SECTION 7:
LEGAL RESOURCES

BACKGROUND

In this section we include legal resources that have supported various parts of our advocacy around courthouse arrests. They include an amicus brief prepared the NYU School of Law Immigrant Rights Clinic and IDP; and a petition filed in the Massachusetts Supreme Judicial Court seeking a declaratory judgment that courthouse arrests are unlawful.

RESOURCES

Amicus brief. In collaboration with the NYU School of Law Immigrant Rights Clinic, IDP has written and filed a "Brief of Amicus Curiae in Support of Respondent's Motion to Terminate Removal Proceedings" in cases before the New York Immigration Court where the individual noncitizen was arrested by ICE in the course of attending a state court proceeding. The brief, available here, argues that ICE's courthouse arrest policy and practice violates the constitutional and common right to participate in court proceedings.

The brief can be used to provide the legal foundation for a "Motion to Terminate Removal Proceedings (and/or to Suppress Evidence)" in Immigration Courts nationally (though the brief is written under Second Circuit law, much of the argument is adaptable for filing in other Circuits). It can also provide the legal foundation for briefs submitted to the BIA and Circuit Courts. It can be attached as an exhibit in support of a motion to terminate removal proceedings. In certain cases, IDP and the Clinic may be available to formally file the brief in an individual case.

The brief may also be useful in the context of an ICE Out of Courts campaign because it explains how ICE's courthouse arrests are, in fact, unlawful and violate the Constitution. These constitutional arguments can be adapted and included in advocacy materials, including in legal memoranda in support of judicial rules or legislation.

Petition filed in Massachusetts Supreme Judicial Court. A team of attorneys from the Committee for Public Counsel Services, the Lawyers Committee for Civil Rights and Economic Justice, and Greater Boston Legal Services have filed a petition with the highest court in Massachusetts requesting a declaratory judgment that ICE's courthouse arrests violate Massachusetts common law protections against civil arrest while attending court. The petition has been included here.

Additional resources:

- Christopher Lasch, Yale Law Journal, "A Common Law Privilege to Protect State and Local Courts During the

Crimmigration Crisis" (Oct. 24, 2017).

- IDP/NYU annotated version of ICE Directive 11072.1 (see Section 5).
- Please contact IDP if interested in our legal memoranda in support of judicial rules or legislation.

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
NEW YORK, NEW YORK

In the Matter of:	)	
[redacted]	)	File No: A# [redacted]
In removal proceedings	)	

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT IN SUPPORT OF RESPONDENT'S MOTION TO TERMINATE PROCEEDINGS

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PRELIMINARY STATEMENT

Despite a centuries-long common law limitation on civil arrests in courthouses, a practice that had long faded from the American legal landscape, ICE has recently resurrected this practice of civil arrests in courthouses by arresting immigrants in state courthouses for violations of immigration law. ICE's reliance on carrying out its immigration enforcement actions at courthouses has skyrocketed – in New York State, for example, there was a 1200% increase in the frequency of courthouse arrests in 2017 compared to 2016. Immigrant Defense Project, Press Release: *IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017*, Dec 31, 2017, attached as Exhibit A (Exhibit p. 1). When immigrants are arrested by ICE in state courthouses, both their Tenth Amendment right to a federalist system of governance and their right to access court under the First, Fifth, and Sixth Amendments are violated. Further, because ICE has refused to protect any classes of immigrants from its policy of courthouse arrests, all immigrants who have any business at state courthouses, whether as witnesses, defendants, victims, supportive family members, or simply members of the public, are now fearful of coming to court. Without necessary parties present in court, state courts are in turn less able to effectively administer justice, and the safety of the whole community suffers as a result. Terminating proceedings in these cases, like the instant case, where immigration proceedings are instituted on the basis of a courthouse arrest is the only remedy that can deter ICE from continuing to deprive immigrants of their fundamental rights and the only remedy that can protect the functioning of the state courts.

STATEMENT OF INTEREST

Amicus curiae Immigrant Defense Project ("IDP") is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted

of crimes. IDP is a leading national expert on issues that arise from the interplay of immigration and criminal law. Since 1997, IDP has provided expert legal advice, training and publications on such issues to criminal defense, family defense, and immigration lawyers; criminal court, family court, and Immigration Court judges; and noncitizens. As such, IDP has a keen interest in this case and the fair and just administration of the nation's criminal and immigration laws.

Furthering its mission, IDP frequently appears as amicus curiae in cases involving both the immigration and criminal justice systems. It has filed briefs or other amicus submissions in many key cases involving important criminal, family, and immigration matters before the U.S. Supreme Court, the U.S. Court of Appeals, the Board of Immigration Appeals, and Immigration Court. *See, e.g.*, Brief for Americans for Immigrant Justice & IDP et al. Supporting Petitioner in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); Brief for IDP et al. Supporting Petitioner in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); Brief of Amicus Curiae IDP Supporting Petitioner in *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018); Brief of Amicus Curiae IDP et al. Supporting Petitioner in *Richards v. Sessions*, 711 F. App'x 50 (2d Cir. 2017); Brief of Amicus Curiae IDP in *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2009); Brief of Amicus Curiae New York State Defenders Association (IDP) for Respondent in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); Brief of Amicus Curiae New York State Defenders Association (IDP) et al. for Respondent in *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001); Brief of Amicus Curiae IDP in *In re. E-A-C-O-*, AXXXXXX123 (filed in Immigration Court Feb. 24, 2016); Brief of Amicus Curiae IDP in *In re. R-L-B-*, AXXXXXX463 (filed in Immigration Court Feb. 24, 2016).

Through daily conversations, exchanges, and interviews with criminal and family defense lawyers and directly-impacted immigrant community members throughout New York State, IDP

has developed unique insight into the sharp spike in immigration arrests in New York State courthouses, and has documented the widespread violation of noncitizens' fundamental rights by ICE courthouse arrests. IDP has been widely cited about this trend of ICE enforcement, and has testified about this issue before the New York City Council. *See* Stephen Rex Brown, *ICE Courthouse Arrests of Immigrants up 900% Across N.Y. in 2017*, N.Y. Daily News (Nov. 15, 2017), attached as Exhibit B (Exhibit p. 3). *See also* Leon Neyfakh, *Secret Police: ICE agents dressed in plainclothes staked out a courthouse in Brooklyn and refused to identify themselves*, Slate (Sep. 15, 2017), attached as Exhibit C (Exhibit p. 5). *See also* Priscilla DeGregory, *New York authorities demand ICE stop hunting immigrants in courthouses*, N.Y. Post (Aug. 3, 2017), attached as Exhibit D (Exhibit p. 9); Liz Robbins, *A Game of Cat and Mouse With High Stakes: Deportation*, N.Y. Times (Aug. 3, 2017), attached as Exhibit E (Exhibit p. 11).

