tackerman, 7 Johns. 538; [Ex parte McNeil, 5 Mass. 235, 6 Mass. 264, contra.]

punishable as a contempt of Court.[1] On the same principle, it is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the Court upon which he is attending;[2] though any service elsewhere, without personal restraint, it seems, is good. But this freedom from arrest is a personal privilege, which the party may waive; and if he willingly submits himself to the custody of the officer, he cannot afterwards object to the imprisonment, as unlawful.[3] The privilege of exemption from arrest does not extend through the whole sitting or term of the Court, at which the witness is summoned to attend; but it continues during the space of time necessarily and reasonably employed in going to the place of trial, staying there until the trial is ended, and returning home again. In making this allowance of time, the Courts are disposed to be liberal; but unreasonable loitering and deviation from the way will not be permitted.[4] But a witness is not privileged from arrest by his bail, on his return from giving evidence; and if he has absconded from his bail, he may be retaken, even during his attendance at Court.[5]

§ 317. The privilege is granted *in all cases*, where the attendance of the party or witness is given in any matter pending *before a lawful tribunal* having jurisdiction of the cause. Thus, it has been extended to a party attending on an arbitration, under a rule of Court;[6] or on the execution of

[1] Commonwealth v. Feely, 2 Ving. Cas. 1.

[2] Cole v. Hawkins, Andrews, 225; Blight v. Pitcher, 1 Peters, C. C. R. 31; Miles v. McCullough, 1 Dall. 77.

[3] Brown v. Getchell, 11 Mass. 11, 14; Goyer v. Jeckle, 1 Dall. 307; Meekins v. Smith, 1 H. Bl. 636; Randall v. Gurney, 3 B. & Ald. 252; Willingham v. Matthews, 9 Marsh. 57; Lightfoot v. Cameron, 2 W. Bl. 1113; Selby v. Hills, 8 Bing. 166; Hare's case, 4 Dall. 367; Smythe v. Banks, 1 Dall. 329; 1 Tidd's Pr. 195, 196, 197; Phil. & Am. on Evid. 782, 783; 2 Dall. Ev. 371.

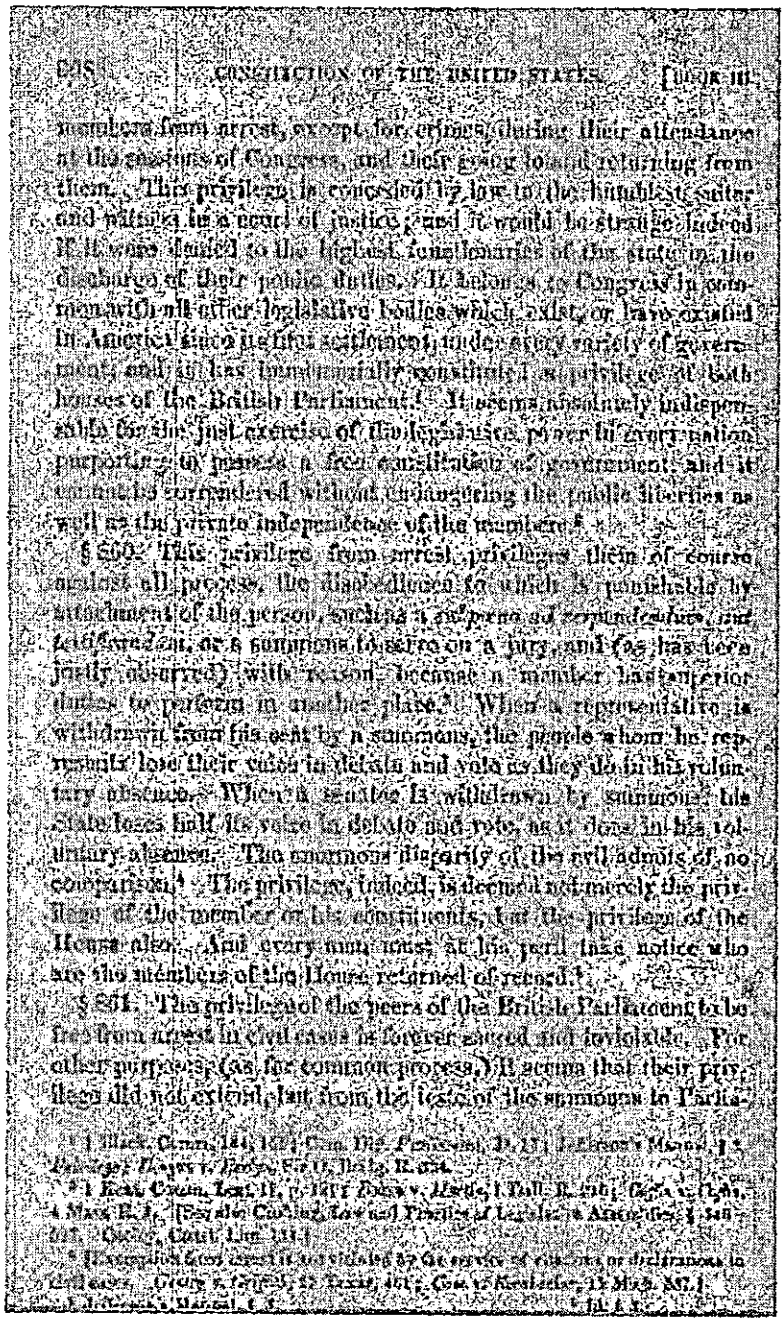
[4] 1 Tidd's Pr. 197; Ex Parte Lyne, 3 Stark. R. 170.

[5] Spence v. Stuart, 3 East, 89; Sanford v. Chase, 2 Cowen, 281.

SIMON GREENLEAF

A TREATISE ON THE LAW OF EVIDENCE §§ 316-17

(3rd ed. 1846)



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A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis

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ABSTRACT. Under the Trump presidency, Immigration and Customs Enforcement (ICE) officers have been making immigration arrests in state and local courthouses. This practice has sparked controversy. Officials around the country, including the highest judges of five states, have asked ICE to stop the arrests. ICE's refusal to do so raises the question: can anything more be done to stop these courthouse immigration arrests?

A common-law doctrine, the "privilege from arrest," provides an affirmative answer. After locating courthouse immigration arrests as the latest front in a decades-long federalism battle born of the entanglement of federal immigration enforcement with local criminal systems, this Essay examines treatises and judicial decisions addressing the privilege from arrest as it existed from the fifteenth to the early twentieth century. This examination reveals that the privilege had two distinct strands, one protecting persons coming to and from their business with the courts, and the other protecting the place of the court and its immediate vicinity.

Although the privilege is firmly entrenched in both English and American jurisprudence, the privilege receded from the body of modern law as the practice of commencing civil litigation with an arrest fell by the wayside. However, the recent courthouse arrests make this privilege newly relevant. Indeed, there are several compelling reasons to apply the common-law privilege from arrest to immigration courthouse arrests. First, immigration arrests are civil in nature, and civil arrests were the chief focus of the privilege. Second, the policy rationales underlying the common-law privilege—facilitating administration of justice and safeguarding the dignity and authority of the court—are equally applicable to immigration courthouse arrests. Third, the federal courts have a shared interest with state and local courts in enforcing the privilege to advance those policy rationales.

This deeply entrenched common-law privilege demonstrates that local courts have legal authority to regulate courthouse immigration arrests and would be standing on firmly recognized policy grounds if they did so.

INTRODUCTION

Since the Trump Administration promised to "take the shackles off" immigration enforcement officers,[1] arrests in state and local courthouses around the country have sparked controversy. In February 2017, the Meyer Law Office, an immigration law firm, released a video filmed in a Denver courthouse that depicted Immigration and Customs Enforcement (ICE) officers admitting they were in the courthouse to make an immigration arrest.[2] The video, viewed over 17,000 times on YouTube,[3] increased awareness of the issue of courthouse arrests and reportedly surprised local officials who were unaware of ICE's practice.[4]

In April 2017, top Denver officials including the Mayor, City Attorney, and all members of the City Council, sent a letter to the local ICE office.[5] Citing the "recent media accounts" of courthouse arrests,[6] the letter asked ICE to "consider courthouses sensitive locations" and "follow [its] directive . . . that par-

1. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESS BRIEFING BY PRESS SECRETARY SEAN SPICER (Feb. 21, 2017), http://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13 [http://perma.cc/G89C-GJFF].

2. Erica Meltzer, *A video Shows ICE Agents Waiting in a Denver Courthouse Hallway. Here's Why That's Controversial,* DENVERITE (Feb. 23, 2017), http://www.denverite.com/ice-agents-denver-courthouse-hallway-video-30231 [http://perma.cc/3SGW-UCH4]; Chris Walker, *ICE Agents Are Infiltrating Denver's Courts, and There's a Video to Prove It,* WESTWORD (Feb. 24, 2017), http://www.westword.com/news/ice-agents-are-infiltrating-denvers-courts-and-theres-a-video-to-prove-it-8826897 [http://perma.cc/BVM3-86U6].

3. *ICE in Court,* YOUTUBE (February 23, 2017), http://www.youtube.com/watch?v=35YUQbq5uBo (reporting 17,521 views on October 9, 2017).

4. Meltzer, *supra* note 2 (noting that the issue of courthouse arrests had come up at a February forum, where the City Attorney reported she "suspect[ed] there might be some instances" of courthouse arrests but that she was unable to confirm the practice, and reported that the presiding county judge was also unaware of the practice); Walker, *supra* note 2 (reporting earlier February forum at which a Deputy City Attorney responded affirmatively when asked if it was "safe to enter courthouses without risking a run-in with ICE"). The day after the video was publicized, the Denver City Attorney reported that four domestic violence cases would be "dropped as victims fear ICE officers will arrest and deport them." Mark Belcher, *Denver Prosecutor: ICE Agents in Courthouses Compromising Integrity of Domestic Violence Cases,* DENVER CHANNEL (Feb. 24, 2017), http://www.thedenverchannel.com/news/local-news/denver-prosecutor-ice-agents-in-courthouses-compromising-integrity-of-domestic-violence-cases [http://perma.cc/B2LL-WDTQ].

5. Letter from Michael Hancock, Mayor of Denver, to Jeffrey D. Lynch, Acting Field Office Director, U.S. Immigration and Customs Enf't (Apr. 6, 2017), http://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids [http://perma.cc/WB2C-FT2V].

6. *Id.* at 1. The letter also "acknowledged" that ICE previously used Denver courthouses "as staging areas for enforcement activities"—a fact that went unmentioned in either of the community forums at which courthouse arrests were publicly discussed. *Id.* at 2.

ticular care should be given to organizations assisting victims of crime."[7] For over six weeks, ICE did not respond while continuing courthouse arrests,[8] two of which were captured on video.[9]

In late May 2017, ICE finally responded to the Denver officials' letter, assuring the Mayor that ICE would "continue to be respectful of, and work closely with, the courts."[10] But following shortly on these assurances was the suggestion that ICE's courthouse arrests might be retaliation for Denver's policy of not detaining suspected immigration violators at ICE's request[11]—ICE's letter described "state and local policies that hinder [ICE's] efforts" as among the "challenges to effective enforcement" causing ICE to "continually improve [its] operations."[12] Taken in its entirety, the letter made clear there would be no actual change to ICE's practice of courthouse arrests.[13]

Similar stories have unfolded around the country.[14] By June 2017, the chief justices of the highest courts of California,[15] Washington,[16] Oregon,[17] New Jer-

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7. *Id.* at 2. The references to "sensitive locations" and the "directive" was to the Department of Homeland Security's (DHS) "sensitive locations policy," which generally precludes ICE enforcement at schools, hospitals, "institutions of worship," "public religious ceremon[ies]" and public marches. Courthouses are not specifically mentioned in the policy, though the list is non-exhaustive. Memorandum from John Morton, Director, Dep't of Homeland Sec., "Enforcement Actions at or Focused on Sensitive Locations" (Oct. 24, 2011), http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [http://perma.cc/G5KH-7R25] [hereinafter DHS Sensitive Locations Policy].

8. *See* Chris Walker, *ICE Courthouse Busts Ten Times Higher Than City Knew*, WESTWORD (Sept. 19, 2017), http://www.westword.com/news/immigration-agents-breaking-protocol-during-courthouse-arrests-in-denver-9499512 [http://perma.cc/7LZL-LUK8] (releasing records documenting six arrests at the Denver County Court from April 20 through May 8, 2017).

9. Erica Meltzer, *New Videos Show ICE Arresting Immigrants at Denver Courthouse, despite local leaders' requests*, DENVERITE (May 9, 2017), http://www.denverite.com/new-videos-show-ice-arresting-immigrants-denver-county-court-something-local-officials-asked-not-35314 [http://perma.cc/3RNN-E5GL].

10. Letter from Matthew T. Albence, Exec. Assoc. Dir., Immigration and Customs Enf't, to Michael B. Hancock, Mayor, City of Denver (May 25, 2017) [hereinafter Albence Letter], *available at* http://www.denverpost.com/2017/06/08/ice-denver-courthouse-arrests-will-continue [http://perma.cc/H43L-PRUJ]; *but see* Meltzer, *supra* note 2 (reporting that the presiding judge was unaware of courthouse arrests by ICE officers).

11. *See* Memorandum from Gary Wilson, Sheriff, Denver City and County, "48-Hour ICE Holds" (Apr. 29, 2014), http://www.ilrc.org/sites/default/files/resources/denver_county.pdf. [http://perma.cc/7G72-V5X2]; *see also infra* notes 41-43 and accompanying text (describing immigration "detainers").

12. Albence Letter, *supra* note 10, at 2.

13. *Id.*

14. *See, e.g.*, Maria Cramer, *ICE Courthouse Arrests Worry Attorneys, Prosecutors*, BOS. GLOBE (June 16, 2017), http://www.bostonglobe.com/metro/2017/06/15/ice-arrests-and-around

sey,[18] and Connecticut[19] had asked the federal government to stop ICE's courthouse arrests.[20] Meanwhile, Democrats in Congress introduced bills to include courthouses as "sensitive locations"[21] to prevent ICE enforcement actions.[22] Nevertheless, federal officials showed no sign of stopping the courthouse ar-

-local-courthouses-worry-lawyers-prosecutors/xxFH5vVJnMeggQaoNMi8gI/story.html [http://perma.cc/NK9P-9BSJ]; Aaron Holmes, *House Democrats Seek Answers After ICE Agents Arrest Possible Victim of Human Trafficking*, N.Y. DAILY NEWS (July 14, 2017), http://www.nydailynews.com/news/politics/dems-seek-answers-ice-arrests-human-trafficking-victim-article-1.3326930 [http:/perma.cc/L3DJ-XAHC].

15. Letter from Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, to Jeff Sessions, U.S. Attorney Gen. (Mar. 16, 2017) [hereinafter Cantil-Sakauye Letter], http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses [http://perma.cc/6YXM-PLRT].

16. Letter from Mary E. Fairhurst, Chief Justice, Wash. Supreme Court, to John F. Kelly, Secretary, Dep't of Homeland Sec. (Mar. 22, 2017) [hereinafter Fairhurst Letter], http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf [http://perma.cc/2Y7Q-BP9E].

17. Letter from Thomas A. Balmer, Chief Justice., Or. Supreme Court, to Jeff Sessions, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec. (Apr. 6, 2017) [hereinafter Balmer Letter], http://media.oregonlive.com/portland_impact/other/CJ%20ltr%20to%20AG%20Sessions-Secy%20Kelly%20re%20ICE.pdf [http://perma.cc/7EE6-JTB2].

18. Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y, Dep't of Homeland Sec., (Apr. 19, 2017), http://assets.documentcloud.org/documents/3673664/Letter-from-Chief-Justice-Rabner-to-Homeland.pdf [http://perma.cc/ZLT5-DPDM] [hereinafter Rabner Letter].

19. Letter from Chase T. Rogers, Chief Justice., Conn. Supreme Court, to Jeff Sessions, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec. (May 15, 2017) (on file with author) [hereinafter Rogers Letter].

20. Advocates in other states urged their courts to take action to stop ICE's courthouse arrests. *E.g.*, Matthew Chayes, *Ban ICE Arrests of Immigrants at New York Courthouses, Advocates Say*, NEWSDAY (June 22, 2017, 8:46 PM), http://www.newsday.com/news/new-york/advocates-ban-ice-arrests-of-immigrants-at-new-york-courthouses-1.13757452 [http://perma.cc/Y8UX-9RAZ]; Letter from Ivan Espinoza-Madrigal, Exec. Dir., Lawyers' Comm. for Civil Rights and Econ. Justice, to Ralph D. Gants, Chief Justice, Mass. Supreme Judicial Court, et al. (June 16, 2017), http://lawyerscom.org/wp-content/uploads/2017/06/Letter-Regarding-ICE-in-Courthouses.pdf [http://perma.cc/4Y5H-AY8P].

21. *See* DHS Sensitive Locations Policy, *supra* note 7.

22. Protecting Sensitive Locations Act, S. 845 § 2, 115th Cong. (2017) (modifying 8 U.S.C. § 1357(i)(1)(E) by defining "sensitive location" to include the area within one thousand feet of "any Federal, State, or local courthouse, including the office of an individual's legal counsel or representative, and a probation, parole, or supervised release office"); Protecting Sensitive Locations Act, H.R. 1815 (2017) (defining "sensitive location" to include the area within one thousand feet of any "Federal, State, or local courthouse, including the office of an individual's legal counsel or representative, and a probation office").

rests.[23] On October 17, 2017, Acting ICE Director Thomas Hohman defended ICE's courthouse arrests, stating, "I won't apologize for arresting people in courthouses. We're going to continue to do that."[24]

This Essay examines the current impasse over courthouse immigration arrests. Part I briefly describes the decades-long "crimmigration" crisis. Part II contextualizes courthouse arrests as the latest front in the federalism battle fueled by federal efforts to co-opt local criminal justice systems to serve the immigration enforcement mission. Part III examines a longstanding common-law doctrine establishing a privilege against courthouse arrests, and discerns two strands of this privilege. The first strand protects persons coming to and from the courts, while the second protects the place of a court and its environs. Part IV contends that this common-law privilege empowers states and localities to break the current impasse for three main reasons. First, courthouse immigration arrests fall within the privilege's core concern with civil arrests. Second, they raise many of the same policy concerns—facilitating administration of justice and safeguarding the dignity and authority of the court—underlying the rationale for the privilege. And finally, case law indicates that federal courts will likely respect the privilege of state and local courts even in a federalism contest triggered by federal arrests.

I. THE CRIMMIGRATION CRISIS AND THE FEDERALISM BATTLE IT CREATED

In 2006, Juliet Stumpf described a "crimmigration crisis" in which the merger of criminal law and immigration law "brings to bear only the harshest elements of each area of law," resulting in "an ever-expanding population of the

23. *See, e.g.*, Letter from Jefferson B. Sessions III, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec., to Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court (Mar. 29, 2017), http://assets.documentcloud.org/documents/3533530/Attorney-General-and-Homeland-Security-Secretary.pdf [http://perma.cc/JN7H-7NLE] [hereinafter Sessions Letter]; Matt Katz, *Defying N.J.'s Top Judge, ICE Continues Courthouse Arrests*, NJ.COM (May 5, 2017, 4:36 PM), http://www.nj.com/news/index.ssf/2017/05/defying_njs_top_judge_ice_continues_courthouse_arr.html [http://perma.cc/3PMY-EHQ6]. After the Attorney General and DHS Secretary wrote to the California Chief Justice indicating they would not change their practice, California prosecutors wrote in support of the Chief Justice, asking General Sessions and DHS Secretary Kelly to reconsider. Letter from Mike Feuer, L.A. City Att'y, et al., to Jeffrey Sessions, Att'y Gen., & John Kelly, Sec'y, Dep't of Homeland Sec. (Apr. 4, 2017), http://freepdfhosting.com/b3da7bbbf5.pdf [http://perma.cc/J9FM-9TNM].

24. Thomas Homan, Acting Dir., Immigration & Customs Enf't, Keynote Address at the Heritage Foundation: Enforcing U.S. Immigration Laws: A Top Priority for the Trump Administration, at 1:10:05 (Oct. 17, 2017), http://www.c-span.org/video/?435827-1/acting-ice-director-discusses-immigration-enforcement [http://perma.cc/94QE-SRZ7].

excluded and alienated."[25] The crisis has intensified since the 1980s, making the record deportation numbers Stumpf cited[26] seem modest in comparison with the 2.7 million deportations under the Obama Administration[27]—more than all twentieth-century administrations combined.[28] And Donald Trump, in his presidential campaign, promised even more intense enforcement.[29]

One dimension of the "crimmigration" regime has been an enduring federalism battle resulting from increasing downward pressure from the federal government on state and local criminal justice systems to cooperate with and participate in immigration enforcement. Courthouse immigration arrests are some of the more recent fault lines broken open by this downward pressure.

