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January 30, 2020

VIA FEDERAL EXPRESS

Ms. Susan L. Carlson
Clerk of the Court
Washington State Supreme Court
415 12th Avenue SW
Olympia, WA 98501-2314

Re: Comments Regarding Proposed General Rule 38

Dear Ms. Carlson:

I write to oppose Proposed General Rule 38. As the United States Attorney for the Western District of Washington, I am the chief federal law enforcement officer for the Western Washington with responsibility for federal criminal prosecutions and civil matters involving the United States and its Departments and agencies arising in the State's nineteen western-most counties. That work includes civil and criminal immigration-related matters. In that work, my staff and I regularly consult with the Department of Homeland Security (DHS) and its law enforcement officers and agents, although we do not supervise or otherwise set policy for that Executive Branch Department.

As drafted, the proposed General Rule 38 purports to bar "civil arrests"—a term that the rule does not define—of a person "inside a court of law in this state" in connection with a judicial proceeding or other business with the court. The second section of the rule would also bar "civil arrests" of a person travelling to or from a court of law of this state to participate in judicial proceedings, or accessing services, or conducting business with the court, something that the rule defines broadly.[1] And it would authorize Washington courts to issue writs and other court orders to enforce the rule.

[1] The proposed rule published on the Court's website would apply to a person travelling to or from a court of law. The proponents of the proposed amendment appear to have submitted an amended version of the proposed rule to the Washington State Bar Association Board of Governors. That proposal provides that "the civil arrest prohibition extends to within one mile of a court of law." It does not appear that this amended rule proposal has been published on the Court's website and, accordingly, has not been made part of this comment process. With respect

I recognize that arrests inside state courtrooms are generally unnecessary to the enforcement of the immigration laws and support the goal of ensuring access to justice and the continued orderly operation of state courts. But, because this proposed rule purports to extend the authority to regulate conduct of federal agents well beyond the courtroom and is preempted by federal law, I must express my opposition to the rule.

A. The Proposed Rule Exceeds the Court's Rule-Making Authority.

First, the proposed rule exceeds this Court's rule-making authority. A Washington Court certainly has inherent authority to control the proceedings before it, *State v. Gresham*, 173 Wash. 2d 4045, 428 (2012), and to address the safety of courthouse personnel, litigants, and the public. *State v. Hertzog*, 96 Wash. 2d 383, 701, 635 P.2d 694 (1981) (court has inherent authority "to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public."). But a Washington Court does not have authority to regulate conduct of federal officers in other places as this rule purports to do so. It attempts to extend a court's authority beyond the courtroom to the courthouse, its environs, to all areas of the state more generally, and—depending on the location of the residence or employment of the particular individual involved—potentially beyond the state's borders. In that respect, it represents an unprecedented extension of this Court's authority to regulate places and facilities.

The proposed rule also violates Washington separation of powers principle and exceeds this Court's rule-making authority under Article IV, Section 1 of the Washington Constitution and Wash. Rev. Code § 2.04.190. Although this Court has authority to make rules governing "practice and procedure limited to the essentially mechanical operations of courts by which substantive laws, rights and remedies are effectuated," it does not have authority to make rules that create "[s]ubstantive law prescribe[ing] norms for societal conduct and punishments for violations thereof." *State v. Smith*, 84 Wash. 2d 498, 501 (1974). By creating a right to be free from "civil arrest" in certain places and circumstances regardless of whether the arrest is otherwise legally valid under federal law, the proposed rule attempts to "create[], define[], and regulate[] primary rights" and to create a cause of action to punish a violation of the rights so created and defined. For that reason, it is a substantive rule that is outside this Court's authority. *Id.*

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to that proposal I would simply note that, although the one-mile language is more specific, as written it would essentially create a circle of a one-mile radius around each courthouse in this State in which any person arrested for an immigration offense could challenge the arrest based on a claim that he or she was on the way to or from the courthouse regardless of the validity of that claim.

The proponents of the rule fail to analyze this Court's authority, or lack of authority, to adopt such a rule even though the rule proposed represents a significant and unprecedented extension of the Court's authority. Instead, the proponents suggest that the rule is supported by "the civil arrest privilege." That suggestion is mistaken. A review of the history, purpose, and scope of this so-called privilege makes clear that it offers no support for a rule of the breadth and scope as that proposed.