As an organization committed to fair treatment for immigrants involved in the criminal justice, family court, and child welfare systems, IDP is concerned that the fundamental right to access to the courts, whether as a victim, defendant, witness, supportive family member, or otherwise, is being impaired. This chilling effect on people's ability to participate in the court system is, in turn, a serious threat to public safety and to the integrity of the New York State court system.

IDP respectfully submits this brief to assist the Court with resolving the important question of the remedial role of Immigration Courts in responding to ICE courthouse arrests.

BACKGROUND

A. ICE has disrupted the long-standing American limitation on civil arrests in courthouses

Few American values are more dearly held than pride in the courts of this country - courts which strive to be open, accessible to all, and the place where people from all walks of life can go to seek the justice that they deserve. Immigrants and non-immigrants alike enjoy the right to access court, *see* n. 2 *infra*, and from the time of the founding of this country, there has existed a long-standing common law principle rejecting civil arrests in courthouses so as to protect the effective administration of justice in the courts.

This common law principle dates back to the common law of England, predating the 18th century, and was a right extended not only to case parties and witnesses but rather to all people "necessarily attending" the courts on business. 3 William Blackstone, *Commentaries on the Laws of England* 289 (1769) ("Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning"). This rule against civil arrests in connection with court proceedings has remained a fundamental one within American jurisprudence. States and federal courts have upheld this tradition throughout American history, and the Supreme Court has explicitly noted it in several cases, even emphasizing that immunity extends also to civil service of process in courthouses, which is inherently less disruptive than civil arrest in courthouses. *Lamb v*. *Schmitt*, 283 U.S. 222, 225 (1932) (noting "the general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another").

The practice of civil arrests, and thereby civil arrests at courthouses, had long faded from the American legal landscape until it was recently resurrected through ICE's practice of courthouse arrests. As deportation proceedings are civil actions, ICE's courthouse arrests of noncitizens, for the purpose of commencing deportation proceedings, are civil arrests. *INS v*.

Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country"). When ICE arrests an individual, it is because of a suspected violation of civil immigration law. By contrast, when local, state, or federal police officers arrest an individual, it is because they have probable cause to believe the individual is committing or has committed a crime, and there are procedures in place to assess whether this belief justifies the arrest. This fundamental distinction creates a clear difference between ICE civil arrests and criminal arrests. Under the common law, civil arrests are not allowed at courthouses, while criminal arrests are, demonstrating that this crucial distinction has long historical roots.

ICE's escalating use of courthouse arrests resurrects a practice of civil arrests that had long faded from the American legal landscape, and thus represents a new practice for ICE. *See* Sec. B *infra* (describing a 1200% increase in courthouse arrests between 2016 and 2017). Moreover, this arrest practice is being used in lieu of far less invasive and damaging ways of initiating removal proceedings that are authorized by statute, such as issuing Notices to Appear (NTAs) by mail. ICE's new choice of making arrests of individuals while they attend court is having widespread and damaging effects on immigrant and mixed-state communities across the country.

B. ICE's policy of courthouse arrests is having devastating effects on immigrant and mixed-status communities

Across the board, immigrants who are going to court for any reason – as defendants, witnesses, victims, family supporters, and members of the public obtaining records – are fearful of going to court due to ICE's persistent presence and the threat of arrest. Out of concern for the chilling effects on access to justice as a result of this growing use of ICE courthouse arrests, IDP, as part of a coalition of legal services and community-based organizations, conducted and

published the results of a survey on ICE courthouse arrests in June 2017. Immigrant Defense Project, *ICE in New York State Courts Survey*, attached as Exhibit F (Exhibit p. 15). Two hundred and twenty five (225) advocates and attorneys, practicing in criminal, family, and civil courts and spanning 31 counties across the State of New York, participated in the survey. The statistics from the survey show that immigrants are experiencing pervasive fear of going to court out of fear of encountering ICE: three of four legal service providers reported that clients have expressed fear of going to court because of ICE, 48% of providers reported clients have expressed fear of calling the police out of fear of ICE, and 29% of providers have worked with immigrants who have failed to appear in court due to fear of ICE. Of survey participants who work with survivors of violence, 67% have clients who decided not to seek help from the courts out of fear of ICE, and 46% reported clients have fear of serving as a complaining witness in court out of fear of ICE. Of survey participants who work with tenants in housing court, 56% reported clients have fear of filing a housing court complaint out of fear of ICE. Victoria Bekiempis, *Immigrant Violence Victims Fear N.Y. Courts as ICE Lingers Nearby*, N.Y. Daily News (Jun. 29, 2017), attached as Exhibit G (Exhibit p. 18).

This widespread fear mirrors the courthouse arrest trend itself: a widespread and egregious practice that has culminated in a formal policy from ICE. Throughout the year of 2017, IDP documented 144 courthouse arrests and attempted arrests in New York State, representing a 1200% increase in courthouse arrests compared to 2016. Exhibit A (Exhibit p. 1). Since the beginning of 2018, IDP has further documented over 50 arrests and attempted arrests at courthouses around the state by ICE, an additional 60% increase from the same time period in 2017. Erin Durkin, *Judge Urged to Curb Courtside Arrests at New York State Courts*, N.Y. Daily News (May 9, 2018), attached as Exhibit H (Exhibit p. 21).