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25. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006). Stumpf saw a convergence in the substance, enforcement mechanisms, and procedural regimes of criminal and immigration law. *See id.* at 379-92; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) (describing the regulation of migration through criminal proceedings and the subsequent "importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1459 (arguing that "[c]rimmigration law . . . developed in the closing decades of the twentieth century due to a shift in the perception of criminal law's proper place in society combined with a reinvigorated fear of noncitizens that occurred in the aftermath of the civil rights movement"); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 599 (2015) (analyzing "the way in which crimmigration restructures the relationship between Latinos and dominant society to ensure their marginalized status").

26. Stumpf, *supra* note 25, at 372 (noting almost 200,000 deportations in 2004).

27. César Cuauhtémoc García Hernández, *Removals & Returns, 1892-2015*, CRIMMIGRATION (Feb. 16, 2017, 4:00 AM), http://crimmigration.com/2017/02/16/removals-returns-1892-2015 [http://perma.cc/RXP5-FRJB]. Every year the Obama Administration posted between 135% and 180% of the 2004 number of removals. *Id.*

28. Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [http://perma.cc/U2PH-5D9S]; *see also* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 247 (2017) ("By every measure, immigration enforcement reached its historic peak in the Obama years.").

29. Trump promised on his campaign to deport all undocumented immigrants. Alexandra Jaffe, *Donald Trump: Undocumented Immigrants 'Have to Go,'* MSNBC (Aug. 15, 2015, 10:23 PM), http://www.msnbc.com/msnbc/donald-trump-undocumented-immigrants-have-go [http://perma.cc/SJ2M-X5HL]. In his "immigration" speech in Phoenix in August 2016, Trump promised to deport "at least 2 million . . . criminal aliens" as well as "gang members, security threats, visa overstays, public charges—that is, those relying on public welfare or straining the safety net, along with millions of recent illegal arrivals and overstays who've come here under the current administration." Donald Trump, *Speech on Immigration* (Aug. 31, 2016), *in* Domenico Montanaro et al., *Fact Check: Donald Trump's Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM ET), http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration [http://perma.cc/68P6-YQEW].

There have been no reports of immigration arrests in *federal* courthouses (and no outcry from federal judges), for the simple reason that federal immigration officials can count on the cooperation and support of federal criminal justice agencies like the U.S. Marshals Service and the Bureau of Prisons.[30] The absence of such cooperation on the state and local level was explicitly cited by ICE as a reason for sending officers to make arrests in state and local courthouses.[31]

Historically, the federal government increased pressure on local governments slowly at first. In 1996, Congress passed legislation that simply *invited* local criminal justice agencies to enter into "287(g) agreements" that would allow local officers to enforce immigration law.[32] After 9/11, however, the federal government opined that local law enforcement had "inherent authority" to enforce immigration laws[33] and encouraged the activation of this dormant authority.[34] The ever-increasing identification of noncitizens with criminals observed by Stumpf and others[35] worked to transform immigration into a

30. ICE can count on these agencies to provide notification of the upcoming release of suspected immigration violators, for example, and to detain suspected immigration violators for transfer to ICE when the law permits it. *See, e.g.*, Letter from Peter J. Kadzik, Asst. Att'y Gen. to Rep. John A. Culberson, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations (Feb. 23, 2016), http://culberson.house.gov/uploadedfiles/doj_february_23_letter.pdf [http://perma.cc/S9TA-2QX6] (describing new procedures giving ICE the "right of first refusal" over inmates being released from Bureau of Prisons custody).

31. Albence Letter, *supra* note 10, at 2 (suggesting courthouse arrests were response to local policies that "hinder" immigration enforcement); Sessions Letter, *supra* note 18, at 2 (same).

32. 287(g) agreements are named after Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2012), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 133, 110 Stat. 3009, 563. Section 287(g) allows states or localities to enter into written agreements whereby local officers can perform immigration enforcement functions. *Id.*

33. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to the Att'y Gen. (Apr. 3, 2002), http://perma-archives.org/warc/AXV3-V8FV/http://www.aclu.org/sites/default/files/field_document/ACF27DA.pdf [http://perma.cc/4DF6-PVDH].

34. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084-88 (2004) (describing the "federal effort to enlist, or even conscript, state and local police in routine immigration enforcement").

35. *See* Stumpf, *supra* note 25, at 419 (2006) (noting that "aliens become synonymous with criminals"); *see also* Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 598 (2016) (observing that crimmigration "requires the constant production of populations who can be labeled 'criminal aliens'" and that "this production of 'criminal aliens' occurs along lines of race, class, and other vectors of social vulnerability"); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1839-43 (2007) (describing the construction of immigrants as criminals and perpetuation of "images of migrant criminality"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1458 (describing how the "emblems of

criminal problem, and therefore a problem appropriately solved by state and local police.[36] The "inherent authority" argument, though, was susceptible to challenge based on principles of federalism,[37] and was ultimately discredited in the Supreme Court's 2012 decision striking down portions of Arizona's Senate Bill 1070.[38]

Meanwhile, by 2008, as enforcement numbers soared, the federal appetite for crime-based immigration enforcement could no longer await voluntary or even encouraged local participation. The "Secure Communities" program, initially depicted as a voluntary data-sharing program from which localities could "opt out" if they did not want to be part of the local-federal immigration enforcement team, was finally unmasked in 2011 (three years into the program) as a mandatory regime.[39] This brought the federalism battle to the fore, as unwilling participants at both the local and state level turned to the Tenth Amendment to disentangle local law enforcement from federal immigration enforcement.[40] After a federal court decision in early 2014[41] made clear that the federal government could not use immigration "detainers" to command localities to prolong the detention of noncitizens otherwise entitled to release from local custody, a wave of policies limiting detainer compliance engulfed the

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crimmigration law" work to "abandon framing noncitizens as contributing members of society" and instead "reimagine[] noncitizens as criminal deviants and security risks").

36. *See* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1475 (2012) (noting that the trope of immigrant criminality leads to the conclusion that "states and cities could and should be part of the solution, thereby justifying local police participation in immigration enforcement.").

37. *See, e.g.*, Wishnie, *supra* note 34, at 1088-95 (arguing that legislative history shows that Congress understands it "has preempted all state and local power to make immigration arrests except where specifically authorized"); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that the Constitution demands that immigration enforcement power, "because of its effect on foreign policy, must be exercised exclusively and uniformly at the federal level.").

38. Arizona v. United States, 132 S.Ct. 2492, 2506 (2012) (rejecting the inherent authority theory and finding that state-level immigration enforcement was largely preempted in light of the INA's specification of "limited circumstances in which state officers may perform the functions of an immigration officer"). *See also* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 34 (2013) (finding "no force" to the "inherent authority" argument after *Arizona*).

39. Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 154-59 (2013).

40. *Id.* at 160-63 (describing the resistance of Santa Clara County, California, and other jurisdictions characterized by "legal reliance on the Tenth Amendment, and the argument that the federal government—particularly in the absence of compensation—cannot compel enforcement of federal law by state and local officials").

41. Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014).

country.[42] Currently, over twenty-five percent of counties decline to hold prisoners based on immigration detainers.[43]

The Trump Administration, apparently intent on exceeding the record deportation numbers of the Obama Administration,[44] has not retreated from the federalism battle. Instead, President Trump has attempted to pressure localities into immigration enforcement at every turn. A January 2017 Executive Order suggests that accomplishing the Administration's enforcement goals depends on the participation of state and local criminal justice actors.[45] The Order promised a return to the Secure Communities program[46] (which the Obama Administration had abandoned after losing the federalism fight it engendered[47]), expressed a policy authorizing 287(g) agreements "to the maximum extent permitted by law,"[48] and directed the DHS Secretary to "on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers

42. *See* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279–81 (2015) (describing policy changes following *Galarza* and the decision in *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014), granting summary judgment on the claim that a prisoner's detention based on an immigration detainer violated the Fourth Amendment).

43. *National Map of Local Entanglement With ICE*, IMMIGRANT LEGAL RESOURCE CTR., (Dec. 19, 2016), http://www.ilrc.org/local-enforcement-map [http://perma.cc/8WW6-WWMG].

44. Early in his campaign, candidate Trump said he would deport all of the estimated eleven million undocumented immigrants in the United States. *See* Jeremy Diamond, *Trump's Immigration Plan: Deport the Undocumented, 'Legal Status' for Some*, CNN (July 30, 2015, 8:48 AM ET), http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop [http://perma.cc/38WD-VP6Z]. After he was elected, he vowed to deport two to three million undocumented people with criminal records "immediately" on taking office. Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), http://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants [http://perma.cc/R27K-JNUG].

45. Exec. Order 13,768 at § 5, 82 Fed. Reg. 8799 (Jan. 25, 2017); Walter Ewing, *Understanding the Dangerous Implications of President Trump's Immigration Executive Order*, IMMIGR. IMPACT (Jan. 26, 2017), http://immigrationimpact.com/2017/01/26/understanding-dangerous-implications-president-trumps-immigration-executive-order [http://perma.cc/966S-LJBR] (stating that the priorities in the Executive Order were "defined so expansively as to be meaningless").

46. Exec. Order 13,768, *supra* note 45, § 10.

47. Memorandum from DHS Secretary Jeh Charles Johnson to Acting ICE Director Thomas S. Winkowski, "Secure Communities" (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [http://perma.cc/R6A6-9EQY].

48. Exec. Order 13,768, *supra* note 45, § 8.

with respect to such aliens."[49] Finally, the Order appeared to make good on Trump's campaign promise to "end . . . sanctuary cities"[50] by starving them of federal funding.[51] This latter provision spawned immediate litigation and was enjoined by a federal judge in part because it "attempts to conscript states and local jurisdictions into carrying out federal immigration law,"[52] and its coercion of local governments "runs contrary to our system of federalism."[53]

Three decades of crimmigration have thus set the stage for the current conflict, as the federal government moved from strategies of coaxing and cajoling states and localities to participate in immigration enforcement to strategies of co-opting, coercing, and commandeering them.

II. COURTHOUSE IMMIGRATION ARRESTS: THE LATEST FRONT IN THE FEDERALISM BATTLE

Courthouse arrests represent the latest front, with some new twists, in crimmigration's ongoing federalism battle. One such twist has been the emergence of state-court judges at the front lines of this conflict: where the federalism battlefield was previously on the street (when entanglement of local police was at issue[54]) or in the jails (when detainer policies were contested), it is now in state and local courthouses. In addition, the Tenth Amendment has not been invoked—yet. But a closer look at the complaints of state and local govern-

49. Exec. Order 13,768, *supra* note 45, § 9(b). This "name and shame" report was abandoned after three weeks, due to numerous inaccuracies. Darwin BondGraham, *ICE 'Public Safety Advisory' Criticizing Local Law Enforcement for Immigration Policies Appears to Contain Bad Data*, EAST BAY EXPRESS (Mar. 21, 2017), http://www.eastbayexpress.com/SevenDays/archives/2017/03/21/ice-public-safety-advisory-criticizing-local-law-enforcement-for-immigration-policies-appears-to-contain-bad-data [http://perma.cc/5R4P-CE4G]; David Nakamura & Maria Sacchetti, *Trump Administration Suspends Public Disclosures of 'Sanctuary Cities,'* WASH. POST (Apr. 11, 2017), http://www.washingtonpost.com/politics/trump-administration-suspends-public-disclosures-of-sanctuary-cities/2017/04/11/7ea7f078-1ec8-11e7-ad74-3a742a6e93a7_story.html [http://perma.cc/US9D-VCT4].

50. Montenaro et al., *supra* note 29 ("We will end the sanctuary cities that have resulted in so many needless deaths.").

51. Exec. Order 13,768, *supra* note 45, § 9(a).

52. County of Santa Clara v. Donald J. Trump, No. 5:17-cv-00574, 2017 WL 1459081, at *23 (N.D. Cal. Apr. 25, 2017).

53. *Id.* (quoting Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 577-78 (2012)).

54. *See New Orleans: How the Crescent City Became a Sanctuary* City *Hearing Before the H. Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. (2016), http://judiciary.house.gov/wp-content/uploads/2016/09/114-96_22124.pdf [http://perma.cc/V2F7-BYKW] (compiling testimony concerning the New Orleans Police Department policy against participating in immigration enforcement).

ments—and the response of the federal government—reveals that the controversy over courthouse arrests is merely a continuation of crimmigration's federalism battle.

State-court judges primarily feared that civil immigration arrests would cause witnesses,[55] criminal defendants,[56] and civil litigants[57] to avoid the courthouse.[58] Deterring people from coming to court, they argued, in turn interferes with the state and local courts' administration of justice,[59] deprives them of their ability to adjudicate cases effectively,[60] and threatens to cut off access to justice.[61] In sum, state-court judges believed their "fundamental mis-

55. *E.g.* Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning crime victims and witnesses); Fairhurst Letter, *supra* note 16, at 1 (noting that "witnesses summoned to testify" may no longer find state courthouses to be a trustworthy public forum).

56. Fairhurst Letter, *supra* note 16, at 1 (describing how immigration officials in the courthouse may erode the trust of "criminal defendants being held accountable for their actions," reducing their likelihood to "voluntarily appear to participate and cooperate in the process of justice); Rabner Letter, *supra* note 18, at 1 (noting that "defendants in state criminal matters may simply not appear").

57. *E.g.*, Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning "unrepresented litigants"); Balmer Letter, *supra* note 17, at 2 (mentioning "a driver paying a traffic fine; a landlord seeking an eviction or a tenant defending against one; or a small claims court plaintiff in a dispute with a neighbor" and "a victim seeking a restraining order against an abusive former spouse"). A number of the letters referenced domestic violence victims, who could be appearing either as witnesses or as litigants seeking a protective order. *E.g.*, Fairhurst Letter, *supra* note 16, at 1 (referencing "victims in need of protection from domestic violence"); *see also* P.R. Lockhart, *Immigrants Fear a Choice Between Domestic Violence and Deportation*, MOTHER JONES (Mar. 20, 2017, 10:00 AM), http://www.motherjones.com/politics/2017/03/ice-dhs-immigration-domestic-violence-protections [http://perma.cc/A6M2-H73M] (documenting concerns about the underreporting of domestic violence).

58. *See* Rogers Letter, *supra* note 19, at 1 (expressing concern that "having ICE officers detain individuals in public areas of our courthouses may cause litigants, witnesses and interested parties to view our courthouses as places to avoid, rather than as institutions of fair and impartial justice").

59. *See* Balmer Letter, *supra* note 17, at 3 (describing courthouse arrests as a "current and prospective interference with the administration of justice in Oregon"); Fairhurst Letter, *supra* note 16, at 2 (suggesting courthouse arrests "impede" the "mission, obligations, and duties of our courts").

60. *See* Balmer Letter, *supra* note 17, at 2 ("The safety of individuals and families, the protection of economic and other rights, and the integrity of the criminal justice system all depend on individuals being willing and able to attend court proceedings . . . ."); Cantil-Sakauye Letter, *supra* note 15, at 2 (noting that courthouse arrests "compromise our core value of fairness").

61. Rabner Letter, *supra* note 18, at 1 ("Enforcement actions by ICE agents inside courthouses would . . . effectively deny access to the courts."); Balmer Letter, *supra* note 17, at 2 ("Oregon courts must be accessible to all members of the public."); Fairhurst Letter, *supra* note 16, at 1-2 ("When people are afraid to appear for court hearings . . . their ability to access justice is compromised."); Cantil-Sakauye Letter, *supra* note 15, at 2 (stating that courthouse

sion"[62] and "ability to function"[63] were undermined by courthouse arrests. Federal courts have not faced similar problems, as federal immigration officials can count on the cooperation and support of federal criminal justice agencies in lieu of making courthouse arrests.

The federal response made no effort to address the concerns of state-court judges that courthouse immigration arrests erode and undermine justice in state and local courts. Instead, administration officials suggested that the courthouse arrests might in some sense be retaliation for earlier federal defeats in the ongoing federalism battle fueled by the rise of crimmigration. "Some jurisdictions," wrote Attorney General Sessions and then-DHS Secretary Kelly in response to California's Chief Justice, "have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests."[64] It was because of such policies, General Sessions and Secretary Kelly insisted, that "ICE officers and agents are required to locate and arrest these aliens in public places."[65]

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arrests "undermine the judiciary's ability to provide equal access to justice"). Notably absent from the chief justices' letters was any discussion of the discriminatory intent or effect of the courthouse immigration arrests. The chief justices' reticence contrasts with state officials' allegations that other Trump Administration immigration programs are motivated by animus. *See, e.g.*, State of Hawai'i, et al. v. Donald J. Trump, et al., No. 1:17-cv-00050, Document 64 ("Second Amended Complaint for Declaratory and Injunctive Relief") at 32 (D. Haw. Mar. 8, 2017) (arguing March 6 executive order imposing travel ban was "motivated by animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage"); States of New York, Massachusetts, et al. v. Donald Trump et al., No. 1:17-cv-05228, Document 1 ("Complaint for Declaratory and Injunctive Relief") at 2-3, 52 (E.D.N.Y. Sep. 6, 2017) (arguing President's decision to end Deferred Action for Childhood Arrivals program "is a culmination of President's Trump's oft-stated commitments . . . to punish and disparage people with Mexican roots" and violates equal protection principles because it was grounded in anti-Mexican animus).

62. Fairhurst Letter, *supra* note 16, at 1; *see also* Balmer Letter, *supra* note 17, at 2 (arguing that courthouse immigration arrests "seriously impede[]" efforts to "ensure the rule of law for all Oregon residents").

63. Fairhurst Letter, *supra* note 16, at 1; *see also* Rabner Letter, *supra* note 18, at 2 (suggesting that courthouse arrests "compromise our system of justice").

64. Sessions Letter, *supra* note 23, at 2. As one commentator trenchantly observed, the Attorney General and DHS Secretary arrived at this explanation only after "needlessly mansplain[ing] the elements of the federal crime of 'stalking' (and basic Fourth Amendment doctrine on public arrests) to the Chief Justice . . . ." Jennifer Chacón, *California v. DOJ on Immigration Enforcement*, TAKE CARE (Apr. 11, 2017), http://takecareblog.com/blog/california-v-doj-on-immigration-enforcement [http://perma.cc/YHT3-J8XB].

65. *Id.* The federal response also indicated that courthouse arrests were a way to decrease risk to federal immigration officers, since arrests could take place behind the security screening provided by the state courts. *Id.*

ICE later suggested courthouse arrests would be directly correlated to a locality's cooperation with (or resistance to) federal immigration enforcement: "As ICE undertakes the necessary enforcement of our country's immigration laws, its officers and agents will continually improve their operations to meet the challenges to effective enforcement, *including state and local policies that hinder their efforts*."[66] The suggestion in both letters that courthouse arrests were a response to local "sanctuary" policies reveals that the federal government viewed courthouse arrests as another weapon in the ongoing federalism battle, deployed simultaneously with the defunding threat.[67]

The current federalism impasse raises several questions: Can state and local courts do anything more to protect those coming before them, beyond simply pleading with ICE to change its practice?[68] Or does the classification of a courthouse as a "public place" end the inquiry, as the Attorney General and DHS Secretary have argued?[69] And, even if the courthouse itself can be protected, will ICE lurk outside the courthouse and render such protection meaningless?[70]

A legal doctrine from the past—the common-law privilege from arrest—suggests possible answers to these questions. Mainly concerned with the practice of arresting the defendant to commence a civil suit, which fell into disuse when civil arrests largely disappeared from the American legal landscape,[71] the

66. Albence Letter, *supra* note 10, at 2 (emphasis added).

67. *See supra* notes 50-53 and accompanying text.

68. In Denver, for example, the City Council enacted legislation prohibiting city employees (specifically including "Denver County Court administrative and clerical employees") from using city resources to assist in immigration enforcement, declaring that "courts serve as a vital forum for ensuring access to justice and are the main points of contact for the most vulnerable in times of crises, . . . who seek justice and due process of law without fear of arrest from federal immigration enforcement agents." Council Bill No. 17-0940 (Denver, Colo. Aug. 31, 2017) (enacted). And Mayor Hancock issued an executive order committing the City and County to "strongly advocate" that areas including courthouses "should be respected as 'sensitive locations' to ensure the fair and effective administration of justice." Michael B. Hancock, Mayor of Denver, Colo., Exec. Order No. 142 (Aug. 31, 2017).

69. *See* Sessions Letter, *supra* note 23, at 1 (discussed *infra* at notes 153-159 and accompanying text).

70. *See* Balmer Letter, *supra* note 17, at 1 (requesting that ICE officials not "detain or arrest individuals *in or in the immediate vicinity of* the Oregon courthouses" (emphasis added)).

71. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 61-68 (1968) (describing the rise and fall of this civil procedure). *But see* Hale v. Wharton, 73 F. 739, 740-41 (W.D. Mo. 1896) (suggesting that "[t]he rule in the English courts at first was limited to exemption from arrest in a criminal proceeding"). This Essay does not address whether and to what extent the privilege from arrest might be applied to prevent criminal arrests, because immigration arrests are civil in nature. *See infra* Section IV.A. Likewise, this Essay is concerned with arrests, and therefore does not address many of

privilege from arrest has become newly relevant in light of the Trump Administration's increased use of courthouse arrests.[72]

III. THE ANCIENT COMMON-LAW PRIVILEGE FROM ARREST

The common-law privilege from arrest dates back at least to the early fifteenth century.[73] Blackstone succinctly described it as follows:

> Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.[74]

Blackstone's first sentence describes a strand of the privilege pertaining to *persons* conducting business with the courts, while his second sentence describes a strand more generally pertaining to *places*—courthouses and their surroundings. Each is addressed here in turn.

