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February 3, 2020

Ms. Susan L. Carlson
Clerk of the Washington Supreme Court
P.O. Box. 40929
Olympia, WA 98504-0929

Via Email to: supreme@courts.wa.gov

Re: Comment in Opposition to Proposed General Rule 38

Dear Madam Clerk,

I write to oppose the adoption of Proposed General Rule 38.[1] As the United States Attorney for the Eastern District of Washington, I am the chief federal law enforcement officer for the twenty Washington counties east of the Cascade Mountains. My responsibilities include, among others, enforcing our Country's civil and criminal laws, including immigration laws adopted and implemented by the United States Congress.[2] My office, which is within the Department of Justice, works closely with the Department of Homeland Security (DHS) and its component agencies such as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). Although we work with DHS law enforcement officers and agents, we do not supervise them or set policy for their agencies. For the reasons addressed below, Proposed GR 38 should not be adopted.

A. Proposed GR 38 Would Undermine the Federal Government's Unquestioned Authority to Regulate Immigration and is Therefore Preempted by Federal Law.

In his January 30, 2020 letter to the Court, my counterpart in the Western District of Washington, United States Attorney Brian Moran, submitted a detailed analysis of many legal and practical reasons why Proposed GR 38 should not be implemented. As U.S. Attorney Moran persuasively explains, Proposed GR 38, *inter alia*, exceeds the Washington Supreme Court's

[1] A comment letter opposing the proposed revisions to Comment [4] accompanying Rule 4.4 of the Rules of Professional Conduct is being submitted separately. That comment letter is incorporated herein.
[2] "Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are: publicly promulgated; equally enforced; independently adjudicated; and consistent with intentional human rights principles." *See* https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law.

authority to adopt rules regulating court proceedings and providing for courthouse security where it attempts to impermissibly control federal law enforcement. Proposed Rule 38 violates well-settled separation of powers principles, it misconstrues the history and scope of the "civil arrest privilege," and it conflicts with provisions of the federal Immigration and Nationality Act (INA) which allow both civil and criminal arrests to be made at courthouses under certain circumstances.[3] Very troublingly, the proposed rule was created for the express purpose of thwarting the federal government's enforcement of federal immigration laws, thereby violating the *Rule of Law* principle. Therefore, I join fully in U.S. Attorney Moran's comments, and adopt them here by reference.

While all of U.S. Attorney Moran's comments are well stated, the federal government's "broad, undoubted power" over immigration, *Arizona v. United States*, 567 U.S. 387, 394 (2012), bears repeating. By operation of the Supremacy Clause of the United States Constitution, the State of Washington and any state "may not pursue policies that undermine federal [immigration] law." *Id.* at 416. When a state policy conflicts with, infringes upon, or otherwise "stands as an obstacle" to the federal government's exercise of its unquestioned authority in this arena, the policy will be preempted. *Id.* at 399.

There can be no question that Proposed GR 38 would stand as an obstacle to the federal government's enforcement of federal immigration law. Indeed, Proposed GR 38 was proposed with that objective in mind. As the proponents of the rule unapologetically explain, Proposed GR 38 is designed to prevent agents employed by U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) from enforcing federal immigration law in and around state courthouses.[4] More succinctly stated, Proposed GR 38 is designed to carve out "sanctuary" areas in which federal immigration law – the INA and its implementing regulations[5] – do not apply.

Congress clearly established two independent pathways leading to the removal and deportation of illegal immigrants from the United States. Congress established the civil arrest authority in the INA. Congress also established the judicial arrest authority. The fact that a similar civil arrest authority does not exist under state law does not diminish its legal legitimacy.

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[3] *See* 8 U.S.C. §§ 1229(e)(1) and 1367(a)(1).
[4] In the GR 9 cover sheet accompanying Proposed GR 38, the proponents of the rule describe it as a "strategy" to prevent ICE and CBP from "targeting those who appear at our courthouses and subjecting them to arrest without a judicial warrant for alleged civil immigration violations."
[5] 8 U.S.C. § 1357, *et seq.*; 8 C.F.R. Part 287.

By adopting Proposed GR 38, the Court will be making that very distinction between a civil arrest and a judicially mandated arrest which distinction the Court has no authority to make.