B. There Is No Courthouse Privilege That Would Support this Proposed Rule.

This Court has held that parties and witnesses who are not residents of the State are privileged from service of a summons or process in an unrelated civil action while temporarily within the State for the purpose of attending proceedings in a pending civil suit. *State ex rel. Gunn v. Superior Court of King County*, 111 Wash. 187, 189–90 (1920). That 1920 holding, founded in English common law, had as its purpose "to insulate the pending litigation against the interference and vexation which might arise from the untimely intervention of unrelated litigation." *Anderson v. Ivarsson*, 77 Wash. 2d 391, 393 (1969). The holding rested on "the foundation of judicial convenience and the furtherance of the orderly and unfettered administration of justice." *Id.* But since that opinion, this Court also concluded the privilege is not to be "arbitrarily and rigorously enforced." *Id.* (citing *Stewart v. Ramsay*, 242 U.S. 128 (1916); *Lamb v. Schmitt*, 285 U.S. 222 (1932)). Moreover, this common-law privilege applies only to individuals coming from out of state to appear in Washington courts; it does not protect residents of *this* State from service of process when attending a civil trial in a Washington court. *Anderson*, 77 Wash. 2d at 393 (rule extends "extending immunity from the service of unrelated civil process to *nonresident* suitors and witnesses, attending upon a local civil judicial proceeding" (emphasis added)).

While early decisions referred to this privilege as an immunity from arrest, that was because "the mode of process in civil actions had grown up as an arrest of the person," and such an "arrest" was the only means by which civil process could be served when the rule originated. *Gunn*, 111 Wash. at 189–90. It is more correctly thought of as a privilege against service of process. Wright and Miller, 4A *Fed. Prac. & Proc. Civ.* § 1076. And even this privilege does not bar a process server from serving process; rather, the "privilege" must be asserted in the relevant proceeding by a motion to quash, and it may be forfeited. 4A *Fed. Prac. & Proc. Civ.* § 1079. Further, this privilege has not been extended to criminal matters, or for apprehensions to enforce this country's immigration laws. Calling the detention of an individual as part of an action to enforce immigration laws a "civil arrest" would not bring it within the common-law privilege for all of these reasons.

Moreover, the process-immunity privilege has largely given way to personal service of summons or other form of notice based on the minimum-contacts standard. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation & Placement*, 326 US 310, 316

(1945). Once long-arm statutes extended state-court jurisdiction in the wake of *International Shoe Co.*, potential defendants could not necessarily avoid civil process by remaining outside a forum state. Courts have since explained that when an out-of-state defendant is subject to civil process under a forum state's long-arm statute, the process-immunity privilege does not apply. *See, e.g., In re Arthur Treacher's Franchise Litigation*, 92 F.R.D. 398, 405 (E.D. Pa. 1981). And in England, where the privilege originated, it was abolished in 1947. *See Crown Proceedings Act*, 1947, 11 Geo. 6, c. 44 (Eng.). For all these reasons, the privilege against service of process does not provide a foundation for the proposed rule.

Finally, the majority of Washington's 39 county courts are housed in, or are immediately adjacent to, buildings that also house other departments such as vehicle licensing, voter registration, and law enforcement offices. Even if a privilege exists and could provide some foundation for the proposed rule, by definition, it would not extend to state residents who enter such county buildings to access unrelated county services. Indeed, that would extend the meaning of "court of law" well beyond its normally accepted meaning. As such, a rule as broadly drafted as this has the potential to create confusion.

C. The Proposed Rule Conflicts with and Is Preempted by Federal Law.

Even if some portion of the proposed rule is within the Court's authority to adopt, the proposed rule would conflict with, and be preempted by, federal law. *See Hines v. Davidowitz*, 312 U.S. 52 (1941). As the United States Supreme Court has explained, "[w]hen the Constitution was adopted, a portion of [the States'] judicial power became vested in the new government created," and thus withdrawn from the states. *Tennessee v. Davis*, 100 U.S. 257, 267 (1879). "[T]he execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted." *Id.* That principle is also reflected in Article I, Section 2 of the Washington State Constitution.

It is well-established that immigration and the status of aliens is not subject to state regulation. *Arizona v. United States*, 567 U.S. 387, 394 (2012). "'The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.'" *Id.* at 409–10 (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)). Through the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and related statutes, Congress has created an "extensive and complex" framework for the "governance of immigration and alien status." *Id.* at 395. "Congress has specified which aliens may be removed from the United States and the procedures for doing so." *Id.* at 396. This "federal statutory structure" governing immigration and detention of aliens "instructs when it is appropriate to arrest an alien during the removal process." *Id.* at 407.

Federal law, not State law, controls any challenge to an arrest by immigration officials because it must be made in a federal immigration court, where federal law applies. Immigration officers act under federal law, not state law, and a state court cannot prohibit the federal government from acting, *In re Tarble*, 80 U.S. 397 (1871); *M'Culloch v. Maryland*, 17 U.S. 316 , 436 (1819). A state-law privilege that would allow a state to alter or interfere with the INA's comprehensive removal scheme—which governs the relief available to aliens otherwise subject to removal—is preempted by the INA and the federal authority to control immigration. *Arizona,* 567 U.S. at 409. Under the Supremacy Clause, "federal courts may not use state common law to rewrite a federal statute." *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (citing *Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957)).