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the nuances attendant to the doctrine as it was extended beyond arrest to service of process and then to the question of how personal jurisdiction might or might not be obtained over non-residents. *See infra* notes 91-93 and accompanying text.

72. *See* Liz Robbins, *A Game of Cat and Mouse with High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017), http://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html [http://perma.cc/XA2A-LLJG] (reporting the Immigration Defense Project's assertion that compared to 14 courthouse arrests in 2015 and 11 in 2016, there had been 53 courthouse arrests in the state of New York in the first seven months of 2017).

73. Sampson v. Graves, 203 N.Y.S. 729, 730 (N.Y. App. Div. 1924) (noting that "[t]he doctrine of the immunity from arrest of a litigant attending the trial of an action to which he was a party found early recognition in the law of England, and in Viner's Abridgment (2d Ed.) vol. 17, p. 510 et seq., is to be found a very interesting collection of cases asserting the privilege dating back to the Year Book of 13 Henry IV, I. B."), *overruled on other grounds* by Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636 (N.Y. 1936); *see also* Meekins v. Smith (1971) 126 Eng. Rep. 363, 364; 1 H. Bl. 636, 637 (referencing a yearbook from the reign of King Edward IV as supporting the notion that "a mainpernor [surety] shall have the privilege of the Court").

74. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 766 (1877) (footnote omitted).

A. The Privilege as Applied to Persons Attending Court

A leading English case from 1791 set forth the general rule reported by Blackstone, "that all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, . . . were intitled to privilege from arrest eundo et redeundo,[75] provided they came bonâ fide."[76] A decade later, *Spence v. Stuart* demonstrated the breadth of this privilege.[77] The court found the defendant "clearly privileged" from his arrest, even though the proceeding he had attended was an arbitrator's examination at a coffee house.[78] Application of the privilege to the arrest occurring the morning after the proceeding[79] showed the liberality with which "eun-

75. "Eundo et redeundo" means "going and returning." BLACK'S LAW DICTIONARY (2d ed. 1910). Another common formulation of the privilege was to say it applies "eundo, morando, et redeundo" (with "morando" meaning "remaining," *id.*). *See* Person v. Grier, 66 N.Y. 124, 125 (1876) ("It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo.*"); *Spence v. Stuart*, 102 Eng. Rep. 530, 531; 3 East at 89, 91 ("[T]he privilege extends to one redeundo as well as eundo et morando."); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 316, at 474 (Lawbook Exchange, Ltd. 2001) (16th ed. 1899) (emphasis added) (footnote omitted) ("Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo, morando, et redeundo.*") (footnote omitted). As will be shown below, *see infra* Section III.B, a privilege preventing arrests at the courthouse and its environs addressed much of what might be encompassed by "morando."

76. *Meekins*, 126 Eng. Rep. at 363; 1 H. Bl. at 637. The privilege was not extended to the habeas petitioner in *Meekins*, on the ground that he was "an uncertificated Bankrupt, and in desperate circumstances," and showed "a manifest intention . . . to impose upon the Court . . . ." *Id.* at 363-364.

77. (1802) 102 Eng. Rep. 530; 3 East 89.

78. *Id.* at 90.

79. *Id.* at 89-90 (reporting that the arbitrator's examination concluded at 11 o'clock in the evening, whereupon the defendant, "having intimat[ed] that bailiffs were lying in wait to arrest him . . . slept at the coffee-house that night, and was arrested there early the next morning").

do et redeundo" was interpreted.[80] This served the rule's policy "to encourage witnesses to come forward voluntarily."[81]

The breadth of this component of the privilege was sustained upon its arrival in America. Greenleaf's influential treatise on evidence, citing the leading English and American cases, noted that the rule was interpreted broadly to encompass "all cases" and "any matter pending before a lawful tribunal" (including proceedings before arbitrators, bankruptcy proceedings, and the like).[82] Additionally, the courts were "disposed to be liberal" with respect to "going . . . and returning."[83] And neither a writ of protection nor a subpoena compelling one's attendance was a prerequisite for enjoyment of the privilege.[84]

At common law a court might issue a "writ of . . . protection" to a litigant or witness who feared arrest while coming to court.[85] But obtaining the writ was not a precondition for exercise of the privilege; rather, it served simply to provide "convenient and authentic notice to those about to do what would be a violation of the privilege. It neither establishes nor enlarges the privilege, but merely sets it forth, and commands due respect to it."[86]

The Supreme Court has addressed the common-law privilege from arrest in a series of decisions in two closely related contexts—in construing the privilege afforded legislators under the Constitution, and in assessing the extent to which out-of-state residents are immune from service of process while in a state for the purpose of attending court. The Court's discussions demonstrate that the English common-law privilege from arrest has been firmly entrenched in American law from the outset.

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80. The court noted that "it does not appear that [the defendant] has been guilty of any negligence in not availing himself of his privilege redeundo within a reasonable time; for he was arrested early the next morning, before it could be known whether he were about to return home or not." *Spence*, 102 Eng. Rep. at 531; 3 East at 91; *see also* Lightfoot v. Cameron, 96 Eng. Rep. 658, 658 (1776); 2 Black W. 1113, 1113 (collecting similar cases and holding that a party who was dining with his counsel and witnesses after court recessed for the day was privileged from arrest).

81. Walpole v. Alexander (1782) 99 Eng. Rep. 530, 531; 3 Dougl. 45, 46.

82. GREENLEAF, *supra* note 75 § 317, at 475 (footnotes omitted).

83. *Id.* at § 316, at 459.

84. *Id.* at § 316, at 474 (noting that a writ of protection served only to prevent an arrest and perhaps lay the groundwork for subjecting the arresting officer to punishment for contempt for disobeying the writ).

85. *See* Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts.").

86. Bridges v. Sheldon, 7 F. 17, 44 (D. Vt. 1880) (citations omitted).

In *Williamson v. United States*, the Court addressed whether the privilege for legislators extended to arrests for criminal offenses, and quoted Joseph Story, who likened the legislator's privilege to the common-law privilege from arrest described by Blackstone: "*This privilege is conceded by law to the humblest suitor and witness in a court of justice;* and it would be strange indeed if it were denied to the highest functionaries of the State in the discharge of their public duties."[87] And in *Long v. Ansell*, addressing the same question, the Court said that the legislator's privilege "must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another."[88] The Court noted that "arrests in civil suits were still common in America" when the Constitution was adopted, and cited several treatises as authority for this proposition,[89] each of which explicitly recognized the privilege from arrest for those attending court.[90]

Similarly, in the context of immunity for out-of-state residents traveling to a state to attend court, the Court in *Lamb v. Schmitt* noted the "general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another."[91] Here, and in two other cases addressing jurisdiction over nonresidents, the Court adverted to the seminal American decisions concerning the common-law privilege

87. 207 U.S. 425, 443 (1908) (emphasis added) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 859, at 608 (4th ed. 1873)).

88. 293 U.S. 76, 83 (1934).

89. *Id.* at 83 & n.4 (citing WILLIAM WYCHE, PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 50 et seq. (2d ed. 1794); CONWAY ROBINSON, PRACTICE IN COURTS OF LAW AND EQUITY IN VIRGINIA 126-30 (1832); SAMUEL HOWE, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN MASSACHUSETTS 55-56, 141-48, 181-87 (1834); FRANCIS J. TROUBAT & WILLIAM W. HALY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN SUPREME COURT OF PENNSYLVANIA 170-89 (1837)); *see also supra* note 71.

90. HOWE, *supra* note 89, at 143-44 ("[A]ll persons connected with a cause, which calls for their attendance in court, and who attend *bonâ fide*, – are protected from arrest, *eundo, morando, et redeundo*"; ROBINSON, *supra* note 89, at 133 (providing that witnesses should be exempt from arrest) (citing, *inter alia*, Ex Parte McNeil, 6 Mass. Rep. 245 (1810)); TROUBAT & HALY, *supra* note 89, at 178 ("The parties to a suit, their attorneys, counsel and witnesses, are, for the sake of public justice, privileged from arrest in coming to, attending upon, and returning from the court; or as it is usually termed, *eundo, morando, et redeundo*."); WYCHE, *supra* note 89, at 36 ("The parties to a suit, and their witnesses, are, for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the court. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction.") (citations omitted).

91. 285 U.S. 222, 225 (1932).

from arrest.[92] Those decisions recognized the firm entrenchment of the privilege as it pertained to all persons (whether resident or nonresident) attending court.[93]

The Court's decisions, and the lower court rulings upon which they relied, articulated the policy rationale behind the privilege. Quoting a "leading" New Jersey decision, the Court in *Stewart v. Ramsay* said that "[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."[94] And in *Lamb*, the Court described the privilege as

> proceed[ing] 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.*[95]

The Court also characterized the privilege as "founded in the necessities of the judicial administration"[96] and the notion that the courts should be "available to

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92. *See e.g.*, *id.* (citing Hale v. Wharton, 73 F. 739 (C.C.W.D. Mo. 1896); Bridges v. Sheldon, 7 F. 17 (C.C.D. Vt. 1880)); *Stewart* v. Ramsay, 242 U.S. 128, 131 (1916) (citing *Hale*, 73 F. 739 and Peet v. Fowler, 170 F. 618 (C.C.E.D. Pa. 1909)); Page Co. v. MacDonald, 261 U.S. 446, 447 (1923) (citing Larned v. Griffin, 12 F. 590, 590 (C.C.D. Mass. 1882)).

93. *Peet*, 170 F. at 618 ("It is a well-established principle of law that parties to a suit, for the sake of public justice, are privileged from the service of process upon them in coming to, attending upon, and returning from the court, or as it is usually termed, eundo, morando, et redeundo."); *Hale*, 73 F. at 740 ("[N]o rule of practice is more firmly rooted in the jurisprudence of United States courts than that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors." (citations omitted)); *Larned*, 12 F. at 590 ("It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." (citations omitted)); *Bridges*, 7 F. at 43 ("The privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced.").

94. *Stewart*, 242 U.S. at 129 (quoting Halsey v. Stewart, 4 N.J.L. 366, 367 (1817)).

95. *Lamb*, 285 U.S. at 225 (emphasis added) (citations omitted).

96. *Id.* Similarly, when addressing the legislative privilege, the Court found the privilege *necessary* for the functioning of the legislative branch. *See* Williamson v. United States, 207 U.S. 425, 443 (1908) ("It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.").

suitors, fully available, neither they nor their witnesses subject to be embarrassed or vexed while attending, the one 'for the protection of his rights', the others 'while attending to testify.'"[97]

An early New York decision went further and expressed the privilege as an *obligation* of the courts: "We have power to compel the attendance of witnesses, and when they do attend, we are bound to protect them *redeundo*."[98]

B. The Privilege as Applied to the Courthouse and Its Environs

Blackstone's second sentence—"And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting"[99]— addresses the sanctity of the court as a *place*, rather than formulating the privilege as attaching to certain people.[100]

An English case from 1674, in which a person was arrested while "entering his coach at the door of Westminster hall," was cited in a leading treatise in support of an expansive view of the privilege: "[I]t was agreed, that . . . *all persons whatsoever*, are freed from arrests, so long as they are in view of any of the courts at Westminster, or if near the courts, though out of view, lest any disturbance may be occasioned to the courts or any violence used . . . ."[101]

The salient points of this aspect of the privilege—that it applies to "all persons whatsoever" and that it precludes arrest not only in the courts but also "near the courts, though out of view"—are confirmed in other English cases. In *Orchard's Case*,[102] a person was arrested on civil process[103] either inside the court or "in the space between the outer and the inner doors" of the court.[104] Although Orchard was an attorney, he had no business before the court at the time of his arrest.[105] Thus, there was no claim (and could have been no claim) that Orchard enjoyed the privilege of someone "necessarily attending any

97. *Page Co.*, 261 U.S. at 448 (quoting *Stewart*, 242 U.S. at 130).

98. Norris v. Beach, 2 Johns. 294, 294 (1807).

99. BLACKSTONE, *supra* note 74, at *290.

100. *See also* JAMES FRANCIS OSWALD, CONTEMPT OF COURT, COMMITTAL, AND ATTACHMENT, AND ARREST UPON CIVIL PROCESS, IN THE SUPREME COURT OF JUDICATURE: WITH THE PRACTICE AND FORMS 193 (London, William Clowes & Sons, Ltd., 2d ed. 1895) (discussing "[p]laces in which persons are privileged from arrest").

101. 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 530 (London, A. Strahan, 7th ed. 1832) (emphasis added and omitted).

102. (1828) 38 Eng. Rep. 987, 987; 5 Russ. 159.

103. The arrest was pursuant to a writ of *capias ad satisfaciendum*. *Id.*

104. *Id.*

105. *Id.* ("It was admited that *Orchard* was not in court for the purpose of professional attendance, or of discharging any professional duty.").

courts of record upon business."[106] Instead, the case was argued and decided on the basis of a privilege of *place*, with Orchard's representative submitting:

> that every place, in which the Judges of the King's superior courts were sitting, was privileged, and that no arrest could be made in their presence or within the local limits of the place where they were administering justice. To permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.[107]

In addition to quoting the sentence from Blackstone referencing a privilege "where the King's justices are actually sitting,"[108] Orchard's counsel cited *Long's Case*,[109] wherein arrest had been made "in the palace-yard, not far distant from the hall gate, the Court being then sitting."[110] The arresting officer in this case was "committed to the *Fleet*, that he might learn to know his distance."[111] In *Orchard's Case*, the court (after discharging Orchard from custody) "admonished the officer to beware of again acting in a similar manner."[112]

The common-law privilege surrounding the court was deemed sufficiently important that it extended beyond arrest, to mere service of process. In *Cole v. Hawkins*, for example, the court held that an attorney attending court was privileged from service made on the courthouse steps, because "service of a process in the sight of the Court is a great contempt."[113]

American jurists likewise recognized this component of the privilege protecting the *place* of the court. In *Blight v. Fisher*, a federal judge explained that

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106. BLACKSTONE, *supra* note 74, at 288.

107. 38 Eng. Rep. at 987.

108. *Id.* (quoting BLACKSTONE, *supra* note 74, at 289).

109. (1676-77) 86 Eng. Rep. 1012; 2 Mod. 181.

110. 38 Eng. Rep. at 987 (quoting *Long's Case*, 86 Eng. Rep. at 1012).

111. *Id.* The reference was to the Fleet Prison, the "most venerable of all English prisons." Margery Bassett, *The Fleet Prison in the Middle Ages*, 5 U. TORONTO L.J. 383, 383 (1944).

112. 38 Eng. Rep. at 988.

113. (1738) 95 Eng. Rep. 396, 396; Andrews 275, 275. The court rejected the argument that service of process on the courthouse steps "did not hinder, or tend to hinder" the court's business. *Id.* In the New Jersey case of *Halsey v. Stewart*, 4 N.J.L. 366, 368 (1817), a "leading authority" cited by the Supreme Court, *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916), the court took a similarly expansive view of the privilege, discrediting "the idea, that the interruption of the court, must arise from noise, disturbance, or confusion created by the service, in its presence." The court afforded the privilege to a person who was initially read the summons by the sheriff "while descending the steps" from the courthouse, but upon whom the summons was not served until later when he was meeting with counsel in his office. *Id.* at 367.

"[t]he service of process . . . in the actual or constructive presence of the court, is a contempt, for which the officer may be punished."[114] The decision relied on *Cole v. Hawkins* and on the Pennsylvania Supreme Court's decision in *Miles v. M'Cullough* setting aside process served on a person attending oral argument.[115]

These seminal cases—*Blight*, *Cole*, and *Miles*—were cited in Greenleaf's 1864 treatise on evidence, which likewise understood the privilege as heightened at the courthouse and its surroundings, encompassing protection not only from arrest but also from service of process. "[I]t is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending; though any service elsewhere without personal restraint, it seems, is good."[116]

* * *

The tendency of American courts was to expand the privilege,[117] and the privilege as it pertained to persons expanded in some instances to encompass protection from service of process even if it occurred beyond the "actual or constructive presence of the court."[118] This expansion of the privilege as applied to some *persons* attending court,[119] did not diminish or otherwise alter the privilege as to *place* described in *Blight* and established in other English and American decisions. The broad contours of the privilege as to *place* were that it ap-

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114. 3 F. Cas. 704, 704-05 (C.C.D.N.J. 1809) (No. 1,542). The court noted that the strand of the privilege pertaining to *persons* "extends only to an exemption from arrest." *Id.* at 704.

115. *Id.* at 705 (citing *Cole*, 95 Eng. Rep. 396; *Miles v. M'Cullough*, 1 Binn. 77 (Pa. 1803)).

116. GREENLEAF, *supra* note 75, at § 316, at 475 (footnote omitted); *see also In re* Healey, 53 Vt. 694, 696 (1881) (noting a similar understanding of the privilege); *Cole*, 95 Eng. Rep. at 396 (same); *Blight*, 3 F. Cas at 704 (same); *Miles*, 1 Binn. at 77 (same).

117. Larned v. Griffin, 12 F. 590, 592 (C.C.D. Mass. 1882) (describing "the tendency in this country . . . to enlarge the right of privilege so as to afford full protection to suitors and witnesses from all forms of process of a civil character during their attendance before any judicial tribunal, and for a reasonable time in going and returning").

118. *Blight*, 3 F. Cas at 704-05. In *Parker v. Hotchkiss*, the court understood *Miles v. M'Cullough* as applying the privilege pertaining to persons, and "plac[ing] the case of a summons on precisely the same ground as that of an arrest on the score of privilege." 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849) (No. 10,739) (discussing *Miles*, 1 Binn. 77). The Supreme Court later noted that *Parker* had expanded the protection from service beyond that recognized in *Blight* and had given rise to a line of federal decisions that "consistently sustained the privilege" to protect *persons* from service of process regardless of their proximity to the *place* of the court. *Stewart*, 242 U.S. at 130-31 (citing *Parker*, 18 F. Cas. at 1138, as "overrul[ing]" *Blight*, 3 F. Cas. 704; other citations omitted).

119. As noted above, the Supreme Court's decisions were addressing the immunity of nonresidents from service of process. *See supra* notes 91-93 and accompanying text.

plied to prevent arrest and service of process, both at the courthouse or near it, and to all persons regardless of whether or not they were pursuing business before the court.

IV. APPLYING THE COMMON-LAW PRIVILEGE TO CONTEMPORARY COURTHOUSE IMMIGRATION ARRESTS

As arrest gave way to summons as the principal means for initiating a civil suit, the privilege from arrest fell into disuse, and courts increasingly concerned themselves with questions of immunity from service of process.[120] ICE's courthouse arrests justify awakening the doctrine for three compelling reasons. First, the common-law privilege was typically used to address arrests commencing civil litigation. As immigration proceedings are civil, the privilege maps well onto courthouse arrests for immigration violations. Second, the policy objectives underlying the privilege align significantly with the concerns expressed regarding courthouse immigration arrests. And third, the American incorporation of the privilege demonstrates that federal and state courts alike have an interest in enforcing the privilege, making the doctrine particularly apt for resolving the federalism conflict created by courthouse arrests.

Thus, state and local courts not only have the legal authority to protect their courthouses and people coming and going on court business, but also their authority is likely to be respected.

A. Immigration Enforcement Is Largely Civil Enforcement

The Supreme Court has explained that immigration arrests that initiate deportation proceedings are civil in nature.[121] In *Arizona v. United States*, the Court noted that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and that where a person is seized "based on nothing more than possible removability, the usual predicate for an arrest is

120. *See supra* note 71.

121. There are, of course, immigration crimes that may be enforced through criminal arrests and criminal prosecutions. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281 (2010) (describing rise of criminal immigration enforcement); *see also* Chacón, *supra* note 25, at 137 ("In recent years . . . the U.S. government has increasingly handled migration control through the criminal justice system."); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1470 (2015) (documenting the rise of criminal immigration prosecutions). This Essay does not address the applicability of the common-law privilege from arrest to arrests for crimes.

absent."[122] Such an arrest must find justification in federal immigration statutes and regulations, which generally require that trained federal immigration officers perform the arrest.[123] And the proceedings that such an arrest initiates are also characterized as civil: "Removal is a civil, not criminal, matter."[124]

The legal categorization of immigration arrests and proceedings as civil supports application of the common-law privilege, which was largely used to address civil arrests.[125] Furthermore, important similarities exist between civil immigration arrests and civil arrests commencing private litigation. They are both arrests—physical seizures of a person—made by public "officers."[126] For the privilege to apply, the arrests occur either in or near the courthouse,[127] or the arrests are of people who are attending the courts on business.[128] The arrests are followed by jail. And they are accomplished in order to commence a second, unrelated legal proceeding in a different court.[129] These similarities, particularly when considered in light of the policy rationales supporting the privilege,[130] and the shared federal and state interest therein,[131] support application of the privilege.