Because ICE's courthouse arrest policy leaves no immigrant immune from being an arrest target, there is no group of immigrants—not even the most vulnerable in our communities— that is able to feel safe at the courthouse. In Los Angeles, San Francisco, and San Diego, for example, reports of domestic violence among Latino victims in the first half of 2017 dropped by 3.5%, 18%, and 13% respectively, "a retreat that crisis professionals say is driven by a fear that interacting with police or entering a courthouse could make immigrants easy targets for deportation." James Queally, *Fearing deportation, many domestic violence victims are steering clear of police and courts*, Los Angeles Times (Oct 9, 2017), attached as Exhibit I (Exhibit p. 23). Further, a new survey by the National Immigrant Women's Advocacy Project, partnering with the American Civil Liberties Union, found that of the prosecutors they interviewed across 19 states, "82 percent of prosecutors reported that since President Trump took office [in 2017], domestic violence is now underreported and harder to investigate and/or prosecute [compared to in 2016]. Seventy percent of prosecutors reported the same for sexual assault, while 55 percent state the same difficulties for human trafficking and 48 percent for child abuse." American Civil Liberties Union, *Freezing Out Justice: How immigration arrests at courthouses are undermining the justice system* (2018), attached as Exhibit J (Exhibit p. 32).

ICE has arrested a human trafficking victim in a Human Trafficking Intervention Court (Melissa Gira Grant, *ICE Is Using Prostitution Diversion Courts to Stalk Immigrants*, The Village Voice (July 18, 2017), attached as Exhibit K, Exhibit p. 42), a father attending family court to seek custody of his children (Steve Coll, *When a day in court is a trap for immigrants*, The New Yorker (Nov 8, 2017), attached as Exhibit L, Exhibit p. 47), a DACA recipient in traffic court to pay a fine (Robert McCoppin and Robert L. Cox, *ICE detains man at traffic court after DACA status expires, then frees him after outcry*, Chicago Tribune (Feb 2, 2018), attached

as Exhibit M, Exhibit p. 52), and a woman seeking a protective order against her abusive ex-boyfriend (Jonathan Blitzer, *The Woman Arrested by ICE in a Courthouse Speaks Out*, The New Yorker (Feb 23, 2017), attached as Exhibit N, Exhibit p. 55).

IDP's data collected showed that, in 2017, 28% of undocumented immigrants targeted for courthouse arrests had no prior criminal history, and in many cases these individuals were in court for a first-time arrest for a traffic violation. Exhibit A (Exhibit p. 1). Further, "in cases where criminal charges were known, 80% of individuals who were arrested while attending court were appearing for violations and misdemeanors." *Id*. "Immigrants are being arrested in a broad range of courts - including criminal courts, family courts, traffic courts, and specialized courts that are designed as rehabilitation programs," showing that the widespread fear that no undocumented immigrants are safe from arrest in courthouses is grounded in reality. *Id*.

ICE courthouse arrests are also rife with examples of officer misconduct, violating basic law enforcement norms and, in many instances, ICE's own internal regulations and policies. The squads of ICE agents who come to courthouses to effectuate arrests and conduct other surveillance often dress in plain clothes, refuse to identify themselves as immigration officers, refuse to present warrants, refuse to answer questions, and refuse to acknowledge when a non-citizen's criminal defense attorney invokes his or her rights. Exhibit C (Exhibit p. 5); Exhibit D (Exhibit p. 9). In an April 4, 2018 arrest, an individual was arrested after an ICE agent eavesdropped on a private attorney-client conversation in the courthouse hallway, hearing the individual tell his attorney that he was born in Mexico. Sydney Brownstone, *Vancouver Immigrant Claims ICE Arrested Him After Eavesdropping on Him and His Lawyer*, The Stranger (Apr 4, 2018), attached as Exhibit O (Exhibit p. 59).

Further, IDP has received reports of excessive force by ICE agents during courthouse arrests, including an incident where ICE agents pushed a man against the wall and would not allow him to attend his appearance in criminal court, an incident where ICE agents threw a man to the ground, and an incident where ICE agents threw a pregnant young woman to the ground, causing her to bloody her knees. [1]

C. ICE's policy of courthouse arrests is impairing the functioning of the courts

As IDP has extensively documented, the phenomenon of ICE courthouse arrests has caused widespread fear in the noncitizen community of attending court, thereby interfering with the courts' functioning and the administration of justice. ICE's new deliberate policy of courthouse arrests is therefore creating the exact disturbances to the administration of justice that the long-standing tradition granting immunity from civil arrest is meant to protect against. ICE's civil arrests in courthouses not only disrupt the dignity of the courthouse when physically restraining individuals in court, but once those individuals are placed into immigration detention, also interfere with the ability of those individuals to attend future court dates.

ICE's newfound reliance on courthouse immigration arrests has created an uproar amongst prosecutors, defense attorneys, and judges. Numerous state supreme court justices have submitted letters to the Department of Homeland Security, asking ICE to end its practice of courthouse arrests within their respective states. *See* Letter from Hon. Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal., to Jeff Sessions, Attorney General, and John F. Kelly, Sec'y of DHS (Mar. 16. 2017) (expressing concerns about "the impact on public trust and confidence in our state court system" resulting from courthouse arrests), attached as Exhibit P (Exhibit p. 62); Letter from Hon. Mary E. Fairhurst, Chief Justice, Supreme Court of Wash., to

[1] These trends are based on the facts of 144 courthouse arrests and arrest attempts that IDP documented in 2017. The specifics of the removal proceedings arising out of these arrests remain confidential at this time.

John F. Kelly, Sec'y of DHS (Mar. 22, 2017) ("When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised"), attached as Exhibit P; Letter from Hon. Chase T. Rogers, Chief Justice, Supreme Court of Conn., to Jeff Sessions, Attorney General, and John F. Kelly, Sec'y of DHS (May 15, 2017) ("I believe 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"), attached as Exhibit P; Letter from Hon. Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y of DHS (Apr. 19, 2017) ("To ensure the effectiveness of our system of justice, courthouses must be viewed as a safe forum."), attached as Exhibit P; Letter from Hon. Thomas A. Balmer, Chief Justice, Or. Supreme Court, to Jeff Sessions, Attorney General, and John F. Kelly, Sec'y of DHS (Apr. 6, 2017) ("ICE's increasingly visible practice of arresting or detaining individuals in or near courthouses…is developing into a strong deterrent for access to the court[.]"), attached as Exhibit P.