If there is one principle on which members of the Court should readily agree, it is that states cannot exempt themselves from federal law. And yet that is exactly what the proponents of the rule are asking this Court to do. The Court should not abide this brazen flouting of the Supremacy Clause. Proposed GR 38 would be preempted as a matter of well-settled law and should not be adopted.

Interested immigration advocacy groups in the State of Washington are engaged in a campaign to limit or eliminate the enforcement of this Country's national immigration laws and to seek to eliminate the difference between legal immigration, which we all respect, and illegal immigration which Congress has defined and has directed must be prohibited. The arrest of individuals at or near state courthouses in Washington is based upon the enforcement of well-established federal law mandating the removal of illegal immigrants from our communities. It does not restrict legal immigration or the rights of legal immigrants. By adopting Proposed GR 38, however, the State Supreme Court will be wading into an anti-illegal-immigration enforcement advocacy role which it should steadfastly avoid.

B. The Court Should Abandon Consideration of Proposed GR 38 because the Legality of Courthouse Arrests is Currently Being Litigated in U.S. District Court in Seattle.

In December of last year, just weeks after Proposed GR 38 was published for comment, the State Attorney General filed a lawsuit in U.S. District Court in Seattle challenging ICE's and CBP's authority to make immigration-related arrests in and around state courthouses (hereafter, the "Courthouse Arrest Litigation").[6] The aim of the Courthouse Arrest Litigation, as explained in the State's complaint (copy enclosed as Attachment A), is to prevent federal immigration officers from arresting anyone "coming to, attending, or returning from state courthouses or court-related proceedings."[7] That, of course, is precisely the same objective that Proposed GR 38 sets out to achieve.

At a press conference announcing the filing of the Courthouse Arrest Litigation, Washington State Attorney General Robert Ferguson was asked why the State decided to seek an injunction barring arrests in and around state courthouses when the Washington Supreme Court is

[6] *State of Washington v. U.S. Department of Homeland Security, et al.*, Case No. 2:19-CV-02043-TSZ (W.D. Wash.).
[7] Complaint for Declaratory and Injunctive Relief at ¶ 138.

already considering attempting to achieve the same result through the adoption of a court rule. AG Ferguson did not mince words: "What I can say, in short, is that I tend to file a lawsuit when I think that is the best way to resolve an issue. I wouldn't have filed this lawsuit if I thought there was an alternative, better way to resolve it."[8] King County Prosecutor Dan Satterberg offered a similarly blunt answer, expressing "doubts" about whether Proposed GR 38 could be enforced and explaining that it would be better to resolve the issue through litigation.[9]

Former Washington judges, including former Supreme Court Justices Bobbe Bridge and Faith Ireland, have likewise taken the position that adopting Proposed GR 38 would be futile. In an amicus curiae brief filed in support of the State's position in the Courthouse Arrest Litigation, the former judges explained that Proposed GR 38 would confuse court staff who lack formal legal training and would therefore result in "uneven and imperfect" implementation.[10] The former judges thus urged the federal district court to grant a preliminary injunction in lieu of relying on a rule "that *might* address *some* aspects" of the supposed problem. *Id.* (emphasis in original).

As should be obvious, the Courthouse Arrest Litigation has overtaken Proposed GR 38 as the State's preferred approach to resolving its differences with the federal government on this important issue. This provides yet another basis for rejecting Proposed GR 38. The legality of immigration-related arrests in and around state courthouses will be fully litigated and definitively resolved in the Courthouse Arrest Litigation, and the federal court's judgment (after any appeals) will stand as the final word on the subject.

I also feel compelled to note that some of the groups who support Proposed GR 38 have grossly mischaracterized the frequency of civil immigration arrests at state courthouses and the manner in which they are conducted. The Courthouse Arrest Litigation has proceeded in its early stages, and it has become apparent that there is no factual support for many of the most inflammatory claims that have been publicly made by these groups. Sworn declarations with countervailing facts have been filed. An *accurate* factual record will be developed as the case proceeds. This Court should be guided by that factual record rather than the inflammatory and unsupported claims being made by some of Proposed GR 38's supporters.

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[8] December 17, 2019 Press Conference, timestamp 34:34, available at: https://www.youtube.com/watch?time_continue=237&v=YQEi5YHTHtQ&feature=emb_logo
[9] *Id.* at timestamp 39:27.
[10] Brief of Former Judges as Amici Curiae in Support of Plaintiff's Motion for a Preliminary Injunction, ECF No. 93-1, at 17.