Reframing immigration arrests as somehow criminal in nature—based on, for example, the fact that immigration proceedings are initiated by the federal government rather than a private litigant—could conceivably support an argument against application of the privilege. But doing so would turn existing precedent on its head and undermine a premise currently used to justify denying criminal-style procedural protections to immigrants in removal proceedings, making this an argument unlikely to come from the federal government.[132]

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122. 132 S.Ct. 2492, 2505 (2012) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)).

123. *Id.* at 2505-06. This Essay does not examine whether the statutory basis for a lawful civil immigration arrest is being met in the courthouse immigration arrests that are occurring. The privilege against arrest would apply even in the face of an otherwise lawful arrest.

124. *Id.* at 2499; *see also Lopez-Mendoza*, 468 U.S. at 1038 ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country.").

125. *See supra* note 71.

126. *See* Orchard's Case, (1828) 38 Eng. Rep. 987, 987; 5 Rus. 158 (referring to the "officer" who made the arrest); *Long's Case*, (1676-77) 86 Eng. Rep. 1012, 1012; 2 Mod. 181, 181 (referring to the same).

127. *See supra* Section III.B.

128. *See supra* Section III.A.

129. *See supra* note 91 and accompanying text.

130. *See infra* Section IV.B.

131. *See infra* Section IV.C.

132. *Lopez-Mendoza*, 468 U.S. at 1038 (explaining that "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a

B. Significant Policy Alignment

The policy reasons underlying the common-law privilege from arrest dovetail nicely with the objections raised to courthouse immigration arrests. The privilege was principally concerned with protecting the business of the court.[133] The privilege pertaining to the place of the court—preventing all arrests in the "face"[134] or "view"[135] of the court, or "near the courts, though out of view"[136] (in the "constructive presence"[137])—prevented "violence" and "disturbance" in or near the courts.[138] This preservation of decorum[139] upheld the dignity and authority of the court generally.[140] But the privilege of place attaching to the courthouse was also deemed essential to the administration of justice itself:[141]

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deportation hearing"). Some have argued that the rise of a "crimmigration" enforcement system justifies importation of criminal procedural protections into immigration proceedings. *See, e.g.*, Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System*, 42 COLUM. J.L. & SOC. PROBS. 261, 291 (2008) (describing immigration enforcement as "a system of criminal investigation and punishment held only to civil law standards" and arguing for application of criminal protections); Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 558-59 (2016) (describing the push to "extend[] to immigrants enhanced judicially enforced procedural protections" but arguing that "[j]ust as the Warren Court revolution in constitutional criminal procedure failed to ameliorate the harshness of substantive criminal law, more robust immigration procedural protections would likely fail to reorient immigration enforcement in a more humane and sustainable direction").

133. *Long*, 293 U.S. at 83 (describing the privilege as "founded upon the needs of the court").

134. Whited v. Phillips, 126 S.E. 916, 917 (W. Va. 1925).

135. BACON, *supra* note 101, at 530.

136. *Id.*

137. *Blight*, 3 F. Cas. at 704.

138. BACON, *supra* note 101, at 530 ("[L]est any disturbance may be occasioned to the courts or any violence used.").

139. *See Orchard's Case*, 38 Eng. Rep. at 987; 5 Russ. at 159 (arguing that "[t]o permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.").

140. *See* Bramwell v. Owen, 276 F. 36, 41 (D. Or. 1921) (citation omitted) (stating that the "rule is even buttressed upon a broader principle, namely, that it is a privilege of the court as affecting its dignity and authority, and is founded upon sound public policy."); Bridges v. Sheldon, 7 F. 17, 44 (C.C.D. Vt. 1880) ("The privilege arises out of the authority and dignity of the court where the cause is pending"); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity . . . .").

141. *See, e.g.*, *Parker*, 32 N.E. at 989 (stating the privilege "is deemed necessary . . . in order to promote the due and efficient administration of justice . . . .").

> This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power.[142]

Justice was thought to be hindered in two ways by courthouse arrests. First, the threat of arrest and additional litigation might "disturb and divert the witness so that on the witness stand his mind might not possess that repose and equipoise essential to a full and true deliverance of his testimony."[143] Proceedings might even be interfered with, interrupted, or delayed by the arrest of a witness or party.[144] Second, the fear of arrest might deter parties and witnesses from coming to court at all.[145] To borrow the words of Chief Justice Lee in *Cole v. Hawkins,* "it would produce much terror."[146]

This last reason, of course, was why the privilege pertaining to *people* attending court was extended "eundo et redeundo."[147] Protection at or near the courthouse was deemed insufficient, so the threat of arrest was removed as a possibility (and a deterrent) during the journey to and from the courthouse. Only in this way could the courts be made "available to suitors, *fully available,* neither they nor their witnesses subject to be embarrassed or vexed while at-

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142. Hale v. Wharton, 73 F. 739, 741 (C.C.W.D. Mo. 1896)

143. *Id.*

144. Stewart v. Ramsey, 242 U.S. 128, 129 (1916) (quoting Parker v. Hotchkiss, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849)) (stating that the privilege "is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify").

145. *Id.* at 130-31 ("Witnesses would be chary of coming within our jurisdiction . . . and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense . . . ." (quoting *Parker,* 18 F. Cas. 1137, 1138)); Person v. Grier, 66 N.Y. 124, 126 (N.Y. Ct. App. 1876) ("Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done."); Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (stating that "justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony."); Bramwell v. Owen, 276 F. 36, 40 (D. Or. 1921) (noting that deterring witnesses "would result many times in a failure of justice").

146. (1738) 95 Eng. Rep. 396, 396; Andrews 275, 275.

147. Meekins v. Smith (1791) 126 Eng. Rep. 363, 363; 1 H. Bl. 636, 636.

tending, the one 'for the protection of his rights,' the others 'while attending to testify.'"[148]

All of these policy reasons support application of the privilege to courthouse immigration arrests, given the shared features of immigration arrests and arrests to which the privilege was applied at common law.[149] The prospect of arrest and jail—whether at the hands of an eighteenth-century English or American lawman or a twenty-first-century ICE officer—provides a powerful deterrent to the attendance of parties and witnesses in court. Indeed, echoing the concern of "terror" raised by Chief Justice Lee in *Cole v. Hawkins*[150] (who was merely discussing service of process), those chief justices objecting to ICE's courthouse arrests have principally complained about the "chilling effect" of ICE arrests.[151] Furthermore, the prospect of violent courthouse arrests, like those captured on video in Denver, for example, offers no less a threat today to the decorum, dignity, and authority of the courts than it has in the past.[152]

The ancient foundations of the common-law privilege also neatly address the argument put forth by the Attorney General and DHS Secretary: that courthouse arrests are lawful because they take place in a "public place based on probable cause."[153] Attorney General Sessions and Secretary Kelly relied on a Supreme Court case, *United States v. Watson*, in which postal officers conducted a warrantless arrest of the defendant in a restaurant.[154] In *Watson*, the Court relied heavily on an examination of common-law sources (including Black-

148. Page Co. v. MacDonald, 261 U.S. 446, 448 (1923) (emphasis added).

149. *See supra* Section IV.A.

150. Cole v. Hawkins (1738) 95 Eng. Rep. 396; Andrews 275.

151. *E.g.*, Balmer Letter, *supra* note 17, at 2 (noting the "chilling effect" of courthouse arrests); Rabner Letter, *supra* note 18, at 1 (same); Rogers Letter, *supra* note 19, at 1 (worrying that courthouses will be seen "as places to avoid"). The common-law privilege, in its application "eundo et redeundo," *Meekins*, 126 Eng. Rep. at 363, addresses the concern that even if ICE ceases arrests in courthouses it will simply wait outside the courthouse to make its arrests. *Cf.* S. 845, 115th Cong. § 2 (2017) (proposing a 1,000-foot penumbra around "sensitive locations" including courthouses).

152. *See* Meltzer, *supra* note 9.

153. Sessions Letter, *supra* note 23, at 1.

154. 423 U.S. 411, 412-13 (1976). Note that the case is cited incorrectly as 432 U.S. 411 in Sessions Letter, *supra* note 23, at 1. A critique of *Watson* is beyond the scope of this Essay, as is the question of *Watson*'s suitability as authority to justify ICE courthouse arrests. The assertion by the Attorney General and Secretary Kelly that *Watson* supports ICE courthouse arrests because ICE is "authorized by federal statute" to arrest based upon probable cause of removability, Sessions Letter *supra* note 23, at 1 (citing 8 U.S.C. § 1357), is at best incomplete. The statute, as the Supreme Court has pointed out, indicates such warrantless arrests are permissible "only where the alien 'is likely to escape before a warrant can be obtained.'" Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) (quoting 8 U.S.C. § 1357(a)(2)).

stone) and ultimately held that its Fourth Amendment jurisprudence "reflect[s] the ancient common-law rule" regarding warrantless arrest, and that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact."[155]

But to say that an arrest in a restaurant is consonant with "the ancient common-law rule" is to prefer the more general rule (concerning arrest on probable cause in a public place) to the more specific—but equally ancient and well-established in the common law—rule examined here, the common-law privilege from arrest. Indeed, these two rules can coexist comfortably, as the former is a rule for determining when an arrest is lawful and the latter a rule for determining when there is a privilege from even lawful arrests.

This is not to say the common law rejected the notion of the courthouse as a public place. Rather, to ensure that the courts remained truly accessible to the public, it was deemed necessary to proscribe arrests at or near courthouses,[156] and of those coming and going from the court.[157] The Supreme Court acknowledged the wisdom of this "balance struck by the common law"[158] when it quoted a leading early American case grounding the privilege in the notion that "[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."[159]

C. *Shared Interests of Federal and State Courts*

Because ICE can work closely with other agencies in the federal criminal justice system, it has not found it necessary to make arrests in federal courthouses, and the federal courts will likely have little need to assert the privilege from arrest in order to protect their own administration of justice. But American judicial decisions demonstrate the aligned interests of federal and state tribunals in advancing the public policy goals of the common-law privilege from arrest. First, federal, state, and local governments historically demonstrated a shared interest in applying the privilege from arrest to protect their own courts and those attending them, and therefore a shared interest in the idea that those courts are sufficiently empowered to do so. Second, all courts—federal, state,

155. *Watson*, 423 U.S. at 418, 421.

156. *See supra* Section III.B.

157. *See supra* Section III.A.

158. *Watson*, 423 U.S. at 421.

159. Stewart v. Ramsey, 242 U.S. 128, 129 (1916) (quoting Halsey v. Stewart, 4 N.J.L. 366, 367 (N.J. 1817)).

and local—demonstrated a shared interest in enforcing the privilege as to other courts, that it might likewise be enforced by other courts as to their own.

The privilege from arrest has been deemed necessary to preserve courts' ability to administer justice.[160] The jurisprudence surrounding the privilege unsurprisingly establishes that protecting the courthouse and its environs from disruption and violence (as accomplished by the privilege as to place) and protecting the administration of justice by privileging those with business before the court (as accomplished by the privilege as to people) is deemed a necessary power belonging to all courts.[161]

The most obvious demonstration of this power, at common law, was each court's power to issue a writ of protection. That the power to issue such writs was held by American courts at common law is demonstrated by numerous authorities.[162] A Rhode Island case recounted that a writ of protection had issued

> in the ordinary form, commanding the sheriffs of the several counties, and their deputies, that they "let the said William T. Merritt of and from all civil process, whether original or judicial, so long as he shall attend said court, and until he shall be discharged from the protection aforesaid by this court at the present term."[163]

But the writ of protection was not deemed necessary[164]—the power to grant privilege from arrest was deemed "*a power inherent in courts.*"[165] This inherent power flowed necessarily from the understanding that courts could not do justice without "preventing delay, hindrance, or interference with the orderly ad-

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160. *See supra* Section IV.B.

161. Beyond the scope of this Essay is the question of whether a sovereign government can exercise power over the privilege through nonjudicial action, or whether the power over the privilege is limited to the courts themselves. *Cf.* Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (describing the privilege as "a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice").

162. *See, e.g.*, Bridges v. Sheldon, 7 F. 17, 44 (D. Vt. 1880) ("A writ of protection issued out of that court is proper . . . "); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common-law jurisdiction . . . ."); HOWE, *supra* note 89, at 144-46 (describing Massachusetts procedure with respect to writs of protection).

163. Waterman v. Merritt, 7 R.I. 345, 345-46 (1862); *see also Ex parte* Hall, 1 Tyl. 274 (Vt. 1802) (issuing a writ and upholding liberal reading of the writ).

164. *See* Thompson's Case, 122 Mass. 428, 429 (1877) (recognizing the privilege "whether they have or have not obtained a writ of protection" (citations omitted)).

165. Wemme v. Hurlburt, 289 P. 372, 373 (Or. 1930) (citations omitted) (emphasis added).

ministration of justice"[166]—and that courts could not expect the attendance of parties and witnesses, even pursuant to court order, without the power (or obligation)[167] to also offer protection.[168]

Courts needed this power to operate, but they also needed other courts to recognize it. Indeed, the privilege can be understood as a rule governing the relationship of courts, whereby courts follow the rule out of a categorical imperative, respecting other courts' dignity[169] to ensure their own:

> Out of the enforcement of this policy has sprung the doctrine of comity. No court will direct its process to be served upon litigants before another court where it would protect its own litigants from a like service. Every court will aid every other court by permitting attendance upon one free from the danger of service of process by another. All courts recognize this principle of immunity involved.[170]

A leading case from New York put it similarly: "[T]his court ought not to suffer its process to be executed in violation of the privileges of other courts . . . ."[171] Moreover, the Supreme Court was emphatic in its endorsement of comity as applied to the privilege in a case where service of process in a federal case was served on a nonresident present in Massachusetts to attend state-court proceedings. The Court was asked to uphold the service of process on the ground that the federal lawsuit and the state-court proceedings were taking place in different jurisdictions, but the Court rejected this, holding that "[a] federal court in a State is not foreign and antagonistic to a court of the State within the principle . . . ."[172] The privilege against service of process

166. *Id.*

167. An important early decision from New York described the privilege as an obligation of the court, owing to the court's power to compel the attendance of persons before the court. Norris v. Beach, 2 Johns. 294 (N.Y. 1807).

168. Bridges v. Sheldon, 7 F. 17, 46 (D. Vt. 1880) (holding a writ of protection unnecessary, because "[t]he order to take testimony issued under the authority of the court carried with it the protection of the court"); United States v. Edme, 9 Serg. & Rawle 147, 151 (Pa. 1822) ("[T]he court must necessarily possess the power to protect from arrest all who are necessarily attending the execution of their own order.").

169. *See* Kaufman v. Garner, 173 F. 550, 554 (W.D. Ky. 1909) (stating that the rule is based on "the dignity and independence of the court first acquiring jurisdiction").

170. Feister v. Hulick, 228 F. 821, 823 (E.D. Pa. 1916).

171. Bours v. Tuckerman, 7 Johns. 538, 539 (N.Y. Sup. Ct. 1811); *see also* Vincent v. Watson, 30 S.C.L. (1 Rich.) 194, 198 (S.C. Ct. App. 1845) (describing *Bours* as expressing "[t]he rule most consistent with the courtesy due from the courts to each other, and with a proper care for the liability of the citizen").

172. Page Co. v. Macdonald, 261 U.S. 446, 447-48 (1923).

rests on "the necessities of the judicial administration," the Court wrote.[173] "[T]he courts, federal and state, have equal interest in those necessities."[174]

These decisions have two important implications for the current impasse over courthouse immigration arrests. First, state and local courts have the power "inherent in courts" to privilege from arrest those who attend their courts on business (in their coming, remaining, and returning) as well as those people present in and around the courts.[175] The letters asking ICE to stop making courthouse arrests need not be the last step taken—ICE's refusal to stop these arrests cannot deprive courts of a power they derive simply from being courts. Second, if ICE refuses to respect the power of state and local courts concerning the privilege, once asserted, state and local courts can reasonably expect to be supported by the federal courts, if not the immigration courts, because of the federal courts' shared interest in upholding rules that address the administration of justice and therefore must be universally enforced. This is so even though the federal courts are not identically situated, as ICE arrests have not yet become a problem for federal courts. This difference is insufficient to make the federal courts "antagonistic" to the state courts.[176] That the privilege is thus universally followed[177] as a matter of comity[178] makes it a uniquely suitable solution to the federalism clash caused by immigration courthouse arrests.

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173. *Id.* at 448 (quoting Stewart v. Ramsay, 242 U.S. 128, 130 (1916)).

174. *Id.* at 448.

175. Wemme v. Hurlburt, 289 P. 372, 373 (Or. 1930).

176. *Page Co.*, 261 U.S. at 447.

177. *See* People *ex rel.* Watson v. Judge of Superior Court of Detroit, 40 Mich. 729, 733 (1879) ("If any court were disposed to suffer its own process to be employed for such a purpose, any other court with competent authority should interfere to correct the wrong."); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) (noting that a writ of protection "would be respected by all other courts"); Sofge v. Lowe, 176 S.W. 106, 108 (Tenn. 1915) (applying the privilege in an interstate setting, and concluding: "Justice, in such connection, is to be conceived of as a thing integral and not partible by state or jurisdictional lines; all courts must be presumed to interest themselves alike in promoting and keeping unhampered its fair administration . . . . The courts of this state will see to it that their processes are not used to thus embarrass the administration of justice in a sister state, and we shall expect the courts of other states to rule in reciprocation. Thus, by a species of comity, a common end will be served."); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, 4A FEDERAL PRACTICE AND PROCEDURE § 1078 (4th ed. 2015) (addressing the privilege as applied to service of process on non-residents, stating that "the objectives of the immunity doctrine and notions of judicial cooperation dictate that state courts should grant immunity to persons who have entered the jurisdiction for the purpose of attending federal proceedings and that federal courts should quash service made on those who are in the jurisdiction to attend pending state proceedings" (footnotes omitted)).

CONCLUSION

The common-law privilege from arrest provides a rule of law that could break the federalism impasse caused by immigration courthouse arrests. This Essay has attended to the substance and grounding of the rule,[179] demonstrating that state and local courts have the power to regulate courthouse arrests and in doing so, would be pursuing policy goals recognized by state and federal courts. But numerous questions for future study remain.

First, what are the procedural mechanisms by which the privilege against courthouse immigration arrests can be invoked? Perhaps the most obvious mechanism suggested by the analysis here would be for a court to issue some form of writ of protection. But might the privilege also be implemented by state or local legislative enactments?[180]

Second, what remedies are available for violations of the privilege (or of a writ of protection)? Certainly, the cases surveyed would suggest ICE agents making arrests in violation of the privilege might be held in contempt.[181] But

178. A question beyond the scope of this Essay is whether federalism under the Constitution would *require* federal actors to refrain from interfering with state and local sovereign governments by making arrests in violation of the common-law privilege.

179. There are many nuances in American jurisprudence, not explored here, which are artifacts of the doctrine's migration into the question of interstate personal jurisdiction. I have attempted to canvass the core of the privilege from civil arrest, which came into American law largely unquestioned. *See, e.g.*, Greer v. Young, 11 N.E. 167, 169-70 (Ill. 1887) (distinguishing between the question at hand, involving service of process, and the entrenched doctrine of privilege from civil arrest); Jenkins v. Smith, 57 How. Pr. 171, 173 (N.Y. Supr. Ct. 1878) (noting "[i]t is also well settled that a resident witness is privileged from arrest, but not from the service of a summons.").

180. There are some state statutes addressing privilege from arrest. *E.g.*, IDAHO CODE § 9-1303 (2017) (establishing privilege from arrest for subpoenaed witness); OR. REV. STAT. § 44.090 (2017) (same); ARIZ. REV. STAT. ANN. § 12-2213 (2017) ("A witness shall be privileged from arrest, except for treason, felony and breach of the peace, during his attendance at court, and in going to and returning therefrom, allowing one day for each twenty-five miles from his place of abode."). Such statutes raise additional questions—are they supplements to the common-law privilege or displacements of it? *See, e.g.*, Davis v. Hackney, 85 S.E.2d 245, 247 (Va. 1955) (interpreting Uniform Act regarding out-of-state witnesses as enacted in aid of the common-law privilege). If the latter, can state or local legislatures displace the common-law privilege without violating separation of powers principles? *See, e.g.*, State *ex rel.* Veskrna v. Steel, 894 N.W.2d 788, 801 (Neb. 2017) ("It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary.").

181. This is certainly suggested by the common-law cases surveyed herein. *E.g.*, *Larned*, 12 F. at 594 (stating that the "offender may be punishable for contempt if the arrest is made in the actual or constructive presence of the court . . . ."); *Ex parte* Hall, 1 Tyl. at 281 (in case where a writ of protection was violated, holding "the constable be in mercy for his contempt

could a violation of the privilege also support discharge from custody,[182] suppression of evidence or termination of immigration proceedings,[183] or a damages lawsuit?[184] Could declaratory or injunctive relief be available to prevent further violations?

Third, what is the relation between the privilege and other constitutional provisions guaranteeing individual rights[185] or trial rights for civil or criminal litigants,[186] or prescribing the structures of government?[187]

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of the Court"); *Long's Case*, 2 Mod. 181 (committing officer to the Fleet prison for making arrest in the yard of the court).