Prosecutors and defense attorneys alike have also spoken out in strong opposition to ICE's newfound reliance on courthouse arrests. On Feb 14, 2018, Bronx DA Darcel Clark, Manhattan DA Cy Vance, Brooklyn DA Eric Gonzalez and Public Advocate Letitia James held a joint press conference pleading with ICE to halt its courthouse arrests of immigrants. Erin Durkin, *City DAs plead with ICE to stop arresting immigrants at NYC courthouses: 'It jeopardizes public safety'*, NY Daily News (Feb 14, 2018), attached as Exhibit Q (Exhibit p. 71). Brooklyn DA Eric Gonzales made clear, "We're appealing to them as law enforcement officers not to make these arrests. ... It does not keep us safe. It jeopardizes public safety," while Bronx DA Darcel Clark emphasized that "this enforcement is having a chilling effect on witnesses." *Id*.

Manhattan DA Cy Vance reiterated how immigrants "can't go there [to court] without fear of getting arrested. That means critical witnesses and victims in cases don't proceed with important prosecutions, and New Yorkers are less safe because of it." *Id*. In addition to opposition from New York City prosecutors, numerous state attorneys general have submitted letters to DHS officials, expressing their concerns about ICE's interference with the administration of justice and demanding an end to courthouse arrests. *See* AG Eric Schneiderman Press Release, *New York AG Eric Schneiderman and Acting Brooklyn DA Eric Gonzalez Call for ICE to End Immigration Enforcement Raids in State Courts* (Aug 3, 2017) (warning that "if the Trump Administration continues to arrest people in the heart of our justice system, immigrants will be less likely to serve as witnesses or report crimes - and that leaves us all at risk. ... Everyone, regardless of their immigration status or the status of their loved ones, should have access to equal justice under the law."), attached as Exhibit R (Exhibit p. 74); Letter from the Md. Att'y Gen. Brian E. Frosh to John F. Kelly, Sec'y of DHS, Lori Scialabba, Acting Dir. of USCIS, Kevin K. McAleenan, Acting Comm'r of CBP, and Thomas D. Homan, Acting Dir. of ICE (Mar. 2, 2017) ("I am concerned that the Administration's aggressive new policies will discourage the most vulnerable immigrants from seeking judicial protection"), attached as Exhibit R; Letter from the Me. Att'y Gen. Janet T. Mills to Richard W. Murphy, Acting U.S. Att'y for Me., and John F. Kelly, Sec'y of DHS (Apr. 10, 2017) (expressing concern that courthouse arrests "will have an unnecessary chilling effect on our efforts to obtain the cooperation of victims and our successful prosecution of crimes"), attached as Exhibit R; Letter from N.J. Att'y Gen. Gurbir Grewal, to Sec'y of DHS Kirstjen Nielsen (Jan. 25, 2018) ("Courthouses must be safe forums, and federal immigration enforcement actions occurring at state courthouses compromise the integrity of our state's justice system"), attached as Exhibit R.

Defense attorneys from the Legal Aid Society and Brooklyn Defender Services issued a joint statement on April 6, 2018 declaring, "If the people we represent cannot safely appear in court to participate in their own defense - and further, are sanctioned with warrants for not appearing - then the integrity of the whole system must be questioned." The Legal Aid Society and Brooklyn Defender Services, *Legal Aid, Brooklyn Defender Services Joint Statement on ICE Courthouse Arrests That Undermine Court System Integrity, Erode Due Process Rights, and Deter Immigrants from Seeking Legal Services* (Apr. 6, 2018), attached as Exhibit S (Exhibit p. 83). The frustration from New York City defense attorneys reached a head in April 2018, when, for 3 days in a row, numerous attorneys from the Legal Aid Society, the Bronx Defenders, and the Queens Law Associates staged walk-outs and protests after ICE made three courthouse arrests of their clients in the span of less than a week. Nicole Brown and Lauren Cook, *ICE detains immigrant at Queens courthouse, attorneys say*, AM New York (Apr. 10, 2018), attached as Exhibit T (Exhibit p. 85).

D. ICE's directive formalizing its courthouse arrests policy authorizes an unconstitutional practice, and does not assuage widespread fear of attending court

On January 10, 2018, ICE issued *Directive Number 11072.1*, its first formal, public policy memo on immigration enforcement actions inside courthouses and subsequently updated its FAQ on Sensitive Locations and Courthouse Arrests on its website. U.S. Immigration and Customs Enforcement, *Directive Number 11072.1: Civil Immigration Enforcement Actions Inside Courthouses*, issued Jan. 10, 2018, attached as Exhibit U (Exhibit p. 88); U.S. Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrest*, attached as Exhibit V (Exhibit p. 92). The directive instructs ICE agents to continue making arrests against those attending court. It does nothing to narrow the group of immigrants targeted for arrest, nor does it guarantee any protection to witnesses, victims of crimes, or family

members to be free from arrest. The directive states 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." *Id*. (emphasis added). The directive states that "Aliens encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances" *Id*. (emphasis added). The directive then delegates to "officers and agents" the authority to "make [courthouse arrest] enforcement determinations on a case-by-case basis." *Id*. In effect, the directive places no limits on which immigrants can be arrested at courthouses and continues to authorize the arrest of all immigrants that ICE chooses to arrest. Moreover, DHS officials have previously explicitly announced that victims and witnesses are not safe from arrest in courthouses. Devlin Barrett, *DHS: Immigration agents may arrest crime victims, witnesses at courthouses*, The Washington Post (Apr. 4, 2017), attached as Exhibit W (Exhibit p. 96).

Taken in total, ICE has embraced the courthouse arrest practice as part of its enforcement regime, and has refused to designate any category of immigrants or any category of courthouse or any nature of legal proceeding as out of bounds or off limits to its agents. Many state courthouse buildings around the country are multipurpose buildings, housing family, traffic, civil, and criminal court in the same or adjacent buildings. In Brooklyn, NY, for example, Kings County Family Court is located at 330 Jay St, adjacent to Kings County Criminal Court at 320 Jay St. In the Skokie Courthouse for the Second Municipal District in Skokie, Illinois, where, as discussed *supra*, a DACA recipient was arrested after attending traffic court, the following court matters are all handled in the same courthouse building: traffic, criminal matters, domestic

violence, expungements and record sealing, civil cases, housing, small claims, name changes, child support, marriage ceremonies, mental health court, veteran's court, and juvenile justice. The ICE directive makes clear that immigrant witnesses, victims, family members, defendants, and members of the general public, in attendance at any type of court, are justified in fearing arrest.