I recognize that the State's decision to pursue litigation does not prevent this Court from adopting Proposed GR 38. Most respectfully, however, adopting the rule would be unwise for a multitude of reasons. For one thing, the legal justifications relied upon by the proponents of the rule (the so-called "civil arrest privilege" and the state's interest in controlling the operation of its judicial system), are being challenged by the federal government in the Courthouse Arrest Litigation.[11] If the federal government ultimately prevails on those issues, a future GR 38 would be abrogated. Absent a rejection of the rule, this Court could find itself in the unseemly and awkward position of having to rescind one of its own rules in comity with the federal court's decision.

Moreover, adopting the rule would give those who are subject to being arrested at a courthouse a false sense of security. As U.S. Attorney General William Barr has made clear, state court rules that purport to prohibit administrative arrests on publicly-owned property "cannot and will not govern the conduct" of federal officers acting pursuant to duly-enacted laws passed by Congress.[12] Having been advised of that fact, it would be unwise for the Supreme Court to adopt a rule that purports to create a new legal right of giving safe haven to those travelling to and from a courthouse. With respect, the better course is to abandon consideration of Proposed GR 38 and await the outcome of the Courthouse Arrest Litigation.

C. To the Extent the Court Believes the State Has Authority to Influence Federal Immigration Enforcement at Courthouses, it Should Leave the Matter to the Legislature.

As explained above, any attempt by the State of Washington to influence immigration enforcement at state courthouses is preempted by federal law under the Supremacy Clause. But even if this Court believes that the State retains some authority to exert such an influence, it should leave the matter to the Legislature as the State's policymaking body.

Some of the same advocacy groups that are pursuing the adoption of Proposed GR 38 have likewise proposed the adoption of similar restrictions on courthouse arrests by legislative mandate. Specifically, HB 2567 and SB 6522, proposed in this year's 2020 Legislative Session, would make a legislative finding that civil immigration arrests in and around state courthouses are

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[11] These issues feature prominently in a motion for a preliminary injunction filed by the State on December 18, 2019 (copy enclosed as Attachment B), and by the Department of Homeland Security defendants' brief in opposition to the same (copy enclosed as Attachment C). The briefing on the preliminary injunction motion was complete as of January 31, 2020. A ruling on the motion is expected within the next few weeks.

[12] Letter to Chief Justice Fairhurst dated November 21, 2019, available at https://www.justice.gov/ag/page/file/1219556/download

"deterring and preventing Washington residents from safely interacting with the justice system." These bills would prohibit arrests of anyone "going to, remaining at, or returning from, a court facility," and would also prohibit judges, court staff, and prosecutors' offices from sharing information about a person's immigration status with federal immigration authorities.

If such legislation is adopted, it will likely be subject to challenge in the state or federal courts. That is obviously how our system of government is designed to work. Respectfully, there is no place for this Court to engage in policymaking of this type from the bench, or to attempt, at the urging of political and private interest groups, to create legal rights by Court rule. The Court should leave this politically-charged issue to the Legislature.[13]

Finally, Proposed GR 38 is fraught with ambiguities that make its adoption unwise. Terms are not defined, and the restrictions it purports to impose are limitless in scope. To attempt such a sweeping change in the law, by a vague and incredibly broad court rule, will result in the details being sorted out by "writs" and other orders (presumably seeking to impermissibly regulate federal law enforcement officers), which is a recipe for disparate treatment between courts of this State and will invariably result in inefficient and protracted litigation.

D. The Proposed Rule Would Jeopardize Public Safety

Our federal immigration laws serve a vital public safety role in our society. They establish a defined process for legal immigrants to come to the United States and eventually become naturalized citizens. They also establish a process for dealing with people who come here illegally – including those who pose a threat to public safety.

Proposed GR 38 would upset the careful balance struck by Congress when it passed the INA. At its core, the proposed rule makes a policy judgment that anyone who comes to a state courthouse – including those who are in the United States unlawfully and who have committed crimes or have been previously removed or deported – should be given a free pass to go about their business. That judgment puts lives and public safety at risk.