182. *E.g.*, *Larned*, 12 F. at 591 (noting an English common-law remedy whereby "writ of privilege" would result in prisoner's discharge); *id.* (collecting cases where discharge was accomplished by motion or by plea in abatement); Thompson's Case, 122 Mass. 428, 430 (1877) (noting that "any one arrested in violation of privilege may, like any other person unlawfully imprisoned or restrained of his liberty, be discharged by this court, or by any justice thereof, in the exercise of the general power to issue writs of habeas corpus." (citations omitted)); *Ex parte* Hall, 1 Tyl. At 281 (granting habeas petition and ordering discharge of the prisoner).

183. *See, e.g.*, Bramwell v. Owen, 276 F. 36 (D. Or. 1921) (quashing service made in violation of the privilege and dismissing suit); *Larned*, 12 F. at 594 (allowing a plea in abatement of civil suit initiated in violation of the privilege because such remedy "in our opinion is necessary to the due administration of justice, that this immunity extends to all kinds of civil process, and affords an absolute protection" (citation omitted)).

184. *See, e.g.*, Mary E. O'Leary, *11 Immigrants Arrested in 2007 Raids in New Haven Win $350K Settlement with Feds, Won't Be Deported*, NEW HAVEN REG. (Feb. 14, 2012), http://www.nhregister.com/news/article/11-immigrants-arrested-in-2007-raids-in-New-Haven-11527436.php [http://perma.cc/VU9K-3422] (reporting the settlement of claims alleging, *inter alia*, wrongful arrests by ICE agents).

185. *See supra* notes 153-155 and accompanying text (describing the use of common-law authorities to inform Fourth Amendment analysis); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (arguing that law enforcement policies that deter noncitizens from reporting crimes may be unconstitutional).

186. Trial rights implicated could include the right to a public trial; the right to testify, see Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (noting that a party's right to testify on his own behalf might be "hampered by the hazard that he may become entangled in other litigation"); the right to compulsory process, see Halsey v. Stewart, 4 N.J.L. 366, 367-68 (N.J. 1817) (noting that the privilege enables a litigant "to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights"); the right to be present at critical stages of the case, see Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action which may be used for the purpose of affecting its final determination."); and the right to present claims or defenses.

187. *See* New York v. United States, 505 U.S. 144, 155 (1992) (describing Tenth Amendment inquiry into "whether [the federal government] invades the province of state sovereignty reserved by the Tenth Amendment."); U.S. CONST. art. IV, § 4 (directing the United States to "guarantee to every State . . . a Republican Form of Government . . . .").

And finally, could the privilege be applied or extended to protect other government institutions by preventing arrests at probation offices, administrative courts, public legislative assemblies or offices, or government offices where benefits are sought or distributed?[188]

* * *

The search for a solution to the courthouse-immigration-arrests problem requires blowing the dust off ancient treatises and delving into centuries-old English cases. But there is a good reason the existence of the privilege from arrest now comes as breaking news. The privilege receded from the body of modern law not because the doctrine fell by the way, but rather because the practice of commencing civil litigation with an arrest did.[189] The privilege from arrest was firmly entrenched and undisputed in both English and American jurisprudence when the need for its application waned, and the courts moved on to busy themselves with questions concerning extension of the doctrine to the service of civil process. *Arrests* under circumstances in which the privilege would apply all but disappeared.[190]

The need to resort to ancient authority stands not as evidence of weakness in the doctrine, but rather as an attestation to how aberrational courthouse immigration arrests are. The poor instincts of those who have directed these arrests, and those who have defended them, desperate to harness local criminal systems even at the risk of harming their integrity, stand rebuked by this rule that has been "sustained by [an] almost unbroken current of authority."[191] Those who have expressed outrage at ICE's courthouse arrests and decried the harm they threaten to state and local courts, on the other hand, are fully vindicated by the privilege, its unquestioned status, and its policy justifications that echo undiminished across the centuries.

Their outrage, it seems, would have been shared by judges in every age.

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188. Other privileges from arrest, such as that for state legislators, *see* Thompson's Case, 122 Mass. 428 (involving legislative privilege), or relating to elections, *e.g.* KY. CONST. § 149 ("Voters, in all cases except treason, felony, breach of surety of the peace, or violation of the election laws, shall be privileged from arrest during their attendance at elections, and while they are going to and returning therefrom."), exist to protect government functions.

189. *See supra* note 71.

190. *Id.*

191. *Greer*, 11 N.E. at 187.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK and ERIC GONZALEZ

Plaintiffs,

-v-

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.

Defendants.

19-cv-8876(JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

Courts cannot be expected to function properly if third parties (not least the executive branch of the government) feel free to disrupt the proceedings and intimidate the parties and witnesses by staging arrests for unrelated civil violations in the courthouse, on court property, or while the witnesses or parties are in transit to or from their court proceedings. Accordingly, more than 500 years ago, the English courts developed a common law privilege against civil arrests on courthouse premises and against arrests of parties and other persons necessarily traveling to or from court. This ancient privilege, incorporated into American law in the early years of our republic by virtually all state and federal courts, has remained largely intact over the centuries. But now, according to the State of New York, the federal Immigration and Customs Enforcement agency ("ICE"), in implementation of an Executive

Order issued by the Trump Administration in January 2017 and a Directive to ICE agents promulgated in January 2018, has increased its civil arrests in or around New York state courthouses by a remarkable 1700 percent and more. By this lawsuit, plaintiff The State of New York, joined by co-plaintiff Eric Gonzalez (the District Attorney of Kings County), demand that these intrusions be halted.

In response, ICE now moves to dismiss the complaint, arguing, first, that it is none of this Court's business and second, that even if it is, the common law privilege against courthouse arrests doesn't apply to ICE. Finding these and ICE's other arguments without merit, the Court denies the motion to dismiss, for the reasons set forth below.

THE ALLEGATIONS

Plaintiffs The State of New York and the Kings County District Attorney commenced this suit on September 25, 2019, seeking both declaratory and injunctive relief. Specifically, the plaintiffs seek a declaration that ICE Directive No. 11072.1, Ex. A to Onozawa Decl. (Oct. 23, 2019), ECF No. 27 (the "Directive") is invalid, Compl., Prayer for Relief ¶¶ 2-4. They further ask that ICE be enjoined from "civilly arresting parties, witnesses, and any other individual coming to, attending, or returning from courthouses or court-related proceedings" in New York State. Id. ¶ 5.

According to the complaint, the Directive, which ICE promulgated on January 10, 2018, Compl. ¶ 42, served to formalize aspects of Executive Order No. 13,768, 82 Fed. Reg. 8799, promulgated on January 25, 2017 (immediately after President Trump took office), which directed ICE to vigorously enforce the immigration laws against so-called "sanctuary jurisdictions." According to the complaint, the impact of the Executive Order on arrests on or near the premises of New York state courthouses was immediate: They rose from 11 in 2016 to 172 in 2017. Compl. ¶ 58 n.9 (referencing Immigrant Defense Project, The Courthouse Trap 6 (Jan. 2019)). This shift was then formalized by ICE when it issued the Directive in early January 2018, after which such arrests rose still further, to 202 in 2018. Id.

The Directive provides that ICE agents may target for civil arrest on courthouse premises "aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed," Directive § 2. In addition, the Directive provides that ICE may similarly arrest aliens outside these specified categories, "such as family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding," in "special circumstances, such as

where the individual poses a threat to public safety or interferes with ICE's enforcement actions." Id.[1]

In response to the Executive Order and the Directive, civil arrests by ICE officers in and around New York state courthouses have, as noted, dramatically increased. Although the Directive purports only to offer guidance on how ICE officers should exercise their enforcement discretion on a "case-by-case basis," Directive § 2 n.1, plaintiffs infer from the more than 1700 percent increase in such arrests that the Directive actually embodies a conscious decision to conduct widespread immigration arrests in or around state courthouses, a reversal of ICE's pre-2017 policy to largely abstain from such arrests. Compl. ¶¶ 30-37, 58.

These arrests, according to the Complaint, have seriously prejudiced New York's sovereign interest in maintaining a functioning court system. And this is not just because the arrests are, by their very nature, disruptive. In addition, aliens who are parties to lawsuits have declined to attend

[1] The Directive does place some limits on the authority of ICE agents to conduct immigration arrests inside state courthouses. For example, the Directive states that "ICE officers and agents should generally avoid enforcement actions in courthouses, or areas within courthouses that are dedicated to non-criminal (e.g., family court, small claims court) proceedings." Id. The Directive also tells officers to cooperate with court security staff and to utilize non-public entrances and exits to the extent practicable. Id.

scheduled hearings, fearing arrest. This not only forces courts to adjourn proceedings, thereby wasting judicial resources, see, e.g., Compl. ¶¶ 68, 70, 75; see also Br. of Former Judges as Amici Curiae in Supp. of Pls.' Oppo. to Defs.' Mot. to Dismiss (Nov. 5, 2019), ECF No. 34, at 10-14 (hereinafter "Br. of Former Judges"), but also undermines New York's interest in allowing plaintiffs to pursue meritorious civil claims, Compl. ¶¶ 83-84; see generally Br. of Amici Curiae Immigrant Defense Project and 40 Legal Services Organizations, Public Defender Organizations, and Non-Profit Organizations in Supp. of Pls. (Nov. 5, 2019), ECF No. 30 (hereinafter "Br. of Immigrant Defense Project et al."); Br. of Former Judges 10-11. Further still, these arrests have interfered with New York's ability to prosecute crimes, both because witnesses who are undocumented aliens are afraid to come forward and also because even those defendants who are guilty of New York crimes are sometimes taken into ICE custody before they can be tried and convicted. Compl. ¶¶ 88-105. Finally, the Directive has also chilled crime reporting, with calls to the Brooklyn DA's Immigrant Affairs Unit declining by 67 percent from 2016 to 2018. Compl. ¶ 101; see also Br. of Former Judges 7-10.

Citing these harms, plaintiffs challenge the Directive on three separate grounds. Count One, Compl. ¶¶ 135-42, argues that ICE's courthouse arrest policy violates the ancient common law

privilege against civil arrest when one is present at a courthouse or necessarily traveling to or from court proceedings. This privilege, plaintiffs further argue, is presumptively incorporated into the Immigration and Nationality Act ("INA"), rendering the Directive "in excess of statutory jurisdiction, authority, or limitations" and therefore invalid under section 706(2)(C) of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(C); Compl. ¶¶ 121-29. Count Two argues that ICE's adoption of the Directive was arbitrary and capricious, in violation of section 706(2)(A) of the APA, because ICE did not adequately consider the harms that this policy would impose.[2] 5 U.S.C. § 706(2)(A); Compl. ¶¶ 130-34; see also Compl. ¶¶ 62-105; Br. of Former Judges 7-14; Br. of Immigrant Defense Project et al. Finally, citing these same harms, Count Three argues that the Directive violates the Tenth

[2] The Directive lists three purported justifications for this policy. First, "[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband. Accordingly, civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents." Directive § 1. Second, "many individuals appearing in courthouses for one matter are wanted for unrelated criminal or civil violations." Id. And third, "courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails." Id. None of these justifications addresses any of the harms that plaintiffs allege are inherent in implementation of the Directive.

Amendment to the U.S. Constitution because it impermissibly burdens the State of New York's operation of its judicial system. Compl. ¶¶ 135-42.

THE MOTION TO DISMISS

Defendants present six grounds for dismissal, the first three of which are jurisdictional in nature and are therefore brought under Fed. R. Civ. P. 12(b)(1), and the latter three of which are substantive in nature and therefore brought under Fed. R. Civ. P. 12(b)(6).

The first jurisdictional ground is that the interests plaintiffs ask this Court to protect are not within the "zone of interests" protected by the INA, 8 U.S.C. §§ 1101 et seq. The second is that ICE's immigration enforcement authority is "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2) and therefore unreviewable. The third is that the Directive is not a final agency action and therefore unreviewable under 5 U.S.C. § 704.

The first substantive ground is defendants' contention that there is no applicable common law privilege against courthouse civil arrests still extant. The second is that, even if there is such a privilege, it is preempted by the INA. The third is that plaintiffs do not, in any case, state a Tenth Amendment claim.

STANDARDS OF REVIEW

The Court considers each of these arguments in turn. As to the three grounds for dismissal under Rule 12(b)(1), the plaintiff bears the burden of demonstrating the existence of subject matter jurisdiction. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). But where, as here, the Court "relies solely on the pleadings and supporting affidavits, the plaintiff need only make a prima facie showing of jurisdiction." Id. "In determining whether a plaintiff has met this burden," the Court must "construe jurisdictional allegations liberally and take as true uncontroverted factual allegations." Id.

As to the three arguments under Rule 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). After discarding allegations that amount to nothing more than legal conclusions, see Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), the Court should "accept as true" what remains and "draw all reasonable inferences in plaintiff's favor." Beazley Ins. Co., Inc. v. Ace Am. Ins. Co., 150 F. Supp. 3d 345, 354 (S.D.N.Y. 2015) (citing In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)).

REVIEWABILITY

Defendants' three jurisdictional arguments are all premised on the notion that the Directive and ICE's actions pursuant to the Directive are simply not reviewable by a federal district court. Defendants ask the Court to hold that ICE has unfettered and unchallengeable discretion to adopt a policy of conducting immigration arrests in a setting where it previously did so only rarely, thereby expanding the agency's own authority and significantly altering its relationship with state governments. This result would be a most unusual one under our constitutional system, let alone in any nation that prides itself on adhering to the rule of law. The Court therefore approaches defendants' arguments on reviewability with some skepticism.

First, defendants argue that plaintiffs do not have a cause of action under the APA because the interests they seek to protect are not "within the zone of interests to be protected or regulated by" the INA. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchack, 567 U.S. 209, 224 (2012), (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 F.3d 150, 153 (1970)). Defendants note that the INA broadly authorizes the civil arrest of aliens in the United States, see 8 U.S.C. §§ 1226(a) & 1357(a). And while the INA creates immigration courts (that is, courts that are an arm of the executive) that allow individual aliens to challenge their arrest and removal, see 8 U.S.C. § 1252; 8 C.F.R. § 1003.0 et

seq., the statute does not explicitly provide a cause of action to the plaintiffs here, nor does it "create[] any entitlement or interest that Plaintiffs may invoke." Defs.' Mem. of Law in Supp. of Mot. to Dismiss (Oct. 23, 2019), ECF No. 26, at 8 (hereinafter "Mem.").

If the logic of defendants' arguments were carried to its extreme, ICE would become virtually a fourth branch of government, with unfettered discretion not subject to any meaningful review by any constitutional court. But in fact, the zone-of-interests test that must be satisfied to give the Court jurisdiction is "not especially demanding," Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014) (quoting Match-E-Be-Nash-She-Wish, 567 U.S. at 225) (internal quotation marks omitted), and the Court finds that it is satisfied here. Specifically, plaintiffs offer two rationales as to why their interests are not "so marginally related to or inconsistent with the purposes implicit in the [INA] that it cannot reasonably be assumed that Congress authorized the plaintiff to sue," Id. at 130 (internal quotation marks omitted), and either one is sufficient to satisfy this lenient standard. See Pls.' Mem. of Law in Oppo. to Defs.' Mot. to Dismiss (Nov. 5, 2019), ECF No. 33, at 3-4 (hereinafter "Oppo.").

First, as Judge Talwani of the District of Massachusetts recently held, the text of the INA reflects a Congressional "preference that federal immigration enforcement not impede state criminal law enforcement." Ryan v. U.S. Immigration and Customs Enf't, 382 F. Supp. 3d 142, 155 (D. Mass. 2019). For example, section 1231(a)(4)(A) of Title 8 provides that the agency may not remove an alien who is currently serving a sentence of imprisonment. Although an alien may be removed while on parole or supervised release, id., this subparagraph nonetheless demonstrates Congress's decision, at least in some circumstances, to respect the determinations of the various states' criminal justice institutions over those of federal immigration authorities. Similarly, the U-visa program, see 8 U.S.C. § 1101(a)(15)(U), provides immigration status to alien crime victims who assist law enforcement. This provision evidences not only "Congressional intent to offer visas to vulnerable persons," Defs.' Suppl. Mem. of Law in Further Supp. Of Mot. to Dismiss (Dec. 3, 2019), ECF No. 42, at 2 (hereinafter "Defs.' Suppl. Mem."), but also Congressional intent to facilitate federal, state, and local criminal law enforcement.

Second, plaintiffs here allege the kind of "secondary economic injuries" resulting from the waste of judicial resources that the Second Circuit recently held sufficient to satisfy the zone-of-interests test, "notwithstanding that the

statute violated was not intended to protect against the type of injury suffered by the plaintiffs." C.R.E.W. v. Trump, 939 F.3d 131, 154 (2d Cir. 2019); see Compl. ¶¶ 2, 18, 66. Defendants argue that C.R.E.W.'s holding applies only to suits by competing firms, Defs.' Suppl. Mem. 3-4, but the language of the decision is not so narrow. For example, the C.R.E.W. court cited Bank of America Corp. v. City of Miami, 137 S. Ct. 1297, 1303-05 (2017), in which the Supreme Court held that Miami's predatory-lending suit against the bank fell within the Fair Housing Act's zone of interests because of the impact of foreclosures on the municipal budget.

The Court also notes that at least one circuit court has already recognized that state plaintiffs fall within the INA's zone of interests in a different context. See Texas v. United States, 809 F.3d 134, 163 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016) (challenging the Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans programs as violations of the INA on the ground that states are harmed as providers of public benefits).

The Court therefore finds that plaintiffs fall within the INA's zone of interests and that plaintiffs therefore have a cause of action for their APA claims under 5 U.S.C. § 702.[3]

[3] Defendants also cite additional cases where various non-profit organizations were found not to fall within the INA's zone of

Defendants' second ground for dismissal under Fed. R. Civ. P. 12(b)(1) is that plaintiffs' APA claims are unreviewable because immigration enforcement is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Court rejects this argument as well. While plaintiffs must "clear the hurdle of § 701(a)" before asserting an APA claim, Heckler v. Chaney, 470 U.S. 821, 828 (1985), this hurdle is not very high. An action is "committed to agency discretion by law" only where the statute is "drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (emphasis supplied). In other words, agency action is unreviewable "even where Congress has not affirmatively precluded review . . . if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler, 470 U.S. at 830.

As above, defendants cite sections 1226 and 1357 of the INA to demonstrate the agency's broad discretion to enforce the immigration laws and argue that such discretion deprives the court of any meaningful standard against which to judge ICE's

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interests. E.g., De Dandrade v. U.S. Dep't of Homeland Sec., 367 F. Supp. 3d 174, 188-90 (S.D.N.Y. 2019); INS v. Legal Assistance Project, 510 U.S. 1301 (1993) (in-chambers stay order by O'Connor, J.). But these cases are inapposite to the instant suit brought by government plaintiffs.

decision to arrest immigrants in and around state courthouses. Mem. 9-11. But as plaintiffs persuasively respond, Oppo. 5-8, defendants' argument presupposes that plaintiffs are wrong on the merits. As discussed below, plaintiffs allege that the INA incorporates a pre-existing common law privilege against civil arrest of those present at a courthouse and those necessarily coming and going. Compl. ¶¶ 106-16. If true, this would provide an obvious standard against which to evaluate the agency's exercise of discretion.[4] See Heckler, 470 U.S. at 830. Even assuming arguendo that plaintiffs were wrong on the merits of this argument, their contention satisfies their burden at this stage of the litigation to present a prima facie case for reviewability. See Robinson, 21 F.3d at 507.

Defendants also attempt to rely on the well-settled proposition that an agency's individual enforcement or prosecutorial determinations are generally committed to its discretion by law. See, e.g., Heckler, 470 U.S. at 831 ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to

[4] This argument does not, as defendants claim, conflate APA section 701(a)(2) with section 706(2). See Dep't of Commerce v. New York, 139 S. Ct. 2551, 2568 (2019); Defs.' Suppl. Mem. 4-6. Plaintiffs do not merely assert in the abstract that defendants' conduct violates the INA; they also allege that the common law privilege implicitly adopted by the INA provides a meaningful standard against which to judge the legality of the agency's actions. See 139 S. Ct. at 2568.

an agency's absolute discretion."). But this argument misunderstands the nature of the suit. Plaintiffs do not challenge ICE's decision to arrest particular aliens as opposed to others; they challenge instead what they allege to be a categorical policy to conduct immigration arrests in particular places where the statute (implicitly) and the common law (explicitly) do not permit such arrests. Such a policy would not be committed to unreviewable agency discretion.

Finally, defendants' third jurisdictional ground for dismissal under Rule 12(b)(1) is that the Directive is not final agency action and therefore unreviewable under section 704 of the APA. An agency action is final if two conditions are met: first, "the action must mark the 'consummation' of the agency's decisionmaking process;" and second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted).

Defendants concede that the first prong of the finality test is here met, but they argue that the Directive fails the second prong. In defendants' view, the Directive is a general statement of policy that "merely explains how the agency will enforce a statute or regulation — in other words, how it will exercise its broad enforcement discretion . . . under some extant statute or rule." Nat'l Mining Ass'n v. McCarthy, 758

F.3d 243, 251-52 (D.C. Cir. 2014); see Mem. 11-12; Defs.' Reply Mem. of Law in Further Supp. Of Mot. to Dismiss (Nov. 13, 2019), ECF No. 38, at 4-5.