In carrying out its new deliberate policy of courthouse arrests, therefore, ICE has disrupted the long-standing limitation against civil arrests in the courts that "stands so like a faithful and venerable sentinel at the very portal of the temple of justice that every consideration of a sound public policy… forbids that it should be stricken down." *Hale v. Wharton*, 73 F. 739, 750 (C.C.D. MO. 1896).

SUMMARY OF THE ARGUMENT

Immigration Judges ("IJs") are authorized to "terminate proceedings when the DHS cannot sustain the charges [of removability] *or in other specific circumstances consistent with the law* and applicable regulations." *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012) (emphasis added). In the Second Circuit, circumstances warranting termination of immigration court proceedings include where there has been a violation that constitutes "prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights." *See Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008); *see also Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991) (invalidating deportation proceedings where respondent's fundamental right to counsel was violated); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (noting that a violation of the respondent's fundamental rights derived from the Constitution invalidates a deportation proceeding). Following a similar analysis, in a recent case, the Ninth Circuit found that "removal proceedings *must* be terminated" where a respondent's Fourth Amendment rights were violated by an unlawful detention without reasonable suspicion.

Sanchez v. Sessions, 870 F.3d 901, 913 (9th Cir. 2017) (emphasis added) (citing *Waldron*, 17 F.3d at 518). In deciding whether termination is the appropriate remedy, the Second Circuit emphasizes consideration of "societal benefits" and "deterrent effect" that would result from termination. *See Rajah*, 544 F.3d at 447.

ICE's deliberate policy of targeting individuals in state court for arrest shocks the conscience and violates fundamental rights. There are two fundamental rights at stake here: the Tenth Amendment right to a federalist system of governance, and the right to access court under the First, Fifth, and Sixth Amendments. Courthouse arrests deny these rights to the individuals being arrested, as well as to the immigrant communities that have been made fearful of attending court. The policy renders state courts less able to administer justice effectively because necessary parties, witnesses, defendants, and victims are afraid to come to court. This, in turn, interferes with access to justice for all persons—citizen and noncitizen alike—who rely on the state court system. Terminating proceedings in cases of respondents arrested in courthouses is the appropriate remedy to protect the functioning of the state courts and deter ICE from continuing its policy of depriving immigrants of their fundamental rights.

ARGUMENT

I. An IJ is empowered to terminate removal proceedings where ICE has engaged in conduct that is conscience shocking or deprives the respondent of fundamental rights, and where termination will deter deliberate misconduct.

IJs are authorized to determine removability, adjudicate applications for relief, order withholding of removal, and "[t]o take any other action consistent with applicable law and regulations as may be appropriate." 8 C.F.R. §1240.1(a)(iv). This includes authorization to "terminate proceedings when the DHS cannot sustain the charges [of removability] *or in other*

specific circumstances consistent with the law and applicable regulations." *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012) (emphasis added).

Through the text of the Immigration and Nationality Act ("INA"), Congress indicated its intent that Immigration Court be the principal avenue for determining all issues related to removal proceedings. INA § 242 provides that "[n]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." INA §§ 242 (e)–(g). INA § 242(b)(9) affirmatively seeks to combine all issues into one proceeding before the Immigration Court.

Given the Immigration Court's exclusive jurisdiction over removal proceedings, it is the norm for all issues that arise in the course of removal proceedings to be adjudicated in individual cases before IJs. This gives the IJ an important role in preventing systemic abuse by ICE. IJs can and should discourage misconduct by terminating proceedings where ICE has displayed a widespread pattern of acting in egregious violation of the law.

Under Second Circuit law, a key issue in deciding whether to terminate proceedings is the "deterrent effect" of termination. *See Rajah*, 544 F.3d at 447. Minor, non-systemic violations may not be subject to systemic remedies. It is difficult to deter isolated incidents of individual officers breaking minor procedural rules, and the resulting burden on adjudication could be great. *Id*.; *see also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984) (discussing the difficulty of deterring abuses by immigration enforcement officers). However, where ICE has engaged in a deliberate policy that shocks the conscience or violates fundamental rights, the weighing of the burden on the agency and the societal benefit shifts. In these cases, termination is an appropriate remedy because it can deter a deliberate, agency-wide policy. If the agency knows that cases

brought under its policy will be terminated by IJs, the agency can alter its policy to avoid this outcome, thereby effectively deterring its agents from engaging in the objectionable conduct.

II. ICE's deliberate policy of making arrests in courthouses is conscience-shocking and deprives respondents of fundamental rights.

a. ICE's deliberate policy of courthouse arrests constitutes undue federal interference in state courts in contravention of the Tenth Amendment.

ICE's courthouse arrests hijack the sovereign state judiciary to serve federal interests, in violation of the principle of federalism as embodied in the Tenth Amendment. Under the Constitution, the states retain "a residuary and inviolable sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing The Federalist No. 39, at 245); *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Federalism "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748.

States exercise this sovereignty by maintaining independent state governments of their own design. *See, e.g., Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) ("When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all ... Acts and Things which Independent States may of right do.' ¶ 32."); *Alden*, 527 U.S. at 749 ("[P]lenary federal control of state governmental processes denigrates the separate sovereignty of the States."); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 462 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) ("No function is more essential to the separate and independent existence of the States and their governments than the power to

determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices."). State courts, as a core institution of state government, require the utmost protection from federal intervention in order to preserve state sovereignty. *See Younger v. Harris*, 401 U.S. 37, 43– 44 (1971) (describing the "longstanding public policy against federal court interference with state court proceedings" in accordance with "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"); *Alden*, 527 U.S. at 749 (holding that the federal government cannot compel state courts to hear private suits for damages against nonconsenting states); *Gregory*, 501 U.S. at 452 (declining to apply federal law to qualifications for state judges and emphasizing that qualifications for state judges were decisions of "the most fundamental sort for a sovereign entity"); *see also Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("[P]owers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to [the states] before admission to the Union and preserved to them by the Tenth Amendment.").