The arrests that have occurred outside some of our state courthouses, which are relatively few in number, have removed illegal immigrants who do not respect our laws. The proponents of Proposed GR 38 would apparently have the Court believe that ICE and CBP routinely arrest law-

[13] Additionally, SB 6442 and HB 2576 propose the abolition of any private detention facility in the state of Washington. These proposals have been made with full knowledge by the proponents that the only such facility in existence is the ICE Detention facility in Tacoma.

abiding people who just happen to be present at the courthouse. But that is flatly untrue, and has not been established by the proponents of the rule. As explained in several of the declarations filed by the Department of Homeland Security in the Courthouse Arrest Litigation, ICE and CBP only target those who have been charged with or committed crimes or have violated other laws. The criminal histories of those who have been detained include, as mere examples, sex with a minor, indecent exposure, manufacture and delivery of methamphetamine, trafficking of cocaine, domestic violence assault, domestic violence burglary, domestic violence unlawful imprisonment, vehicular hit-and-run, criminal trespass, disorderly conduct, and driving under the influence.[14]

In their letter of November 21, 2019, to then-Chief Justice Fairhurst,[15] Attorney General William Barr and Acting DHS Secretary Chad Wolf addressed the paramount public safety aspect of enforcing our Country's immigration laws. They cited numerous examples of illegal aliens committing serious crimes – including murder – after being released back into our communities. Many more examples exist nationwide. I have no doubt that those individuals are in the distinct minority of illegal aliens in our Country. The point is, however, they do exist in significant and palpable numbers. ICE and CBP must be allowed to apprehend them at courthouses, county jails, and wherever else they might be found. The safety of our communities depends upon it.

Proposed GR 38 also fails to recognize that there are established legal procedures in place to protect law-abiding individuals who become involved in a court proceeding. One notable example is the U-visa program, which allows victims of certain crimes and their family members to remain in the country while they assist in the investigation or prosecution of the offense.[16] Another example is the T-visa program, which provides similar protections to victims of human trafficking.[17] These and other programs are part of the careful balance that Congress has established to protect the access to our courts which we all value and the elimination of crime and the removal of violators of our laws. This Court should refrain from upsetting that balance and putting lives at risk. This Court should not impose new rights by Court rule when U-visas and T-Visas are available to those who need them.

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[14] *See, e.g.*, Declaration of Thomas D. Watts, ECF No. 96, at ¶¶ 7-28; Declaration of Nathalie Asher, ECF No. 97, at ¶ 5.
[15] https://www.justice.gov/ag/page/file/1219556/download
[16] https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status
[17] https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/victims-human-trafficking-t-nonimmigrant-status

Our State Supreme Court should not adopt Proposed GR 38. The Court should not create new immigration rights and new immigration causes of action by court rule. That right is left for Congress in the laws it adopts.

Very truly yours,

William D. Hyslop
United States Attorney

WDH/jtd
Enc. State of Washington's Complaint in Courthouse Arrest Litigation (Attachment A)
State's Motion for Preliminary Injunction (Attachment B)
DHS Defendants' Opposition to Motion for Preliminary Injunction (Attachment C)

ATTACHMENT A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; U.S. CUSTOMS AND BORDER PROTECTION; MARK MORGAN, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection,

Defendants.

NO.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The State of Washington (the State or Washington) brings this action to protect the State and its residents from the federal government's unlawful, unconstitutional, and deeply harmful policy of coopting Washington state courts to carry out federal civil immigration arrests.

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2. Like all court systems, Washington's relies for the fair administration of justice on the full participation and trust of parties, victims, witnesses, and the public. When parties, victims, and witnesses fail to appear, justice is delayed and sometimes left undone. The U.S. Department of Homeland Security's (DHS) policy of patrolling Washington courthouses—including their courtrooms, hallways, parking lots, sidewalks, and front steps—and arresting those they believe violate federal civil immigration laws, deters victims and witnesses from appearing in court, prevents residents from vindicating their rights, hinders criminal prosecutions, hampers the rights of the accused, undermines public safety and the orderly administration of justice, and erodes trust in the court system.

3. When immigrants are too fearful to come to court, cases are left unadjudicated or adjudicated with incomplete facts. State resources are wasted when prosecutors, defense attorneys, and court staff must prepare for proceedings that are canceled or continued, and judges must issue bench warrants or rearrange crowded dockets to accommodate those interruptions. Yet more state resources are wasted as those same officials—as well as others from across the justice system including interpreters, legal aid lawyers, domestic violence advocates, and statewide agency staff—scramble to respond to the spike in civil immigration enforcement activity at state and local courthouses.