Plaintiffs respond, however, that the facts as alleged in the complaint clearly show that the Directive is effectively an interpretive rule. Oppo. 8-9. It does not simply provide guidance to ICE officers on how to exercise their discretion, but rather embodies a conscious change in policy that is based on a new interpretation of the law. Oppo. 8-10. Such an interpretive rule would have legal consequences, as it would subject aliens to civil immigration arrest in settings where they were not previously so subject, and it would therefore be a final agency action. See Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 106 (2015).

The factors distinguishing policy statements from rules include "the actual legal effect (or lack thereof)," "the agency's characterization of the guidance," and "post-guidance events." McCarthy, 758 F.3d at 252-53. While the Directive purports only to offer guidance to officers on how to exercise their enforcement discretion "on a case-by-case basis," Directive § 2 n.1, the "post-guidance events" alleged in plaintiffs' complaint show beyond cavil that the Directive actually embodies a legally-consequential change to the agency's interpretation of the INA. Thus, while courthouse arrests by ICE

were not totally unheard of prior to the Directive, nevertheless, following its promulgation, according to the Complaint, civil immigration arrests by ICE officers in and around New York state courthouses increased by 1700 percent. Compl. ¶ 58; see also Br. of Immigrant Defense Project et al. 3. Moreover, these arrests have taken place within the courthouses themselves, e.g., Compl. ¶¶ 79-80, on their thresholds, id. ¶ 69, and only a short distance away, e.g., id. ¶¶ 72, 75, 77, 81. Among the latter category are situations where ICE officers have identified an alien within a courthouse and then followed her outside the building to conduct the arrest. E.g., id. ¶ 71.[5] Efforts by New York State to limit the practice, furthermore, have been ineffective. See Id. ¶¶ 52-61. A change of this magnitude necessarily suggests that the Directive embodies ICE's novel interpretation of its statutory authority to conduct

[5] Because of these factual allegations, defendants' argument that any agency action with respect to arrests around (rather than within) courthouses is not final under both Bennett prongs is unavailing. The Directive concededly says nothing on its face about arrests near or outside of a courthouse. But this Court has previously held that "an agency need not dress its decision with the conventional accoutrements of finality" in order to make it so. U.S. Gypsum Co. v. Muszynski, 161 F. Supp. 2d 289, 291 (S.D.N.Y. 2001) (internal quotation marks and alteration omitted). Here, ICE's "own behavior belie[s]" its contention that the Directive does not represent the "consummation of [its] decisionmaking process" about enforcement actions on the peripheries of courthouses. Id. (alterations omitted); Bennett, 520 U.S. at 177-78 (internal quotation marks omitted).

courthouse arrests, and not merely case-by-case guidance to individual officers.

Legal consequences flow from this interpretation. Particularly instructive on this point is U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807 (2016), which stands for the proposition that an agency's decision to deny a safe harbor to a party subject to regulation is a "legal consequence" for the purpose of a finality analysis. That case involved the U.S. Army Corps of Engineers's practice of issuing "jurisdictional determinations" upon the request of a private party, which determinations notified that party whether or not its property was subject to civil and criminal regulation under the Clean Water Act as "waters of the United States." Respondent Hawkes Co. had requested such a jurisdictional determination of its property; in response, the Army Corps of Engineers notified Hawkes that its property was waters of the United States, though it did not initiate any enforcement proceeding. Hawkes sued to challenge the jurisdictional determination, and the Government moved to dismiss on the ground that the jurisdictional determination was not a final agency action. 136 S. Ct. at 1811-13. The Supreme Court denied the motion to dismiss, holding that the jurisdictional determination was final agency action because it denied a five-year safe harbor from Clean Water Act regulation that Hawkes would otherwise have received. See also

Abbott Labs., 387 U.S. at 150 (noting that an agency interpretation that "would have effect only if and when a particular action" were brought can still be a final agency action) (citing Frozen Food Express v. United States, 351 U.S. 40 (1956)).

Here, similarly, the novel interpretation of the INA that plaintiffs allege to be embodied in the Directive has legal consequences for the aliens who were not previously subject to potential enforcement actions at state courthouses, but who now are, as well as for the proper functioning of the state courts themselves.[6] U.S. Army Corps of Engineers is, concededly, not precisely on point, because a favorable jurisdictional determination in that case would have granted respondent a binding, five-year safe harbor, while ICE's pre-Directive policy

[6] ICE's pre-Directive policy, promulgated in 2014, allowed courthouse arrests of limited categories of aliens, including those "engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security," as well as those "convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders." Ex. B to Onozawa Decl. In contrast to the Directive, this policy did not, for example, allow "individuals who may be 'collaterally' present, such as family members or friends" accompanying an alien in one of the prior categories to a court proceeding to be arrested at a courthouse. Id. Of course, the extent to which enforcement of the Directive actually differs from enforcement of the 2014 policy is a question of fact to be answered over the course of this litigation. But for the purposes of this motion to dismiss, the Court accepts as true the allegation in plaintiffs' complaint that courthouse arrests have dramatically increased in response to the Directive. Compl. ¶ 58; Iqbal, 556 U.S. at 678.

is not alleged to have prohibited courthouse arrests under all circumstances. 136 S. Ct. at 1812; see Compl. ¶ 58. But under a "pragmatic" view of finality, Abbott Labs., 387 U.S. at 149, the magnitude of the change in policy is sufficient to bear legal consequences for aliens subject to potential immigration enforcement. The Directive therefore is final agency action subject to judicial review.

LEGAL SUFFICIENCY

The Court now proceeds to consider defendants' three substantive arguments under Fed. R. Civ. P. 12(b)(6). The first such argument is addressed to Count One, which claims that the Directive is invalid because it violates the common law privilege against courthouse civil arrests, i.e., the privilege against arresting people in attendance on courthouse matters for unrelated civil violations either while they are on court premises or are traveling to or from court on their court-related matters. This raises two questions. Is the common law privilege still extant? And, if so, did the INA implicitly incorporate this privilege? After careful examination of the history, policy, and application of the common law privilege, as well as the text of the INA, the Court concludes that the answer to each of these questions is yes.

As a starting point, it is patently clear that English common law provided a privilege against any civil arrests in and

around courthouses, and also against civil arrests of witnesses and parties necessarily traveling to and from the courthouse.[7] Blackstone's famous Commentaries, on which early U.S. courts heavily relied in incorporating English common law into the laws of the several states and the United States, provides explicitly that:

> Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.

3 William Blackstone, Commentaries on the Laws of England 289 (1768). Furthermore, although the privilege goes back to at least the fifteenth century, Lasch, supra n.7, at 423, English courts reconfirmed this privilege in several late eighteenth and early nineteenth century cases, i.e., at the very time that English common law was being incorporated into the laws of the new states of the nascent American republic. See, e.g., Meekins v. Smith (1791), 126 Eng. Rep. 363, 363 ("[A]ll persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, (in which

[7] See generally Br. of Immigration Law Scholars as Amici Curiae in Supp. of Pls. (Nov. 5, 2019), ECF No. 32 (hereinafter "Br. of Immigration Law Scholars"); Christopher N. Lasch, A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis, 127 Yale L.J. F. 410, 432-439 (2017).

number bail were included) were intitled [sic] to privilege from arrest eundo et redeundo [going and returning], provided they came bona fide."); Walpole v. Alexander (1782), 99 Eng. Rep. 530, 530-31 (holding that a witness from France could not be arrested in England while in the country to testify in another case); Orchard's Case (1828), 38 Eng. Rep. 987, 987-88 (holding that a lawyer who was arrested while he was at a court in a non-professional capacity was not validly arrested).

The purposes of this privilege were both to encourage parties and witnesses "to come forward voluntarily," Walpole, 99 Eng. Rep at 531; The King v. Holy Trinity in Wareham (1782), 99 Eng. Rep. 530, 530-31, and also to maintain order in the courthouse, Orchard's Case, 38 Eng. Rep. at 987 ("To permit arrest to be made in the Court would give occasion to perpetual tumults . . . ."). It thus served, in either case, to enable courts to function properly.[8]

There is no real dispute between the parties here that this privilege was adopted into American common law after independence. But they differ as to whether it is still operative. To be sure, these early cases all occurred at a time when civil arrest of the defendant was the means by which a plaintiff initiated a civil suit. See Br. of Immigration Law

[8] See generally cases cited at Oppo. 16-18; and Br. of Immigration Law Scholars 8-10, 15-16.

Scholars at 8; Ryan, 382 F. Supp. 3d at 155-56 (citing Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 Yale L.J. 52 (1968)). Service of process ultimately replaced this form of civil arrest, and as a result, civil arrests in their earlier form were largely extinct at the time of the adoption of the INA. And, while criminal arrests remained, the common law privilege was never thought to apply to criminal arrests.

However, with the rise of the regulatory state, new forms of civil arrest arose, the most common of which are arrests of allegedly undocumented aliens. See I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984)("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."). The immediate question therefore is whether the common law privilege applies to such arrests.

The answer is plainly yes. The continuing availability of the common law privilege, and its breadth, is shown by the fact that even after the former kind of civil arrest had become obsolete, and before regulatory civil arrests had become common, both the highest court of New York and the U.S. Supreme Court continued to apply the privilege even when the intrusion was not an actual arrest but only a disruptive service of process. The

first such New York case, Person v. Grier, 66 N.Y. 124 (1876), involved a resident of Pennsylvania, William Grier, who was served with process for a New York civil action while in New York in order to serve as a witness in a separate matter. The Court of Appeals held that Grier was immune from service of process in New York under the circumstances, writing that:

> It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute eundo, morando et redeundo.

Id. at 125. Similarly, in Parker v. Marco, 136 N.Y. 585 (1893), a resident of South Carolina who was the defendant in an action in federal court in that state came to New York to attend a deposition of the plaintiff. The next day, as the defendant was beginning his journey back to South Carolina, the plaintiff served him with process for a new suit in New York state court that arose out of the same cause of action as the first lawsuit. The Court of Appeals held this defendant immune from suit, noting that the privilege "has always been held to extend to every proceeding of a judicial nature" and that "[i]t is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice." Id. at 589.

The leading U.S. Supreme Court case, Stewart v. Ramsay, 242 U.S. 128 (1916), likewise held that a Colorado resident was immune from civil service of process in Illinois while in that state to testify in a case where he was the plaintiff. The rule articulated in that case is that "suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going." Id. at 129.[9]

What these cases demonstrate is that the common law privilege against courthouse arrests had as its fundamental purpose the protection of the courts in carrying out their functions, and that this policy was so strong that, even in the brief period when civil arrests became rare, the privilege was extended to service of process. Far from being abandoned, therefore, the privilege was being expanded. This is as much as stated in Person, where the highest New York court held that "[i]t is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home." 66 N.Y. at 125 (emphasis

[9] While plaintiffs' argument rests on the contention that this privilege was incorporated into the common law of the various states, specifically New York, Stewart recognized this privilege as a matter of federal common law as well, and did so in part because of its ubiquity among the common laws of the states. See 242 U.S. at 130 ("The state courts, with few exceptions, have followed this rule . . . .").

supplied). A fortiori this privilege extends to civil immigration arrests.[10]

But, although we are ultimately concerned here with a New York state privilege recognized by the INA, this conclusion is also reinforced at the federal level by the limited privilege

[10] At oral argument before the Court, see Transcript 11/20/19 at 16:25-17:11, defendants sought to narrow the thrust of these cases by citing Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377 (1910), which in their view demonstrates that the privilege against courthouse civil arrest attaches only when the arrestee travels out of her state of residence for the purpose of attending a court proceeding. See also United States v. Green, 305 F. Supp. 125, 128 (S.D.N.Y. 1969) ("The rule of immunity was seen as generally applicable to persons ordinarily without the jurisdiction of a court, and, therefore, necessarily not amenable to its service of process, who appeared within that jurisdiction solely with respect to the cause there already underway."). Netograph held that a citizen of Ohio who was in New York as a defendant in a criminal trial was not immune from being served with process in an unrelated civil case as he was leaving the state following his acquittal. But Netograph is totally distinguishable, because it dealt with the situation where the defendant who appeared in court was there not voluntarily, but because he was a defendant in a criminal case. The court reasoned that the justification for the common law privilege "is to encourage voluntary attendance upon courts and to expedite the administration of justice," and that "that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law." Id. at 380. (Given the historical scope of the privilege, the Court notes without deciding a separate issue as to whether even such a criminal defendant could be arrested within a courthouse, rather than during his travels to and from the courthouse as the defendant in Netograph was. See Parker, 136 N.Y. at 589 ("It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice.").)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARIAN RYAN, in her official capacity as Middlesex County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; and the CHELSEA COLLABORATIVE, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 19-11003-IT
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Immigration and Customs Enforcement, Enforcement and Removal Operations, Acting Field Office Director; U.S. DEPARTMENT OF HOMELAND SECURITY; and KEVIN McALEENAN, in his official capacity as Acting Secretary of United States Department of Homeland Security,	*	
Defendants.	*	

MEMORANDUM & ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

June 20, 2019

TALWANI, D.J.

Middlesex County District Attorney Marian Ryan, Suffolk County District Attorney Rachael Rollins, the Committee for Public Counsel Services ("CPCS"), and the Chelsea

Collaborative, Inc. (collectively "Plaintiffs") bring this lawsuit against U.S. Immigration and Customs Enforcement ("ICE"), U.S. Department of Homeland Security ("DHS"), and several officials in their official capacity (collectively "Defendants"), challenging ICE's policy and practice of conducting civil immigration arrests inside of state courthouses in Massachusetts. In Count 1 of the Complaint [1], Plaintiffs challenge ICE Directive No. 11072.1, entitled "Civil Immigration Actions Inside Courthouses" (the "Courthouse Civil Arrest Directive"), dated January 10, 2018, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C). The APA commands a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Plaintiffs contend that at the time the Immigration and Naturalization Act ("INA") was enacted, all those appearing in court on official court business enjoyed a common law privilege against civil arrest. They argue that the INA does not explicitly extinguish this common law privilege and therefore must be interpreted to be constrained by it. Therefore, Plaintiffs contend, any ICE policies which permit civil courthouse arrests are in excess of the power granted by the INA and must be set aside by the court.

Defendants dispute the existence of a common law privilege against civil arrest in courthouses, and, alternatively, argue that any such privilege was superseded long before the codification of the current immigration scheme. Further, Defendants argue, if such a privilege existed in the past, Plaintiffs nonetheless lack both constitutional and prudential standing to bring this claim. Finally, the government contends that if Plaintiffs do have standing and the common law privilege exists, Congress nonetheless extinguished the privilege when it passed the INA.

Pending before the court is Plaintiffs' Motion for a Preliminary Injunction [5], which seeks to preliminarily enjoin Defendants from implementing the Courthouse Civil Arrest

Directive and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse. Finding that Plaintiffs have standing to bring this suit, are likely to succeed on the merits of their APA claim as to those not in federal or state custody when they arrive, and are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that an injunction is in the public interest, Plaintiffs' Motion for a Preliminary Injunction [5] is ALLOWED. Defendants are enjoined from implementing the Courthouse Civil Arrest Directive and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse. The court's order does not limit ICE's criminal arrests of such individuals or its civil arrests of individuals who are brought to Massachusetts courthouses while in state or federal custody.

I. Statutory and Regulatory Background

In 1952, Congress enacted the INA, governing, among other things, the presence of non-citizens (deemed "aliens" in the INA, 8 U.S.C. § 1101(a)(3)) in the United States and the associated procedures for removing those present in the United States without federal authorization. See INA, Pub. L. No. 82-414, 66 Stat. 163 (1952). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." Arizona v. United States, 567 U.S. 387, 396 (2012) (citing 8 U.S.C. § 1227); 8 U.S.C. § 1227 (a)(1)(B) (an alien present in the United States whose nonimmigrant visa has been revoked is deportable). "As a general rule, it is not a crime for a removable alien to remain present in the United States[,]" Arizona v. United States, 567 U.S. at 407, and removal proceedings are civil, not criminal, even where criminal activity underlies the reason for

removal. See id. at 396; see also 6 C. Gordon, S. Mailman, S. Yale-Loehr, & R.Y. Wada, Immigration Law and Procedure § 71.01[4][a] (Matthew Bender, rev. ed. 2016) (acknowledging "the uniform judicial view, reiterated in numerous Supreme Court and lower court holdings, ... that [removal] is a civil consequence and is not regarded as criminal punishment").

Since first enacted, the INA has granted authority for arrests with and without warrants. INA § 242(a), codified at 8 U.S.C. § 1226(a), provided that "[p]ending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody." INA § 242(a).[1] INA § 287(a)(2), codified as 8 U.S.C. § 1357(a)(2), authorized an immigration officer without a warrant, "to arrest any alien who in his presence or view is entering or attempting to enter the United States" unlawfully, or "to arrest any alien in the United States if [the officer] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." Id. § 287(a)(2).[2] "Although 8 U.S.C. § 1357(a)(2) does

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[1] In 1996, the provision for an arrest with a warrant was replaced by a substantively similar provision. Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009. As amended in 1996, 8 U.S.C. § 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on--
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a).

[2] Congress also amended this section in 1996 to add laws regulating the "removal of aliens" to the list of applicable laws one could be violating upon "entering or attempting to enter the United

not, by its terms, reveal its 'civil' or 'criminal" character,'" the First Circuit has determined that such arrests are civil. U.S. v. Encarnacion, 239 F.3d 395, 398 (1st Cir. 2001).

"A principal feature of the removal system is the broad discretion exercised by immigration officials." Arizona v. United States, 567 U.S. at 396. ICE instructs its agents and employees on its discretionary enforcement priorities through publicly released memoranda from its director. On March 2, 2011, the then-director of ICE distributed a memorandum about civil immigration enforcement priorities (hereinafter the "2011 Civil Enforcement Priorities Memorandum") as they relate to the apprehension, detention, and removal of aliens. ICE Policy Number 10072.1, 2011 Civil Enforcement Priorities Memorandum (Mar. 2, 2011). That memorandum explained that ICE had resources to remove each year less than four percent of the estimated removable population, and thus would prioritize its resources. Id. According to ICE, its top civil enforcement priority was the removal of "Priority 1" aliens: "[a]liens who pose a danger to national security or a risk to public safety." Id. at 1.

> These aliens include, but are not limited to: aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; aliens

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States[.]" Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009. Other than that change, 8 U.S.C. § 1357(a)(2), is the same as when the INA was first enacted in 1952, and provides:

> (a) Powers without warrant
> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
> ...
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]

8 U.S.C. § 1357(a)(2).

> convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; aliens not younger than 16 years of age who participated in organized criminal gangs; aliens subject to outstanding criminal warrants; and aliens who otherwise pose a serious risk to public safety.

Id. at 1-2. The memorandum notes that the provision concerning those who otherwise pose a serious risk to public safety "is not intended to be read broadly, and officers, agents, and attorneys should rely on this provision only when serious and articulable public safety issues exist." Id. at 2, n. 1. After those "Priority 1" aliens, ICE prioritizes the apprehension and removal of "[r]ecent illegal entrants" and "[a]liens who are fugitives or otherwise obstruct immigration controls." Id. at 2.

On June 17, 2011, the then-director of ICE distributed a memorandum entitled "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (hereinafter "Prosecutorial Discretion Memo"), Ex. C [28-3], directing ICE officers and attorneys to "exercise all appropriate prosecutorial discretion" in removal cases "to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice." Id. at 2. According to this memorandum, "it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime." Id. "Absent special circumstances, it is similarly against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties." Id. at 3. The memorandum continued that "[t]o avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints." Id.

In 2014, ICE addressed the application of these 2011 policies to "[e]nforcement actions at or near courthouses." Enforcement Actions at or Near Courthouses Memorandum (hereinafter the "2014 Courthouse Memorandum") Ex. B [28-2]. In that memorandum, ICE specified that "[e]nforcement actions at or near courthouses will only be undertaken against Priority 1 aliens, as described in [the 2011 Enforcement Priorities Memorandum]." Id. Further, courthouse enforcement actions, would "only take place against specific, targeted aliens, rather than individuals who may be 'collaterally' present, such as family members or friends who may accompany the target alien to court appearances or functions." Id. at 2. The memorandum directed further that "whenever practicable," such actions will be taken outside of public areas of the courthouse. Id.