ICE's policy of courthouse arrests impedes the efficient functioning of this important sovereign state institution. As described *supra* in the background section, the policy deters immigrants from attending court. IDP Survey, *supra at* 6, Exhibit F (Exhibit p. 15). This deterrence interferes with the court's ability to adjudicate disputes, because necessary parties are afraid to attend court. Robbins *supra* at 3, Exhibit E (Exhibit p. 11) (describing a press conference where the Brooklyn District Attorney and New York State Attorney General called for an end to courthouse arrests because they are "interfering with the criminal justice system, making witnesses and defendants afraid to appear in court."); *see also* Letter from Hon. Tani G.

Cantil-Sakauye, Chief Justice, Supreme Court of California (Mar. 16, 2017), attached as Exhibit P (Exhibit p. 62); Letter from Hon. Thomas A. Balmer, Chief Justice, Or. Supreme Court (Apr. 6, 2017), attached as Exhibit P (Exhibit p. 62); Letter from Hon. Stuart Rabner, Chief Justice, Supreme Court of N.J. (Apr. 19, 2017), attached as Exhibit P (Exhibit p. 62). The Tenth Amendment does not allow federal actors to undermine a sovereign state institution in this way.

The disruption of state court is the inevitable consequence of ICE courthouse arrests, which is why the common law rule does not allow civil arrests of individuals attending, coming, or going from court. *See supra* Background Section. Courts have long recognized that civil arrests at or around courthouses disrupt the administration of justice, most notably by interfering with the attendance of parties who are necessary for court proceedings. The purpose of the common law tradition against courthouse arrests has always been to encourage attendance in court by protecting "any…person without whose presence full justice cannot be done." *Montague v. Harrison*, 3 C.B., N.S., 292; *see also Netograph Mfg. Co. v. Scrungham*, 197 N.Y. 377, 380 (1910) ("[T]he obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice"). The privilege has been extended to civil service of process for the same reason. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932) ("[T]he 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."). Given that mere civil service of process can intimidate necessary parties, the threat of ICE officers prepared to take noncitizens into indefinite detention pending deportation is an even greater problem for the court.

In addition to the Tenth Amendment violation inherent in the federal government disrupting a core institution of state sovereignty, ICE's courthouse arrests also violate the Tenth Amendment through unlawful commandeering of the state judicial apparatus. The anti-commandeering doctrine prevents the federal government from hijacking any of the three branches of state governmental power. *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government may not compel state legislatures to adopt laws); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government may not directly conscript the state's executive officers); *Alden*, 527 U.S. at 749 (stating that the federal government may not "press a State's own courts into federal service"): *Murphy*, 138 S. Ct. at 175 ("The anticommandeering doctrine…is simply the expression of a fundamental structural decision incorporated into the Constitution."). As the Court noted in *Printz*, "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service–and at no cost to itself–the police officers of the 50 states." *Printz*, 521 U.S. at 898. ICE's policy impresses into its service, at no cost to itself, the courthouses of the 50 states. The Court's recent decision in *Murphy* widened the scope of the anti-commandeering doctrine by holding that no affirmative Congressional command is required to trigger a commandeering problem. *Murphy*, 138 S. Ct. at 1478 (rejecting the federal government's arguments that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it").

The courts apply the anti-commandeering doctrine against ICE's practices that impermissibly hijack state law enforcement resources, facilities, and systems. *See, e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government."); *City. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1215 (N.D. Cal.

2017) ("[C]ondition[ing] all federal grants on honoring civil detainer requests…is likely unconstitutional under the Tenth Amendment because it seeks to compel the states…to enforce a federal regulatory program through coercion."); *The City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 1305789, at *11 (E.D. Pa. Mar. 13, 2018) (denying motion to dismiss claim that policy conditioning state funding on cooperation with ICE was unconstitutional commandeering of city employees to perform federal functions). As the Seventh Circuit recently identified, forced cooperation between states and federal immigration enforcement undermines the states' legitimate "concerns with maximizing the safety and security of their own communities" because "persons who are here unlawfully—or who have friends or family members here unlawfully—might avoid contacting local police to report crimes as a witness or a victim if they fear that reporting will bring the scrutiny of the federal immigration authorities[.]" *City of Chicago v. Sessions*, No. 17-2991 at *9 (7th Cir. April 19, 2018). ICE's forced intrusion into the state courts implicates the precise same set of problems.

Through its policy of courthouse arrests, ICE has conscripted those who work in state courthouses–including state-employed judges, clerks, prosecutors, and security guards. *Cf. Murphy*, 138 S. Ct. at 1477 ("[The anticommandeering] rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks."). The entire premise of courthouse arrests is to use state resources, employees, and facilities. The state judicial apparatus of the state brings individuals to the courthouse, an enclosed physical space where individuals are screened by security guards, and ICE's policy takes advantage of these state functions to effectuate immigration arrests. *See ICE Directive 11072.1* (noting that "Individuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband" and advising that arrests should "take place in non-public

areas of the courthouse be conducted in collaboration with court security staff, and utilize the court building's non-public entrances and exits"). ICE also uses state courts' public dockets, maintained by state employees, to locate noncitizens for arrest. This federal interference taxes the states with nonmonetary costs, as the states' ability to administer justice is hampered and community trust in the courts is undermined. *See Printz*, 521 U.S. at 898. ("[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."). The purpose of the ICE courthouse arrest policy is to commandeer state resources–an impermissible federal action that puts a costly political burden on the states and violates the Tenth Amendment.

In its recent decision in *Murphy*, the Supreme Court struck down a federal anti-gambling law, explaining, "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." 138 S. Ct. at 1478. In the case of courthouse arrests, no metaphor is necessary to understand the affront to state sovereignty–federal officers are literally patrolling state courthouses and disrupting the judicial process.

Whether understood as unlawful interference with a core state institution or as an act of commandeering, or both, ICE's courthouse arrests are in violation of the Tenth Amendment.

This violation of state sovereignty and the commandeering of the courthouse are deprivations of individual fundamental rights warranting termination of immigration proceedings. The right to a federalist system of governance that separates power between the states and the federal government is a fundamental right of all individuals in the United States. *Bond v. United States*, 564 U.S. 211, 220-22 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

When government acts in excess of its lawful powers, that liberty is at stake."). Therefore, an individual can independently allege violations of the Tenth Amendment on her own behalf. *See Bond*, 564 U.S. at 220–22 (holding that criminal defendant could challenge his conviction based on a contention that the federal statute he was convicted under violated the Tenth Amendment). ICE's courthouse arrests deprive individuals of fundamental Tenth Amendment rights and thus constitute grounds for terminating removal proceedings.

b. ICE's deliberate policy of courthouse arrests violates the fundamental constitutional right to access both civil and criminal courts.