4. Although a broad range of actors from across the Washington court system have taken steps to counteract these harms, including repeatedly requesting that DHS stop interfering with Washington's judicial system, DHS enforcement actions at Washington courthouses have increased dramatically since 2017. The regularity of DHS's public and aggressive enforcement activities in and around courthouses has chilled participation in Washington courts. Crime victims, especially domestic violence and sexual assault victims, endure abuse rather than risk arrest by DHS. Defendants fail to appear for hearings, even in instances when the result of the hearings will most likely be dismissal of their case. Others forego assertions of their civil legal rights for fear of DHS arrest, including housing rights, consumer rights, and family law rights

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that fall under the exclusive jurisdiction of state courts. Residents needing to access state and county services housed inside the courthouse leave ordinary civic business unattended. The public spectacle and disturbance that attends courthouse arrests debases the dignity of the courts and creates a public safety risk for bystanders and staff. And, worst of all, immigrant communities lose trust in state and local governments when courthouses are used as a trap. All of this amounts to a multi-front intrusion on Washington's sovereign duty to operate a court system governed by the principles of order, justice, and fairness.

5. DHS's policy of arresting noncitizens at or near courthouses is unlawful. First, DHS lacks statutory authority to issue and implement the policy. Indeed, both the U.S. Supreme Court and the Washington Supreme Court have long recognized privileges against civil arrests for those attending court—privileges that rest on the simple principle that a judicial system cannot function if parties and witnesses fear that their appearance in court will result in civil arrest. Even when authorizing civil arrests for violations of federal immigration law, Congress left intact these longstanding federal and state common-law privileges. By purporting to authorize civil arrests in violation of these privileges, DHS exceeded its authority and violated the Administrative Procedures Act (APA).

6. Second, DHS's policy is arbitrary and capricious. It is vague and insufficiently explained, including by failing accurately to describe who is subject to the policy and how it can coexist with congressional requirements that certain non-citizens *must* attend state court proceedings to be eligible for certain forms of immigration relief. In addition, DHS failed to consider the far-reaching and predictable harms inflicted on Washington's sovereign judicial system by a policy of routinely arresting noncitizens at or near courthouses, or the reliance interests that had developed as a result of DHS's previous policies limiting enforcement at courthouses.

7. Third, DHS's policy violates the Tenth Amendment, which preserves Washington's core sovereign autonomy to control the operation of its judiciary and prosecute criminal violations

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without federal interference. By coopting the state's justice system, and using it as a tool to engage in exclusively federal immigration enforcement, DHS infringes on that autonomy.

8. Fourth, DHS's policy violates the constitutional right to access the courts, which prohibits systemic official action that frustrates the right to prepare and file suits or to defend oneself. By interfering with police and prosecutors' ability to investigate crime, file cases, and pursue justice in criminal matters, and by making Washington residents choose between pursuing their rights or risking civil arrest, DHS frustrates the right to access the courts.

9. For these reasons, and as set forth below, Washington asks this Court to declare unlawful and enjoin DHS's policy of civilly arresting noncitizen parties, victims, witnesses, and others at state and local courts in Washington.

II. JURISDICTION AND VENUE

10. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. This Court has further remedial authority under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202. The United States waived its sovereign immunity pursuant to 5 U.S.C. § 702.

11. Venue is proper in the Western District of Washington under 28 U.S.C. §§ 1391(b)(2) and (e)(1) because this is an action against an officer, employee, and/or agency of the United States, the State is a resident of the Western District of Washington, and a substantial part of the events or omissions giving rise to this action have occurred in the Western District of Washington.

III. PARTIES

12. Plaintiff State of Washington, represented by and through its Attorney General, is a sovereign state of the United States of America. Washington operates its state court system under the authority and requirements of its state constitution and laws. The Attorney General is Washington's chief law enforcement officer and is authorized under Washington Revised Code § 43.10.030 to pursue this action.

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13. Washington is aggrieved by Defendants' actions and has standing to bring this action because DHS's policy of arresting noncitizens at or near state courthouses harms Washington's sovereign, quasi-sovereign, and proprietary interests and will continue to cause injury unless and until DHS's policy is permanently enjoined.

14. Defendant the U.S. Department of Homeland Security is a cabinet agency within the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). Its mandate includes the administration of the interior enforcement provisions of the country's immigration laws. DHS agents execute civil arrests in and around Washington state and local courthouses.