D. The Immigration and Nationality Act Authorizes Courthouse Arrests.

The INA provides that "on a warrant issued" by the DHS attesting to an alien's removability, "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). Authorizing arrests pursuant to an administrative warrant and subsequent civil detention is a constitutionally permissible part of Congress's broad power over immigration and the Executive's authority to execute that power, *Denmore v. Kim*, 538 U.S. 510, 523 (2003), and the DHS Secretary's judgment regarding the application of Section 1226 is not subject to judicial review. 8 U.S.C. § 1226(e). The INA also gives immigration officers authority to make warrantless arrests where there is reason to believe that the individual is "in the United States in violation of any [immigration] law or regulation," but only where the alien "is likely to escape before a warrant can be obtained." 8 U.S.C. §§ 1357(a)(2) and 1357(a)(3), (6).

The INA imposes no place restrictions on the place of arrest. The statute sets only one limitation on the Department's broad detention powers—immigration officials cannot take into custody an alien who is serving a criminal sentence but must wait until the sentence is completed. 8 U.S.C. §§ 1226(c), 1231.

More importantly, the INA specifically contemplates arrests in courthouses. The statute imposes a certification requirement when an individual who appears for certain specified proceedings is being arrested. It provides that "where an enforcement action leading to a removal proceeding was taken against an alien" at 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 described in subparagraph (T) or (U) of

section 1101(a)(15) of this title," the Notice to Appear[2] shall include a statement that the provisions of section 1367 of this title have been complied with." 8 U.S.C. § 1229(e)(1). Section 1367 prohibits immigration officials from making "an adverse determination of admissibility or deportability of an alien . . . using information furnished solely by . . . a spouse or parent who has battered the alien or subjected the alien to extreme cruelty" or others potentially complicit in the abuse or trafficking of the alien or their family. *See* 8 U.S.C. § 1367(a)(1)(A)-(F).

This provision makes plain that courthouse arrests are permissible. If immigration officers were subject to a general prohibition on arrests at courthouses, Congress would have had no reason to include reference to arrests in a courthouse in § 1229(e). That section accordingly affirmatively demonstrates that immigration officials do have authority to make courthouse arrests in immigration matters. It also demonstrates that federal law has already made provision for the protection of immigrants who are the victims of trafficking and other forms of abuse.

Because the proposed rule would interfere with broad federal powers of immigration, including the discretion to determine the place of arrest and to effect arrests in courthouses or of individuals who are travelling to or from courthouses, it would be preempted by federal law if adopted. *Arizona,* 312 U.S. at 399-400, 409 ("the removal process is entrusted to the discretion of the Federal Government"). "[S]tate laws are preempted when they conflict with federal law. This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S. at 399 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963), and *Hines*, 312 U.S. at 67 (1941)).

In *United States v. California*, 921 F.3d 865 (9th Cir. 2019), the Ninth Circuit considered California laws that required employers to alert employees before federal immigration inspections; imposed inspection requirements on non-federal facilities that house civil immigration detainees; and limited the discretion of state and local law enforcement to cooperate with federal immigration authorities. Although the Court upheld the denial of a preliminary injunction against two of these laws, it reversed the denial of an injunction against the law requiring the California Attorney General to inspect non-federal facilities housing civil immigration detainees. In so doing, the Court reaffirmed the principle that state laws reflecting a state's "active frustration of the federal government's ability to discharge its operations" are preempted by federal law. *Id.* at 885. By prohibiting federal immigration officials from making arrests pursuant to an administrative warrant in and around courthouses or of people travelling to

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[2] The Notice to Appear is the basis for the administrative arrest warrant.

and from courthouses, the proposed rule would actively frustrate federal immigration officials' ability to enforce our immigration laws and therefore would be preempted by federal law.

E. The Rule as Drafted Proposes Unenforceable Remedies.

The provision of the proposed rule purporting to authorize Washington courts to "issue writs and other court orders necessary to enforce this court rule," is particularly troubling and, to the extent it contemplates the issuance of a writ against a federal official for enforcing federal law, runs contrary to the supremacy of federal law in our constitutional order. As the Supreme Court recognized in *Davis*, the federal government "'can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members.'" *Davis*, 100 U.S. at 263.