On January 25, 2017, the President issued an executive order, entitled "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017). Of particular relevance to this case, section five of the Executive Order orders the Secretary of Homeland Security to prioritize the removal of removable aliens who "[h]ave been charged with any criminal offense, where such charge has not been resolved" and "[a]re subject to a final order of removal, but who have not complied with their legal obligation to depart the United States." [3] Id. On February 20, 2017, the then-Secretary of Homeland Security

[3] The Executive Order also instructs the Secretary to prioritize the removal of aliens described in 8 U.S.C. §§ 1182 (a)(2), (a)(3), and (a)(6)(C), 1225, and 1227 (a)(2) and (4). These individuals are inadmissible or deportable due to criminal convictions, are in or attempting to enter the United States to commit espionage, attempted to obtain admission through fraud, or are subject to expedited removal. See 8 U.S.C. §§ 1182 (a)(2), (a)(3), and (a)(6)(C), 1225, and 1227 (a)(2) and (4). The Executive Order further instructs the Secretary to prioritize the removal of removable aliens who:

> "(a) [h]ave been convicted of any criminal offense; . . . (c) [h]ave committed acts that constitute a chargeable criminal offense; (d) [h]ave engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; (e) [h]ave abused any program related to receipt of public

implemented that Executive Order and issued a memorandum entitled "Enforcement of the Immigration Laws to Serve the National Interest" (hereinafter the "2017 Memorandum"). 2017 Memorandum Ex. 9 [7-9]. The 2017 Memorandum directed ICE to prioritize the removal of aliens in accordance with the Executive Order, including aliens who "have been charged with any criminal offense that has not been resolved" and "are subject to a final order of removal but have not complied with their legal obligation to depart the United States." Id. at 3. The 2017 Memorandum rescinded, with exceptions not relevant here, "all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal . . . to the extent of the conflict [with the 2017 Memorandum]." Id.

On January 10, 2018, ICE issued Directive No. 11072.1, the Courthouse Civil Arrest Directive. Compl. Ex. D [1-4]. The Courthouse Civil Arrest Directive refers to the 2017 Memorandum and explains that ICE civil immigration enforcement actions inside courthouses include actions "against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location." Id. at 2. According to the policy, ICE will not arrest aliens other than the "target alien . . . absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions." Id. The Courthouse Civil Arrest Directive explains that the purpose of this policy, in part, is to "reduce safety risks"

> benefits; . . . or (g) [i]n the judgment of an immigration officer, otherwise pose a risk to public safety or national security."

Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

because "[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband." Id.

All of the foregoing relates to civil arrests for removal purposes, not criminal arrests. In 1990, the INA was amended to allow immigration officers to make warrantless criminal arrests. Pub.L. 101-649, Title V, § 503(a), (b)(1), Nov. 29, 1990, 104 Stat. 5048, 5049, codified at 8 U.S.C. 1357(a)(4). Those arrests, unlike arrests under § 1357(a)(2), require that the alien be brought before a magistrate judge, rather than an immigration officer. See U.S. v. Encarnacion, 239 F.3d at 398; see also Morales v. Chadbourne, 793 F.3d 208, 214-16 (1st Cir. 2015) (noting that "criminal custody" and ICE enforcement are different contexts). Plaintiffs' APA claim does not challenge ICE's authority to conduct criminal arrests.

II. The Record Before the Court Concerning Courthouse Arrests in Massachusetts State Courts

In July 2017, the Massachusetts Supreme Judicial Court released a decision about civil immigration detainers, holding that "Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody." Lunn v. Commonwealth, 477 Mass. 517, 537 (2017).

The Massachusetts Trial Court subsequently promulgated a policy entitled "Policy and Procedures Regarding Interactions with the Department of Homeland Security ["DHS"]." Mass. Trial Ct. Policy at 16-18 [46-1], effective November 13, 2017. The Policy is directed to civil, not criminal, enforcement action, specifically noting that nothing in the policy abrogates a court officer's authority to detain an individual pursuant to a criminal detainer or a warrant authorizing the arrest of an individual for a criminal offense. Id. at 16. According to the policy, Massachusetts Trial Court employees are required to respond to DHS requests for information

about an individual's case or probation in the same manner as a request by any other member of the public. Id. DHS officials "may enter a courthouse and perform their official duties provided that their conduct in no way disrupts or delays court operations, or compromises safety or decorum." Id. As applicable to all law enforcement officers, when an armed DHS official enters a courthouse, courthouse security personnel are directed to ask him or her the official law enforcement purpose for entering the courthouse and the proposed enforcement action to be taken, and that information is to be transmitted to a judicial officer if DHS officials state an intent to take into custody a party or other participant in a case before a judge or magistrate, or a person attending to business in the courthouse. Id.

The Policy includes separate procedures for individuals in custody, and those not in custody. Under the policy, individuals who are brought into court in custody, and are subject to release after a court proceeding, should be processed in the normal course, even if there is an immigration detainer. Id. Court employees do not have the authority to comply with or serve civil immigration warrants, but DHS officials are permitted to enter the holding cell area to take custody if the DHS official presents a civil arrest warrant or detainer and the court officer supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse. Id.

As to individuals coming to court who are not in custody, under the Policy, trial court employees may not impede or assist DHS in the physical act of taking such individuals into DHS custody. Id. DHS officials shall not be permitted to take an individual into custody pursuant to a civil immigration detainer or warrant in a courtroom, absent advance permission by a judicial officer. Id. The policy also requires court security personnel to draft an incident report for every instance in which DHS takes an individual into custody in the courthouse. Id.

In support of their motion, Plaintiffs submitted affidavits from the executive director of the Chelsea Collaborative, Vega Decl. Ex. 10 [7-10], an immigration law specialist from the Immigration Impact Unit at CPCS, Klein Decl. Ex. 11 [7-11], the Chief of Victim Witness Services for the Middlesex County DA's office, Foley Decl. Ex. 12 [7-12], the executive director of Lawyers for Civil Rights, an organization providing pro bono legal representation to immigrants, Espinoza-Madrigal Decl. Ex 13 [7-13], and a legal advocacy specialist with HarberCOV, an organization that provides services to people affected by abuse, Moshier Decl. Ex. 14 [7-14]. These affidavits aver that ICE is civilly arresting people at courthouses throughout Massachusetts. Espinoza-Madrigal Decl. ¶ 7, Ex. 13 [7-13]; Klein Decl. ¶ 6, Ex. 11 [7-11]. CPCS "regularly receives calls from defense counsel detailing incidents in which ICE arrests an individual outside the courthouse prior to entering the courthouse for their trial or pre-trial hearing." Klein Decl. ¶ 7, Ex. 11 [7-11]. Plaintiffs allege that these arrests are disruptive of civil and criminal proceedings. For example, Plaintiffs describe an arrest by two ICE officers at Somerville District Court as "look[ing] like a fistfight had broken out" and noting that court officers had to get involved to end the confrontation. Foley Decl. ¶ 7, Ex. 12 [7-12]. Plaintiffs report that prior to ICE targeting courthouses for enforcement actions, "noncitizen[s]…who were potentially removable" "did not express concern about appearing in court as plaintiffs, victims, or witnesses[,]" but now, noncitizens are reluctant to attend court in any capacity, "explicitly pointing to the presence of ICE in the courts." Vega Decl. ¶¶ 6-10, Ex. 10 [7-10]. The Middlesex Victim Witness Services office reports that "noncitizen victims and witnesses frequently express concerns about ICE's presence and deportation." Foley Decl. ¶ 6, Ex. 12 [7-12]. Individuals identified by the declarant as "permanent residents" have reported fear seeking the court's assistance for help with domestic violence concerns. Moshier Decl. ¶ 6, Ex. 14 [7-14].

"[Chelsea] Collaborative members who have been victims of employer abuse and wage theft have also refused to seek court intervention because of their fears of ICE presence in the courthouses." Vega Decl. ¶ 14, Ex. 10 [7-10].

Defendants represented at the hearings on this motion that "generally" ICE is not arresting people prior to their participation in hearings and is not targeting witnesses or victims. Defendants did not submit any countervailing affidavits, but submitted a copy of responses posted on a DHS website to frequently asked questions on sensitive locations policy and courthouse arrests. ICE Frequently Asked Questions on Sensitive Locations and Courthouse Arrests, as printed on May 6, 2019 (hereinafter "FAQ Responses") [46-1]. According to the FAQ Responses, "ICE does not view courthouses as a sensitive location," ICE has "for some time had established practices in place related to civil immigration enforcement inside courthouses," and "the increasing unwillingness of some jurisdictions to cooperate with ICE in the safe and orderly transfer of targeted aliens inside their prisons and jails has necessitated additional at large arrests." FAQ Responses at 8-9 [46-1]. The FAQ Responses note further that "[f]ederal, state, and local law enforcement officials routinely engage in enforcement activity in courthouses throughout the country," that the actions "are consistent with longstanding law enforcement practices nationwide," and that because individuals entering courthouses are typically screened for weapons, "civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents." Id. at 9. The FAQ Responses state further that these arrests "are the result of targeted enforcement actions against specific aliens." Id. at 10. The FAQ Responses also state that "ICE makes every effort to ensure that the arrest occurs after the matter for which the alien was appearing in court has concluded." Id.

III. Plaintiffs' Standing

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" Hollingsworth v. Perry, 570 U.S. 693, 704 (2013). Accordingly, the court turns first to Defendants' challenge to Plaintiffs' constitutional and prudential standing to bring their APA claim. Defs.' Br. at 6-11 [28].

A. Plaintiffs' Constitutional Standing

In order to satisfy the "irreducible constitutional minimum" of Article III standing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548. "The injury need not be 'significant'; a 'small' stake in the outcome will suffice, if it is 'direct.'" Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (quoting U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14 (1973)). "[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 41–42 (1976). The government argues that Plaintiffs lack an "injury in fact" and that the Plaintiffs' injuries are not traceable to the Courthouse Civil Arrest Directive. Defs.' Br. at 8-11 [34].

The court considers Plaintiffs' injury-in-fact first. Defendants argue that Plaintiffs do not face a threat that the Courthouse Civil Arrest Directive will be applied against them, and moreover, that they have no right to assert a claim against removal on behalf of others who may

be subject to such removal. Id. at 8. But this is not the injury that Plaintiffs are claiming. Plaintiffs "are not asserting incidental injury from Defendants' general enforcement of the immigration laws, but direct injury from Defendants' actions targeting courts for federal immigration enforcement." Pls.' Rep. Br. at 9 [41]. Defendants aptly summarize the DAs' complaints that "the ICE Directive increases their costs, diverts their resources, and makes their prosecutions more 'time consuming and difficult.'" Defs.' Br. at 9 [34] (citing Compl. ¶¶ 80, 82 [1]). The DAs claim that ICE civil arrests *in state courthouses*, the sole forum in which they can prosecute cases, are hindering the DAs' ability to carry out their primary functions as District Attorneys, and Chelsea Collaborative claims that these civil arrests impair their members' ability to protect themselves through the state courts from unlawful actions of other individuals. For example, Plaintiffs allege that survivors of domestic abuse are "reluctant to file for civil protective orders against abusive partners or appear [in] court as witnesses in criminal cases against their abusers." Moshier Decl. ¶ 4, Ex. 14 [7-14]. Fears concerning ICE's presence from victims and witnesses "have been more prevalent since the ICE policy was announced." Foley Decl. ¶ 6, Ex. 12 [7-12]. Victim Witness Advocates can no longer advise victims that their fear of arrest during the court process is unfounded. Foley Decl. ¶¶ 4-5, Ex. 12 [7-12].

Defendants argue that a state prosecutor does not suffer an injury in fact merely because a federal law-enforcement action (or threat of it) increases the time or costs associated with state prosecutions, and assert that they know of no case in which a court has found standing to challenge a federal law on this basis. Defendant conflates two issues, however. Federal prosecutions may well routinely burden state prosecutions (or vice versa), without there being a legal claim that may be asserted. But the inquiry here is whether there is a cognizable injury for purposes of Article III standing. The court agrees with Plaintiffs that being unable to reliably

secure the attendance of defendants, victims, and witnesses hinders the ability of the DAs to prosecute crimes and Chelsea Collaborative's members to secure their rights under state law and amounts to a particularized injury sufficient to constitute injury-in-fact. See Matter of C. Doe, No. SJ-2018-119 at 10-11 (Mass. Sept. 18, 2018), Ex. 7 [7-7] ("[T]he administration of justice in the Commonwealth suffers when litigants, witnesses, and others with business before the courts are afraid to come near a Massachusetts courthouse because they fear being arrested by immigration authorities.").

CPCS alleges that ICE's implementation of the Courthouse Civil Arrest Directive and the fear generated by courthouse arrests is impeding CPCS' representation of its clients and its ability to manage its expenses. CPCS's core function of representing criminal defendants is impeded when its clients are apprehended by ICE prior to appearing in court and proceedings are interrupted or altogether cannot continue. That alone is enough to constitute injury-in-fact. Further, CPCS declares that "time and resources have been consumed by...assisting defense attorneys whose clients have been impacted by this ICE enforcement policy." Klein Decl. ¶ 4, Ex. 11 [7-11]. CPCS has alleged a concrete and particularized injury sufficient to constitute injury-in-fact.

Though Defendants cite to several cases in support of their challenge to Plaintiffs' standing, none are applicable here.[4] The court finds that the injuries alleged by the Plaintiffs satisfy the Article III injury-in-fact requirements.

[4] New York v. United States, 505 U.S. 144 (1992), does not address the requirements for standing. In Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court held that the state did not have standing to sue because the provisions in the challenged statute were voluntary. Plaintiffs here are not suing under similar circumstances. Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011), is also inapplicable, because, in that case, Virginia passed a "non-binding declaration," id. at 270, declaring its opposition to a federal statute and then sued based on the conflict between its declaration and the federal law.

As to traceability, the government argues that each Plaintiff's injury is not traceable to the Courthouse Civil Arrest Directive because it results from "third-party aliens' decisions not to attend Massachusetts courts in an effort to evade arrest and removal proceedings." Defs.' Br. at 10 [34]. "This wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 168–69 (1997). The unwillingness of those at risk of ICE civil arrest to visit courthouses injures the DAs and Chelsea Collaborative members and is alleged be a direct result of the Courthouse Civil Arrest Directive. The DAs report that concerns from witnesses and victims about ICE's presence "have been more prevalent since the ICE policy was announced." Foley Decl. ¶ 6, Ex. 12 [7-12]. Before ICE began civilly arresting people at courthouses, Chelsea Collaborative helped members file suit, and helped members in litigation by filling courtrooms with supporters. Vega Decl. ¶ 6, Ex. 10 [7-10]. Now, Chelsea Collaborative struggles to persuade noncitizen members to go to court as victims, witnesses, or supporters. Vega Decl. ¶ 9, Ex. 10 [7-10]. According to Chelsea Collaborative, the "reluctance to attend court began soon after ICE's increase in targeted enforcement actions in courthouses." Id. The Courthouse Civil Arrest Directive "has caused a strain both on [Chelsea Collaborative's] personnel and [their] budget such that [they] are unable to effectively carry out many of [their] other goals and missions." Vega Decl. ¶ 22, Ex. 10 [7-10]. The injuries alleged by the DAs and Chelsea Collaborative are traceable to the Courthouse Civil Arrest Directive. Accordingly, the DAs and Chelsea Collaborative each have standing to bring this case.

The government argues that CPCS's "alleged injuries are caused by third-party aliens' decisions not to attend Massachusetts courts in an effort to evade arrest and removal proceedings." Defs.' Br. at 11 [34]. However, CPCS is not complaining that its clients are

voluntarily choosing not to attend court, but that ICE is civilly arrested their clients when these individuals come to state court to attend state proceedings against them. These arrests cause CPCS to expend resources to respond to civil courthouse immigration enforcement. CPCS contends that defense attorneys inside courthouses regularly discover that clients are arrested prior to entering the courthouse to appear at criminal proceedings, causing a default judgment to enter. Klein Decl. ¶ 7, Ex. 11 [7-11]. CPCS's cognizable injuries are traceable to ICE's courthouse arrest policy, and not to a third party. Therefore, CPCS also has standing to bring this case.

B. Plaintiffs' Prudential Standing

"The doctrine of standing also includes prudential concerns relating to the proper exercise of federal jurisdiction." Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996). "The interest [Plaintiffs] assert[] must be 'arguably within the zone of interests to be protected or regulated by the statute' that [Plaintiffs allege] was violated." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224-25 (2012) (noting that the prudential standing test "is not meant to be especially demanding") (internal citation omitted). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). Plaintiffs, therefore, need not be the target of ICE civil arrests or enforcement, but merely have interests that are more than "marginally related" to ICE enforcement in courthouses. The Plaintiffs here, as participants in the state civil and criminal justice systems, represent stakeholders affected by civil immigration arrests in state courthouses. Though no specified Congressional intent to include Plaintiffs in the

zone of interest of the INA is needed, Clarke, 479 U.S. at 399-400, Congress nonetheless indicated its preference that federal immigration enforcement not impede state criminal law enforcement. The INA specifies that the federal government "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231 (a)(4)(A). Considering this provision as an example, the low threshold necessary to satisfy the zone of interest test, and the plain interests of prosecutors, criminal defense attorneys, and an organization serving immigrants in the proper enforcement of immigration laws within courthouses, the court finds that Plaintiffs are within the statute's zone of interest and therefore have standing to pursue this case.

IV. Plaintiffs' Motion for a Preliminary Injunction

Having found that Plaintiffs have standing to bring their APA claim, the court turns to Plaintiffs' motion. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

A. Likelihood of Success on the Merits

1. Common Law Privilege Against Civil Courthouse Arrests

In England, for many centuries prior to the founding of the United States, civil litigants commenced their suits by having a civil defendant arrested. See Clinton W. Francis, Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840, 80 Nw. U. L. Rev. 807, 810 (1986); see also Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 Yale L. J. 52, 61 (1968) (In England, "arrest [was] the usual mode of beginning suit"). "[P]ersons so charged [in civil litigation] could be arrested

anywhere in England and brought within the custody of the [court]." Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 Yale L. J. 52, 62 (1968). "At common law, the writ of *capias ad respondendum* directed the sheriff to secure the defendant's appearance by taking him into custody." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999). The courts recognized that permitting arrests at courthouses of those attending court on other matters could chill attendance at those other proceedings. See The King v. Holy Trinity in Wareham, 99 Eng. Rep. 531 (1782) ("for the purposes of justice" those attending court proceedings were privileged from being arrested on civil process); Meekins v. Smith, 126 Eng. Rep. 363 (1791) (same).

The United States imported that procedure of civil arrest and that common law privilege against civil arrest at courthouses into its judicial system. See Stewart v. Ramsay, 242 U.S. 128, 130 (1916) ("[The privilege] is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify.") (quoting Parker v. Hotchkiss, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849)). "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." Larned v. Griffin, 12 F. 590, 590 (C.C.D. Mass 1882). The United States Constitution recognizes a similar privilege from civil arrest during legislative proceedings, stating that members of Congress are "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. CONST. art. I, § 6, cl. 1. In explaining this clause in his treatise on the Constitution, Justice Storey underscored the fundamental nature of the privilege against

courthouse arrests, noting that "[t]his privilege is conceded by law to the humblest suitor and witness in a court of justice." Williamson v. United States, 207 U.S. 425, 443 (1908) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (1883)). Indeed, courts in the United States have recognized that "justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony." Diamond v. Earle, 217 Mass. 499, 501 (1914).

The writ of *capias ad respondendum* eventually gave way to personal service of summons or other form of notice. International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945). As the preferred means for obtaining a civil defendant's presence in a lawsuit changed from a civil arrest to a summons and civil process, state and federal courts recognized the need for that privilege's continued applicability, though this procedure was even less intrusive than a civil arrest. See Page Co. v. MacDonald, 261 U.S. 446, 448 (1923) (recognizing the importance of this privilege and the "necessity of its inflexibility"); Stewart v. Ramsay, 242 U.S. 128, 130 (1916) (citing with approval Parker v. Hotchkiss, 18 F. Cas. at 1138 and applying the privilege against arrest in a courthouse to being served with a summons while attending a court proceeding); Diamond v. Earle, 217 Mass. 499, 501 (1914) (exempting courthouse attendees from service of civil process). Such an "absolutely indispensable" privilege, Williamson, 207 U.S. at 443 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1883)), so fundamental to the functioning of both federal and state judiciary, cannot be assumed to have disappeared simply with the passage of time. The court therefore concludes that a privilege

against civil arrest remained present at common law when Congress enacted the provisions at issue here.[5]

2. Merits of the Administrative Procedures Act Claim

Plaintiffs argue that this common law privilege against civil arrests of court attendees was not abrogated by Congress and that the Courthouse Civil Arrest Directive therefore exceeds ICE's authority and must be invalidated under the Administrative Procedure Act, 5 U.S.C. § 706 (2)(C). The APA instructs a reviewing court to "hold unlawful and set aside agency action...found to be...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (2)(C).

"Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)) (quotation marks and alterations omitted). "In such cases, Congress does not write upon a clean slate." Id. (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108, 111 (1991)). "This presumption is, however, no bar to a construction that conflicts with a common-law rule if the statute speaks directly to the question addressed by the common law." Pasquantino v. United States, 544 U.S. 349, 359 (2005) (internal quotation marks, citations, and alterations omitted). Compare In re Gitto Glob. Corp., 422 F.3d 1, 8 (1st Cir. 2005) ("Because [statute at issue] speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed

[5] The court notes, however, that the privilege is tied to the voluntary attendance of parties, witnesses and others in the courthouse and to the necessities of judicial administration. Plaintiffs offer no authority for the proposition that this privilege extends to individuals who are brought to the courthouse in federal or state custody.

in a bankruptcy case.") with Beck v. Prupis, 529 U.S. 494, 504 (2000) (Holding that Congress intended to "adopt...well-established common-law...principles" where the statute offered no indication to the contrary).