15. Defendant Chad Wolf is the Acting Secretary of DHS and is sued in his official capacity.

16. Defendant U.S. Immigration and Customs Enforcement (ICE) is a sub-agency of DHS and is responsible for enforcing federal immigration laws. ICE agents execute civil arrests in and around Washington state and local courthouses.

17. Defendant Matthew T. Albence is the Acting Director of ICE and is sued in his official capacity.

18. Defendant U.S. Customs and Border Protection (CBP) is a sub-agency of DHS and is responsible for enforcing federal immigration laws. CBP agents execute civil arrests in and around Washington state and local courthouses.

19. Defendant Mark Morgan is the Acting Commissioner of CBP and is sued in his official capacity.

IV. ALLEGATIONS

Before 2017, DHS operates according to specified immigration enforcement priorities that avoid courthouse arrests

20. Section 8 of Article I of the U.S. Constitution grants Congress authority over the nation's immigration laws. Congress enacted the Immigration and Nationality Act of 1952 (INA), which governs the presence of noncitizens in the United States and authorizes the removal of those

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present without federal authorization. *See* Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1537).

21. The INA contains provisions authorizing civil immigration arrests. Such arrests may occur with or without a warrant. *See* 8 U.S.C. §§ 1226(a) and 1357(a)(2). If an arrest is made pursuant to a warrant, the warrant is typically issued by DHS officials—not federal judges or magistrates. *See* 8 C.F.R. §§ 236.1 and 241.2.

22. The INA's statutory arrest provisions give the federal government the same type of civil arrest authority that has historically been used to institute civil proceedings. The INA gives no indication that the arrest authority Congress conferred differs in any way from the civil arrest authority that existed at common law—including the limitations privileging those attending court from civil courthouse arrest.

23. Before 2017, DHS's general policy was to arrest and detain noncitizens according to defined enforcement priorities and publicly released memoranda setting forth those priorities.

24. In November 2000, the Commissioner of the U.S. Immigration and Naturalization Service, Debra Meissner, set forth a list of factors for immigration agents to consider when conducting enforcement actions, including the immigrant's criminal history, length of residence in the United States, family ties to the United States, and home country conditions. *See* Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Reg'l & Dist. Dirs., Chief Patrol Agents, & Reg'l & Dist. Counsel, Immigration & Naturalization Serv., *Prosecutorial Discretion* (Nov. 17, 2000).

25. After 9/11, INS was overhauled and reorganized into the U.S. Department of Homeland Security. Yet, the principles of prosecutorial discretion set forth in the Meissner memo continued and were repeatedly reaffirmed. In October 2005, for example, ICE Principal Legal Advisor William J. Howard issued a memo to all Chief Counsel within the Office of the Principal Legal Advisor discouraging the issuance of charging papers to noncitizens with viable family petitions or those with sympathetic factors such as parents of citizen children. *See* Memorandum from

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William J. Howard, Principal Legal Advisor, DHS, to OPLA Chief Counsel, ICE, *Prosecutorial Discretion* (Oct. 24, 2005).

26. In March 2011, the then-ICE Director issued a memorandum further identifying ICE's civil immigration enforcement priorities. *See* ICE Policy No. 10072.1, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011). Policy Number 10072.1 observed that ICE only has the resources to remove approximately 4 percent of the estimated removable population each year and directed agents to prioritize the removal of noncitizens who pose a danger to national security or a risk to public safety, i.e., those engaged in or suspected of terrorism or espionage, those with criminal convictions or outstanding criminal warrants, or those who participated in organized criminal gangs ("Priority 1"). After Priority 1, ICE directed agents to prioritize "recent illegal entrants," and then noncitizens "who are fugitives or otherwise obstruct immigration controls."

27. In June 2011, ICE further issued policies to protect crime victims, witnesses, and individuals pursuing legitimate civil rights complaints. *See* ICE Policy No. 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011). Policy Number 10076.1 stated "it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime" and directed ICE agents to "exercise all appropriate prosecutorial discretion 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." The policy also directed that "it is similarly against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties."