ICE's courthouse arrests are interfering with access to court for both this individual respondent and the entire community, noncitizens and citizens. The threat of ICE arrest, and subsequent prolonged detention and deportation, is so intimidating to noncitizens that it constitutes a barrier to access to the courts. Noncitizens are intimidated from attending court in any capacity: as plaintiffs, defendants (both criminal and civil), witnesses, victims of crimes, friends or family members of a party involved in a case, interested members of the general public, or simply to access court records. Individuals like the Respondent, in particular, are essentially penalized for attending court because attendance is what led to courthouse arrest and removal proceedings. Citizens are also affected because they may need to rely on noncitizen witnesses in their cases. This is a constitutional problem both because it interferes with the functioning of a core state institution as described in the proceeding section, but also because it violates the fundamental right to access court.[2]

[2] The Supreme Court established long ago that the constitutional guarantee of due process and equal protection is applicable to noncitizens present in the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all "persons" within the U.S., including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") The Supreme Court has also long held that

The right to access court is a fundamental, constitutionally protected right. *E.g*. *Tennessee v*. *Lane* 541 U.S. 509, 533 (2004) (recognizing "the fundamental right of access to the courts"); *Bounds v*. *Smith*, 430 U.S. 817, 828 (U.S. 1977) (enforcing "the fundamental constitutional right of access to the court"). The right is derived from the Fourteenth Amendment due process and equal protection clauses, and thereby incorporated into the Fifth Amendment. *Boddie v*. *Connecticut*, 401 U.S. 371, 376 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *Griffin v*. *Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring) (states may not "bolt the door to equal justice" by creating financial barriers to appeals for indigent defendants). The right is also protected through the First Amendment Right to Petition. *E.g*. *Borough of Duryea, Pa*. *v*. *Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."); *see also* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, UC DAVIS L. REV., 1742, 1745 (2017) ("In more than twenty Supreme Court cases over the past five decades, one or more Justices has asserted or assumed that a lawsuit is a petition, without a single colleague disputing the premise.").

The right to access the court is so fundamental that it requires government officials to take affirmative steps to remove barriers to ensure that people have meaningful access to the court

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noncitizens are guaranteed Fifth and Sixth Amendment rights. *Wong Wing v*. *United States,* 163 U.S. 228 (1896). The Court recently affirmed this principle in *Padilla v*. *Kentucky*, which recognized that noncitizens' Sixth Amendment rights include the right to be informed of immigration-related consequences of entering a guilty plea. *Padilla v*. *Kentucky*, 130 S. Ct. 1473 (2010). This holding makes clear that noncitizens are entitled to protections in the courtroom, and that lack of citizenship does not make the right to access court any less fundamental.

system. *Lane*, 541 U.S. at 542 (finding an access to court problem where a wheelchair user was required to attend court on the second floor of a building without an elevator, though he could have reached the courtroom by crawling or being carried); *Bounds*, 430 U.S. at 828 (1977) (holding that the right of access to the courts requires prison authorities to assist inmates with filing of meaningful legal papers by providing inmates with adequate law libraries or adequate assistance from persons trained in the law); *Burns v. Ohio*, 360 U.S. 252, 257 (1959) (holding that filing fees for criminal appeals are impermissible where they "effectively foreclose[] access"). Constitutional law requires not just literal availability of a day in court—it requires that "access to the courts is adequate, effective, and meaningful." *Bounds* at 822.

Where any noncitizen present in court potentially faces civil arrest, prolonged detention, and deportation by ICE, access to court for noncitizens is not "adequate, effective, and meaningful." *Id. Cf. Directive 11072.1* (simultaneously asserting priorities for courthouse arrest targets and delegating absolute discretionary decision-making power to line agents to make courthouse arrests). Courthouse arrests interfere with the right to access courts both for individuals arrested in the state court, and also for the noncitizen population that feels intimidated from attending court. Immigrants are being denied a meaningful opportunity to be heard in court because they must risk arrest by ICE any time they come to, enter, and/or leave a courthouse. The courts developed the common law privilege against civil arrest based largely on the barriers that such arrests pose to attending court. *Lamb*, 285 U.S. at 225. Today ICE is forcing communities across the country to confront these barriers, as pervasive fear of ICE enforcement keeps people from acting on their right to attend court—a right often born out of necessity. Supreme Court jurisprudence on accessibility for people with disabilities, courthouse fees, and prison law libraries demonstrates that the right to access court is more than just the

technical right to be legally allowed to enter a courthouse: courts need to be affirmatively accessible to all, without barriers that disadvantage certain populations.

This inability to access courts is particularly troubling in the context of criminal defendants, who have additional rights protected by the Sixth Amendment. Under the Confrontation Clause, criminal defendants have a right to be present in the courthouse to confront witnesses. *See Faretta v. California*, 422 U.S. 806, 819-20 n. 15 (1975); *Sanchez v. Duncan*, 282 F.3d 78 (2d Cir. 2002). ICE courthouse arrests interfere with this right by penalizing defendants who exercise their rights. Defendants who may need to be appear for a minor misdemeanor trial are threatened by ICE with the possibility of a civil arrest leading to prolonged detention and deportation. Under common law tradition, the right to be present in court necessarily assumes that parties will not be civilly arrested, knowing that the threat of civil arrest will prevent parties from attending. *See* 3 William Blackstone, *Commentaries on the Laws of England* 289 (1769); *Lamb v. Schmitt*, 283 U.S. 222, 225 (1932); *Long v. Ansell*, 293 U.S. 76, 83 (1934); *see also Crawford v. Washington* 541 U.S. 36, 43 (2004) (relying on common law tradition to interpret the Confrontation Clause). While ICE justifies its policy by dismissing criminal defendants as "criminals and fugitives," FAQ on Sensitive Locations and Courthouse Arrests, U.S. Immigration and Customs Enforcement, https://www.ice.gov/ero/enforcement/sensitive-loc, the Constitution recognizes that being accused of a crime does not strip an individual of her rights. Rather, the Constitution affords criminal defendants a range of specific and sacred rights and protections. Among those protections is the right to be present in court.