The INA, as passed in 1952, did not "speak[] directly" to the common law privilege against civil arrest at the courthouse, nor did any subsequent amendments to the statute. The civil arrest provisions, detailed above, provide for two types of civil arrest: with and without a warrant. When the ICE has secured a warrant, the civil arrest provision permits that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Nothing in this provision or section of the statute speaks to courthouse arrests in any way. See United States v. Texas, 507 U.S. at 534-35 (holding that the Debt Collection Act does not speak directly to the government's common law right to collect prejudgment interest where the statute at issue uses the term "person" and does not specify that "person" includes states).

The provision for warrantless civil arrests includes a specified list of when such arrests are appropriate. An ICE officer or employee may civilly arrest, without a warrant, "any alien...if he has reason to believe that the alien so arrested is in the United States in violation of [an immigration law or regulation] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357 (a)(2). Like § 1226(a), this section does not address courthouse arrests or provide any basis for finding that Congress abrogated the common law privilege against civil arrests in courthouses.

The government argues that the INA supersedes all common law, that immigration law preempts state law, and that the federal government has the sole authority to control immigration. Defs.' Br. at 20-22 [34]. The government's arguments presume that Plaintiffs are seeking to alter

the removal process, but that is not the relief Plaintiffs seek. Plaintiffs are not arguing for any change in removal proceedings, but are simply contending that civil arrests at state courthouses are outside of the statutory authority granted to the government. Even with the comprehensive immigration law system devised by Congress, there are some limits to how and where the government can arrest those it seeks to remove, including the limits written into the statute itself.[6]

At the second day of hearing, the government argued that 8 U.S.C. § 1229(e) demonstrates Congress's intent that the INA abrogate the privilege against courthouse arrests.[7] Section 1229(e)(1) requires that, "[i]n cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with." 8 U.S.C. § 1229(e)(1).[8] One of those specified locations is "a courthouse...if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is

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[6] The DHS website answers the question "is it legal to arrest suspected immigration violators at a courthouse," with the assertion that "ICE officers and agents are expressly authorized by statute to make arrests of aliens where probable cause exists to believe that such aliens are removable." [46-1]. In fact, warrantless civil arrests further require that the arresting officer believe the person "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357 (a)(2).

[7] The cited paragraph is found in a section of the code entitled "Initiation of Removal Proceedings," and not in either section 8 U.S.C. § 1226, entitled "Apprehension and detention of aliens," where the provision concerning arrests with a warrant is found, or 8 U.S.C. § 1357, entitled "Powers of immigration officers and employees," where provisions concerning warrantless arrests are found.

[8] Section 1367, entitled "Penalties for disclosure of information," prohibits ICE and other enforcement agencies from "mak[ing] an adverse determination of admissibility or deportability...using information solely furnished by...a spouse or parent who has battered the alien or subjected the alien to extreme cruelty or others potentially complicit in the abuse of the alien or their family."

described in subparagraph (T) or (U) of section 1101(a)(15) of this title." 8 U.S.C. § 1229(e)(2)(B).

These provisions were added in 2006. See Violence Against Women and Department of Justice Reauthorization Act, PL 109–162, January 5, 2006, 119 Stat 2960. "The views of a subsequent Congress, however, form a hazardous basis for inferring the intent of an earlier one." Bilski v. Kappos, 561 U.S. 593, 645 (2010) (quoting United States v. Price, 361 U.S. 304, 313 (1960)) (internal quotation marks omitted). "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." Bilski, 561 U.S. at 645 (citing Rainwater v. United States, 356 U.S. 590, 593 (1958)) (internal quotation marks and alterations omitted). The 2006 enactment of the Violence Against Women and Department of Justice Reauthorization Act has little bearing on the court's interpretation of Congressional intent regarding courthouse arrests in 1952, and certainly does not amount to a clearly stated intent to abrogate the common law privilege. See, e.g., Pasquantino, 544 U.S. at 359 (requiring Congress to clearly state its intent to abrogate the common law).

The government also argues that "ICE has long exercised its arrest authority at and around courthouses...." Defs.' Br. at 4 [34]; see also 2014 Courthouse Memorandum [28-2]. And the provisions of the Violence Against Women and Department of Justice Reauthorization Act do signal that immigration courthouse arrests were occurring by 2006, that Congress was aware that those arrests were occurring, and that Congress did not legislate to cease those arrests. "But the significance of subsequent congressional action or inaction necessarily varies with the circumstances, and finding any interpretive help in congressional behavior here is impossible." United States v. Wells, 519 U.S. 482, 495 (1997). See also Star Athletica, L.L.C. v. Varsity

Brands, Inc., 137 S. Ct. 1002, 1015 (2017) (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650 (1990)) ("'Congressional inaction lacks persuasive significance' in most circumstances."). That this practice has been ongoing and that Congress has not halted courthouse civil arrests does not alter the court's understanding of the common law privilege against civil courthouse arrests at the time the INA civil arrest provisions were enacted, and the absence of any clearly stated intent to abrogate that privilege at that time. Accordingly, the court finds that Plaintiffs have a strong likelihood of success on the merits of their claim that Courthouse Civil Arrest Directive exceeds the authority granted to ICE by the Congress in the civil arrest provisions of the INA and should be invalidated pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

B. Irreparable Harm

"Irreparable injury in the preliminary injunction context means an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 76 (1st Cir. 2005) (internal quotation marks omitted). "If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996). "'District courts have broad discretion to evaluate the irreparability of alleged harm and to make determinations regarding the propriety of injunctive relief.'" K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (quoting Wagner v. Taylor, 836 F.2d 566, 575–76 (D.C.Cir.1987)).

Plaintiffs argue they are suffering ongoing and irreparable harm. Pls.' Mem at 17 [6]. Specifically, Chelsea Collaborative argues the Courthouse Civil Arrest Directive forces the

diversion of resources from their normal activities to "an extra-judicial mediation and dispute-resolution system." Id. at 18. Chelsea Collaborative's members are afraid to use the courts to vindicate their rights when they are victimized by employers, landlords, family members, and others. Vega Decl. ¶ 9-10, Ex. 10 [7-10]. Chelsea Collaborative's mediation program redirects efforts from other causes and, as a result, Chelsea Collaborative is "unable to effectively carry out many of [its] other goals and missions." Id. at ¶ 22.

Plaintiffs claim the Courthouse Civil Arrest Directive interferes with the District Attorney's ability to prosecute specific cases because victims and witnesses are scared to participate in the proceedings, Pls.' Mem at 18-19 [6], and because ICE civilly arrests many non-targeted individuals at courthouses. Klein Decl. ¶ 6, Ex. 11 [7-11]. For example, survivors of domestic violence fear utilizing the court system in responding to abuse because of a fear of immigration authorities at courthouses. Moshier Decl. ¶ 3, Ex. 14 [7-14]. Domestic violence perpetrators reinforce this fear when talking to survivors. Foley Decl. ¶ 5, Ex. 12 [7-12]. As a result, survivors are "reluctant to file for civil protective orders against abusive partners." Moshier Decl. ¶ 4, Ex. 14 [7-14]. Even complaints successfully filed may not be pursued if survivors fear returning to court to testify in their own cases. Id. at ¶ 6.

CPCS argues the Courthouse Civil Arrest Directive shifts their staff focus to assist criminal defense attorneys in the process of navigating the potential immigration consequences of their client's circumstances, often including helping counsel locate their client in ICE civil detention. Pls.' Mem at 19 [6]. CPCS expends resources "responding to the effects of courthouse arrests, and... assisting defense attorneys whose clients have been impacted by this ICE enforcement policy." Klein Decl. ¶ 4, Ex. 11 [7-11]. Further, when defendants with pending charges are arrested in the courthouse before they can appear before a judge, a default is entered

against them. Id. at ¶ 9. A default can, among other things, cause "the denial of release on immigration bond and denial of relief from removal." Id. at ¶ 10.

None of the financial costs alleged by Plaintiffs could be recovered from the government in the event Plaintiffs succeed at trial. Further, Plaintiffs have made an unrebutted showing that each day that the threat of ICE civil arrests looms over Massachusetts courthouses impairs the DAs and CPCS ability to successfully perform their functions within the judicial system, and Chelsea Collaborative's members' ability to enforce legal rights, and that absent an injunction, some state criminal and civil cases may well go unprosecuted for lack of victim or witness participation. CPCS will continue to incur costs as defendants are civilly arrested when attempting to respond to criminal complaints. Criminal defendants will be unable to vindicate their rights if they are taken into ICE custody prior to appearing in court or if witnesses in their defense are too fearful to visit a courthouse. None of these harms can be remedied after the conclusion of this litigation. Therefore, the court finds that the Plaintiffs have alleged irreparable harm sufficient to warrant and injunction.

C. *Balance of Harms and Weighing of the Public Interest*

Plaintiffs accurately argue that when the government is the defendant in a case for which a preliminary injunction is sought, the court may aggregate its consideration of the balance of harms and weighing of the public interest. Pls.' Br. at 19 [6] (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).

Plaintiffs contend that without an injunction, victims and witnesses will continue to avoid using the state courts, leading to a failure of state civil and criminal proceedings, ultimately harming the rule of law. Over two days of hearing on this preliminary injunction, counsel for the government repeatedly argued that ICE was not conducting courthouse arrests in the manners

described by Plaintiffs. Specifically, counsel represented that "generally" ICE does not arrest civil litigants, witnesses, or victims at courthouses. If this is the case, then to enjoin the applicability of the Courthouse Civil Arrest Directive as to civil arrests of courthouse attendees other than criminal defendants will cause no significant harm to the government. Plaintiffs, in comparison, and the public in general will suffer harm each day that witnesses and victims refuse to participate in proceedings, as detailed above.

Plaintiffs also contend that without an injunction, state criminal defendants who are arrested by ICE coming or leaving the courthouse will be prevented from attending proceedings against them, impairing the DAs ability to prosecute cases and increasing CPCS's costs in representing criminal defendants. According to Defendants' counsel, ICE's general policy is not to arrest criminal defendants until the conclusion of the hearing that they are attending in state court. Counsel acknowledged, however, that ICE would make courthouse arrests before the targeted individuals leave the courthouse. They contend that ICE's inability "to arrest fugitive aliens at the one place at which it can reliably find them in Massachusetts" would harm both the public and the federal government, and that arrestees, officers and the public would be safer if arrests are conducted in courthouses where individuals are screened for weapons. Defs.' Opp. at 26 [34].

The court credits Defendants' safety concerns, as well as the public's need to be protected from dangerous criminal aliens. But Defendants' attempt to justify civil courthouse arrests on these grounds, and on the fact that Massachusetts courts do not recognize civil detainers, and that Federal, state and local law enforcement activity concerning criminal matters "routinely" occurs in courthouses, ignores a critical distinction regarding the challenged arrests. Plaintiffs here seek only to enjoin civil, not criminal, arrests. Where ICE has an alternative route

regarding targeted and dangerous aliens, namely, to pursue a criminal, rather than a civil arrest, see 8 U.S.C. § 1357(a)(4), the balance of harm and public interest support issuance of the injunction against civil arrests.

V. Conclusion

Having found that Plaintiffs have standing to bring this suit, and that they have demonstrated a likelihood of success on the merits of Count 1 of their Complaint [1], that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that an injunction is in the public interest, the court GRANTS Plaintiffs' Motion for a Preliminary Injunction [5]. The court will issue a preliminary injunction enjoining Defendants from implementing ICE Directive No. 11072.1, "Civil Immigration Actions Inside Courthouses," dated January 10, 2018, in Massachusetts and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.

IT IS SO ORDERED.

June 20, 2019

/s/ Indira Talwani
United States District Judge

from arrest that the U.S. Constitution grants to legislators, which also suggests that the courthouse privilege continues to cover more than just service of process. See U.S. Const. art. I, § 6, cl. 1 ("The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . ."). These two doctrines are historically related. As the Supreme Court has recognized, the Framers modelled the privilege for legislators on the privilege against courthouse arrests for ordinary litigants. Williamson v. United States, 207 U.S. 425, 443 (1908) ("This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange indeed if it were denied to the highest functionaries of the state in the discharge of their public duties.") (quoting Joseph Story, Commentaries on the Constitution of the United States § 859 (1833)). The scope of the privilege contained in the Speech or Debate Clause is, accordingly, evidence of the scope of the common law privilege. Indeed, it would be odd to read the latter privilege to no longer cover arrest when the former privilege, enshrined in the Constitution, undoubtedly does.

Finally, and most importantly, the policy objectives cited for hundreds of years by English and American courts to justify

the common law privilege against civil courthouse arrests apply equally to modern-day immigration arrests. The first such objective that English courts cited to justify the privilege was the desire to encourage parties "to come forward voluntarily," Walpole, 99 Eng. Rep at 531. American courts have recognized this same purpose. See, e.g., Person, 66 N.Y. at 126 ("Witnesses might be deterred, and parties prevented from attending . . . ."); Netograph, 197 N.Y. at 380 ("[T]he obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice . . . ."); Stewart, 242 U.S. at 129 ("[T]he fear that a suit may be commenced [at a court] by summons will as effectually prevent his approach as if a capias might be served upon him."). According to the facts here alleged, ICE's Directive undermines this purpose by deterring immigrants from appearing in court, thus denying them an opportunity to seek justice in their own cases and impeding civil suits and criminal prosecutions by dissuading them from serving as witnesses. See Compl. ¶¶ 88-105; Oppo. 20-22; Br. of Former Judges 3-11; Br. of Immigrant Defense Project et al.

The second and even more fundamental purpose of the privilege is to enable courts to function properly. See, e.g., Orchard's Case, 38 Eng. Rep. at 987 ("To permit arrest to be made in the Court would give occasion to perpetual tumults . . . ."); Person, 66 N.Y. at 126 ("[D]elays might ensue or injustice

be done."); Parker, 136 N.Y. at 589 ("It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice."). The Directive undermines this purpose as well. It has caused precisely the delays, re-schedulings, waste, and disruptions that so many earlier courts feared. See Compl. ¶¶ 68, 70, 75; Oppo. 21-22; Br. of Former Judges 10-14. This reason, more than any other, compels the Court to find that, as a matter of New York law, aliens are privileged from immigration arrest while present at courthouses and during their necessary coming and going therefrom.

Of course, the ICE agents conducting these arrests act under authority of federal law, not New York law. The ultimate question then is whether the federal immigration statute, which is silent on this issue, incorporates the common law privilege, here applicable to the courts of New York. Plaintiffs argue that it does, while defendants, on their second substantive argument for dismissal under Fed. R. Civ. P. 12(b)(6), argue that the INA preempted and therefore invalidated any potential common law privilege under the law of New York State.

There is a general presumption in favor of plaintiffs' position. The Supreme Court has held in numerous contexts that "statutes which invade the common law are to be read with a

presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." United States v. Texas, 507 U.S. 529, 534 (1993) (internal quotation marks and alterations omitted). Similarly, to the extent that the question implicates issues of federalism, the Supreme Court has also explained that courts should interpret federal statutes not to "alter the usual constitutional balance between the States and the Federal Government" unless Congress's "intention to do so" is "unmistakably clear in the language of the statute." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989))(internal quotation marks omitted). The standard for finding that federal law has preempted state law is that such a result must have been "the clear and manifest purpose of Congress." City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 316 (1981) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

Gregory v. Ashcroft is particularly relevant. In that case, Missouri state judges challenged a provision of the state constitution that imposed a mandatory retirement age of seventy, arguing that the state law violated the Equal Protection Clause of the Fourteenth Amendment and was preempted by the federal Age Discrimination in Employment Act of 1967. The Governor of Missouri, as respondent, argued that the statute did not violate

Equal Protection and that the state judges fell within the federal statute's exemption for "appointees . . . 'on a policymaking level.'" 501 U.S. at 455-56. On the preemption argument, the Supreme Court construed the statute not to prohibit a mandatory retirement age for state judges. Noting the important federalism interests in allowing "the people of Missouri [to] establish a qualification for those who sit as their judges," Id. at 460, the Court applied a plain statement rule and held that the statute was not sufficiently clear that Congress intended to displace state law in this area. Id. at 464.

In the instant case, this Court similarly finds no indication in the language of the statute that the "clear and manifest purpose of Congress" was to abrogate the relevant state common law, City of Milwaukee, 451 U.S. at 316, and consequently holds that the statute incorporates the privilege.

As evidence for the requisite Congressional intent, defendants again cite the agency's broad arrest authority under sections 1226 and 1357 of Title 8 and argue that these provisions demonstrate that federal immigration regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice, 331 U.S. at 230; Mem. 19-24. But this language from Rice is inapposite. The state common law at issue does not "supplement" the federal

regulatory scheme at all, but rather creates a very narrow limitation on federal enforcement authority that is tailored to protect states' interests in managing their own judicial systems and one that, indeed, has been recognized as a matter of federal common law as well. See Stewart, 242 U.S. 128; Lamb v. Schmidt, 285 U.S. 222 (1932). Defendants' reading of the statute would effectively bar states' sovereign interests from imposing any limitations on ICE's enforcement discretion, which is a reading that is not "clear and manifest" from the language of the statute. City of Milwaukee, 451 U.S. at 316.

Second, and relatedly, defendants argue that "the federal government has exclusive authority over immigration," Mem. 21, and that state law cannot undermine federal power in this area. See Rice, 331 U.S. at 230 (holding that the clear statement rule may be satisfied where "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."); Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). This argument is also unpersuasive. The issue is not whether Congress could displace state common law in this area, but whether the general language of the INA in fact did. Insofar as defendants are arguing that any state law touching

upon immigration is presumptively invalid, the language of the INA does not compel such a result. While the statute preempts state laws that criminalize federal immigration violations, see Arizona, 567 U.S. at 410, it does not necessarily preempt state laws that narrowly limit federal enforcement authority.

Third, in what is probably their strongest argument, defendants point to section 1229(e) of the INA, which is the only place where the statute mentions courthouse arrests. Section 1229(e), read in conjunction with its cross-reference to section 1367, provides that, when "an enforcement action leading to a removal proceeding" takes place at a courthouse, and the alien arrested is appearing in connection with a protection order, child custody, domestic violence, sexual assault, trafficking, or stalking case, immigration officers may not use certain types of information from the proceeding in making an adverse determination of deportability. See 8 U.S.C. §§ 1229(e)(1)-(2)(B) & 1367. This section suggests that Congress did anticipate at least some arrests occurring at courthouses. But as plaintiffs convincingly respond, Oppo. 14-15, the section could fairly be read as referring to criminal arrests, against which the state common law privilege does not protect. Furthermore, this provision does not necessarily speak to ICE's arrest authority at all; rather, it may be anticipating criminal arrests by state and local police forces, which lead to eventual

ICE removal proceedings. Furthermore, the provision is plausibly viewed as a prophylactic against ICE actions that target aliens based on their participation in judicial proceedings; as plaintiffs argue, id., it would be odd to view a provision meant to encourage aliens' attendance at court as evidence of Congressional intent to allow ICE to undermine that very objective. For these reasons, section 1229(e) of the INA does not demonstrate that Congress unambiguously intended to displace the state common law privilege against courthouse civil arrests.

As their final argument under Fed. R. Civ. P. 12(b)(6), defendants argue that Count Three fails to state a Tenth Amendment claim. The crux of plaintiffs' Tenth Amendment argument is that the Directive undermines New York's sovereign interests by "interfering with state court operations and impeding criminal prosecutions." Compl. ¶ 139. The defendants respond that this is not the kind of interference that involves "commandeering" of state agents that in their view is necessary to a Tenth Amendment claim. Mem. 24-25; see Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018). Here, however, the Complaint unmistakably alleges a type of commandeering similar to those that the Supreme Court has found to lie at the heart of a Tenth Amendment cause of action. See Murphy, 138 S. Ct. 1461, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). The

clear implication of the facts alleged in plaintiffs' complaint is that ICE's policy has commandeered state and local judges and court officials not to take action in response to ICE's arrests, even when the federal agency causes great disruption to the functioning of the state judiciary and the state agents would therefore normally intervene. See, e.g., Compl. ¶¶ 69, 74, 75, 77, 78. Plaintiffs accordingly state a Tenth Amendment claim. See Murphy, 138 S. Ct. at 1475-78.

CONCLUSION

For the aforementioned reasons, the motion to dismiss is hereby denied with respect to all of plaintiffs' claims for relief. The stay granted from the bench at oral argument is lifted, and the case management plan adopted on October 8, 2019 is amended as follows:

The administrative record is to be filed by no later than January 3, 2020; all discovery is to be completed by February 28, 2020; moving papers for any post-discovery summary judgment motions are to be filed no later than March 13, 2020, with answering papers by no later than March 27, 2020 and reply papers by no later than April 3, 2020; and a final pre-trial conference, as well as oral argument on any summary judgment motions, will be held on April 14, 2020 at 11:00 AM.

SO ORDERED.

Dated: New York, NY
December 19, 2019

JED S. RAKOFF, U.S.D.J.