As such, a writ, contempt citation, or other order issued by a Washington Court under this proposed rule would be removable to federal court under 28 U.S.C. § 1442(a)(1), the federal officer removal statute, which protects federal officers from interference with their official duties through state-court litigation. Once removed, the action would be subject to dismissal under well-established principles of federal law. *Cunningham v. Neagle (In re Neagle)*, 135 U.S. 1, 75 (1890) (holding that federal officers are immune from state prosecution for acts committed within the reasonable scope of their duties, observing that a U. S. Marshal who performed "an act which he was authorized to do by the law of the United States" and that was "necessary and proper for him to do" "cannot be guilty of a crime under the law of the state of California."). Similarly, the courts of individual states have no authority to interfere with the actions taken under the INA since that power is reserved to the federal government. Any rule adopted by this Court should not include language proposing remedies that are unenforceable.

F. The Rule Is Unwarranted.

In response to the proposed rule, I have met with my federal law enforcement colleagues charged with enforcing immigration laws and with representatives from the county prosecuting attorney ranks and representatives of the Washington Association of Sheriffs and Police Chiefs. These officials were not aware of a single arrest pursuant to an administrative warrant that has taken place within a Washington *courtroom* in the last two years. Although neither Immigration and Customs Enforcement (ICE) nor Customs and Border Protection (CBP), the two DHS components responsible for immigration enforcement, specifically tracks apprehensions based on

where the arrest takes place, each office reviewed its arrest files in connection with *Washington v. U.S. Dep't. of Homeland Security*, No. 19-cv-2043-TSZ (W.D.Wash.). According to declarations based on that file review filed in that case, ICE identified 17 arrests occurring at or near Washington courthouses in 2017, 25 arrests in 2018, and 23 arrests in 2019. ICE estimates that this constitutes an average of 3% of its annual apprehensions. Of the 65 ICE arrests identified as occurring at or near courthouses in this three-year period, 54 arrests involved individuals with criminal convictions, and approximately half involved individuals who either had previously been removed or had an order of removal. Similarly, CBP identified only 55 arrests that took place at or around courthouses in fiscal year ("FY") 2018 and 96 arrests in FY 2019. Of the 151 individuals arrested, 128 of these individuals had criminal records, and 43 had previously been ordered deported from the United States.

The proposed rule seeks to protect non-citizens from a burden that many citizens encounter as an incident of their own prior conduct. Individuals with civil or criminal infractions may end up having to consider the potential consequences of those infractions in their future interactions with the courts. For example, a U.S. citizen who believes he or she may have a warrant for his or her arrest for failure to appear for a misdemeanor traffic summons and goes to court for some other reason is not immune from arrest and could not argue that fear of arrest stemming from the prior infraction improperly burdened his or her right to access the courts. But under the proposed rule, a non-U.S. citizen seeking to access a Washington court after he or she was removed from the country and then reentered in violation of 8 U.S.C. § 1326, a federal felony, would be immune from arrest.

Court rules must unquestionably be proposed, adopted, amended, or deleted from time to time in order to address "practice and procedure limited to the essentially mechanical operations of courts by which substantive laws, rights, and remedies are effectuated...." But in doing so, this Court should limit itself to adopting rules that are within its authority and should not disturb the obligations and rights of co-equal branches of state government or ignore principles of federal preemption. The proposed rule is breathtaking in its scope, poorly conceived, rests on questionable factual assumptions, picks favorites without a rational basis for doing so, and asks this Court to promote a particular immigration policy in a manner that is outside its authority. Respectfully, the Court should decline to do so.

Yours truly,

Brian T. Moran

Brian T. Moran
United States Attorney

From: OFFICE RECEPTIONIST, CLERK
To: Tracy, Mary
Subject: FW: Comments to GR 38 from USA Brian T. Moran--Correction
Date: Friday, January 31, 2020 8:51:07 AM
Attachments: BTM comment on propose dRule 38-final.pdf

From: Skinner, Elisa (USAWAW) [mailto:Elisa.Skinner@usdoj.gov]
Sent: Friday, January 31, 2020 8:49 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: RE: Comments to GR 38 from USA Brian T. Moran--Correction

Good morning:

Attached is a corrected PDF copy of the letter sent to you yesterday containing the comments of USA Brian Moran regarding proposed General Rule 38. Would you replace the letter sent to you yesterday with the attached? Thank you.

Elisa G. Skinner
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Seattle, WA 98101
206.553.4620

From: Skinner, Elisa (USAWAW)
Sent: Thursday, January 30, 2020 2:32 PM
To: supreme@courts.wa.gov
Subject: Comments to GR 38 from USA Brian T. Moran

Good afternoon:

Attached please find PDF copy of the letter containing the comments of Brian T. Moran, United States Attorney for the Western District of Washington regarding proposed General Rule 38. The original is separately being federal expressed to your office.

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