Moreover, under the Compulsory Process Clause of the Sixth Amendment, criminal defendants have a right to present a defense, including by calling witnesses. *E.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused

to present witnesses in his own defense."); *Washington v. Texas*, 388 US 14, 18 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."). The criminal defendant's right to present witnesses goes beyond literally calling his witnesses to the stand; the right also means that the government cannot interfere with these witnesses. In a multitude of cases, the federal courts have found a violation of the Sixth Amendment due to government conduct in connection with a criminal proceeding. In *Webb v. Texas*, the Supreme Court found that a judge's "lengthy admonition on the dangers of perjury" interfered with the defendant's right because it "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." 409 U.S. 95, 98 (1972). The Courts of Appeals have found that witness intimidation by prosecutors or other government officials can also violate the Sixth Amendment. *See, e.g., Soo Park v. Thompson*, 851 F.3d 910, 921 (9th Cir. 2017) (finding a Sixth Amendment violation where detective made intimidating phone call to material defense witness); *United States v. Little*, 753 F.2d 1420, 1439–40 (9th Cir. 1984) (analyzing claim of defense witness intimidation by IRS agents); *United States v. Blackwell*, 694 F.2d 1325, 1333 (D.C. Cir. 1982) (holding that prosecutor threatening prospective witness with prosecution was impermissible interference with the defendant's right to present witnesses); *United States v. Goodwin*, 625 F.2d 693 (5th Cir.1980) (remanding on other grounds, but noting that allegations that defense witnesses were threatened by prison officials regarding testimony for trial would also be grounds for remand).

ICE's courthouse policy articulated in *Directive 11072.1* is a government threat against noncitizen potential witnesses, as it intimidates them from appearing in court through the

possibility of arrest, detention, and deportation. This is impermissible governmental interference with the Sixth Amendment right to present a defense. Interference with witnesses is inherent to the ICE policy–as long as ICE is successfully able to initiate removal proceedings this way, witnesses will be intimidated. The violation of fundamental rights of all criminal defendants who may need to rely on a noncitizen witness compounds the seriousness of the violation of the rights of the respondent in this particular case, and is further grounds for termination of proceedings.

III. Termination of proceedings is necessary to deter ICE's deliberate misconduct.

When a respondent's rights are violated, there are two potential remedies available in Immigration Court: termination of proceedings and suppression of evidence. Second Circuit case law calls suppression of evidence where a violation is *either* widespread *or* egregious. *Almeida-Amaral v*. *Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006). But ICE's courthouse arrests are *both* widespread *and* egregious. *Supra* Background Section. *Rajah*, by emphasizing the deprivation of fundamental rights, as well as "societal benefit" and "deterrence" strongly suggests that where violations are both egregious and widespread, termination is an appropriate remedy. *Rajah*, 544 F.3d at 446. Given that ICE's courthouse arrests meet this heightened standard, suppression is insufficient and termination is necessary.

In many cases, suppression of evidence is no remedy at all. Any time there is independent evidence of alienage, suppression of evidence has no effect. For example, immigrants arrested by ICE in courthouses include legal permanent residents, asylees, and visa holders, so the question of evidence of alienage is irrelevant in those cases. Even if an IJ suppresses evidence obtained through an unlawful ICE arrest, removal proceedings will often be able to continue uninterrupted on the basis of independent evidence of alienage. *See Lopez-Mendoza*, 468 U.S. at 1043 (explaining that suppression has limited deterrent effect because "deportation will still be

possible when evidence not derived directly from the arrest is sufficient to support deportation"). Thus, offering suppression as the sole remedy fails to do anything to correct the conscience-shocking conduct that violates fundamental rights. If suppression were the only remedy, ICE would be able to continue its misconduct without any judicial check on its power.

Termination, however, is a much more effective remedy available to Immigration Judges in response to deliberate conscience-shocking conduct that deprives people of their rights. *Cf*. *Rajah*, 544 F.3d at 447 (declining to terminate where there would be no deterrent effect or societal benefit in the case of isolated, individualized incidents of abuse). It sends a clear and effective message that a particular course of conduct is impermissible, and that proceedings initiated with this kind of violation of rights will not be allowed to move forward. By terminating proceedings brought through courthouse arrests, IJs can set a clear, bright line rule that arresting individuals while they are attending to other matters in state court is not permissible. Unlike suppression, termination has the ability to protect fundamental rights by deterring ICE's objectionable conduct. In this case, termination will deter violations of the fundamental constitutional rights to federalism and to access court.

In the criminal context, the Supreme Court has stated there are cases where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction[.]" *U.S. v. Russell*, 411 U.S. 423 (1973). A defendant can assert a selective prosecution defense if the prosecutor brought charges in a way that violated the defendant's Fourteenth Amendment rights, thus tainting the entire case. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). Deportation proceedings, like criminal proceedings, can be "tainted from their roots" so as to call for a "prophylactic remedy[.]" *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975). Courthouse arrests

are the type of outrageous conduct that taints the entire proceeding, and which should bar the government from invoking judicial processes to obtain removal.

ICE asserts that its practice of making courthouse arrests is necessary for safety and efficiency, *see* Exhibit V (Exhibit p. 92), but this reflects a short-sighted view. ICE fails to take into account the disastrous effect its policy has on the administration of justice in state courts. Where immigrants are afraid to show up at court, our communities are inherently less safe. Moreover, individual access to court is protected by deeply entrenched constitutional law that cannot be single-handedly upended by ICE for the sake of the convenience of ICE officers.

The Supreme Court has recognized that "the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy." *Cox v. State of Louisiana*., 379 U.S. 559, 562 (1965). Termination of proceedings where ICE has made a courthouse arrest can effectively deter ICE's disruption of this sacred American institution.

CONCLUSION

Because this case was brought through a courthouse arrest in violation of constitutional law and against the public interest, respondent's motion to terminate should be granted. There is no other remedy available to deter ICE from this harmful practice that deprives immigrants of fundamental rights, and endangers the functioning of state courts to the detriment of the entire community.

Dated: [redacted]

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