28. On March 19, 2014, ICE issued further guidance regarding enforcement actions at courthouses, instructing that arrests at or near courthouses will "only be undertaken against Priority 1 aliens" and not against individuals who may be "collaterally" present, such as family members or friends who may accompany the noncitizen to court appearances or functions. *See* Memorandum from Philip T. Miller, Assistant Dir. for Field Operations, ICE, to Field Office

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Dirs. & Deputy Field Office Dirs., DHS, *Enforcement Actions at or Near Courthouses* (Mar. 19, 2014).

29. In November 2014, DHS issued a policy memorandum to both ICE and CBP, superseding DHS's previous policies and setting agency-wide policies for the apprehension, detention, and removal of noncitizens. *See* Memorandum from Jeh Johnson, Sec'y of Homeland Sec., to DHS Component Heads, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014). Again, DHS outlined its civil immigration enforcement priorities and directed that Priority 1 is to remove noncitizens who pose threats to "national security, border security, and public safety."

30. ICE updated its courthouse-arrest policy to align with the November 2014 policy. ICE continued to limit courthouse arrests to a narrow subset of noncitizens. *See* Memorandum from Philip T. Miller, Assistant Dir. for Field Operations, ICE, to Field Office Dirs. & Deputy Field Office Dirs., DHS, *Guidance Update: Enforcement Actions at or Near Courthouses* (Jan. 25, 2015). The *Guidance Update* directed that only four categories of Priority 1 noncitizens were subject to courthouse arrest: (1) "aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security," (2) "aliens convicted of a crime for which an element was active participation in a criminal street gang," (3) "aliens convicted of an offense classified as a felony in the convicting jurisdiction," and (4) "aliens convicted of an 'aggravated felon[y]'" as defined under federal immigration law. The *Guidance Update* again instructed that "[e]nforcement actions at or near courthouses will 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."

In 2017, DHS rescinds its prior civil immigration priorities, including the restrictions on courthouse arrests

31. On January 25, 2017, five days after his inauguration, President Trump issued an Executive Order that repealed the deportation prioritization programs of both the Bush and

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Obama Administrations. *See* Enhancing Public Safety in the Interior of the United States, Exec. Order 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017). Rather than prioritizing the removal of dangerous or fugitive noncitizens, the Executive Order specified that immigration laws would be fully executed "against *all* removable aliens." *Id*. (emphasis added).

32. Pursuant to Trump's Executive Order, then-DHS Secretary John Kelly rescinded the agency's November 2014 memorandum setting forth enforcement priorities, as well as all other directives, memoranda, and field guidance regarding enforcement of the country's immigration laws—with the exception of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), which the Trump Administration rescinded separately. *See* Memorandum from John Kelly, Sec'y of Homeland Sec., to DHS Component Heads, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017). Most relevant here, then-Secretary Kelly's memorandum rescinded the policies directing that enforcement actions at courthouses be restricted to certain Priority 1 noncitizens. Instead, DHS announced that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement." *Id.*

33. Since early 2017, DHS's practice of arresting noncitizens has changed dramatically. Following Executive Order 13,768 and Secretary Kelly's February 2017 memorandum, DHS increasingly began coopting the state court system by using noncitizens' appearances in state courts as an opportunity to arrest them for purposes of civil immigration enforcement. DHS adopted a policy of routinely conducting civil immigration arrests in and around state and local courthouses (Courthouse Arrest Policy or Policy), and implemented it nationwide.

34. Throughout 2017, DHS publicly affirmed its Policy of conducting civil immigration arrests at state courthouses. On March 29, 2017, in response to concerns about ICE's increased presence at California courthouses raised by the Chief Justice of the California Supreme Court, then-DHS Secretary Kelly and then-Attorney General Jeff Sessions acknowledged the practice of arresting noncitizens at state courthouses and stated adamantly that it would continue. *See*

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Letter from Jefferson B. Sessions, U.S. Attorney Gen., & John F. Kelly, Sec'y of Homeland Sec., to Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal. (Mar. 29, 2017), https://www.politico.com/f/?id=0000015b-23c8-d874-addf-33e83a8c0001. Then-Secretary Kelly and then-Attorney General Sessions admitted that ICE favors arresting noncitizens at courthouses: "Because courthouse visitors are typically screened upon entry to search for weapons and other contraband, the safety risks for the arresting officers and persons being arrested are substantially decreased." *Id.*

35. On April 4, 2017, a DHS spokesperson defended the Courthouse Arrest Policy, even as applied to victims and witnesses, by stating, "Just because they're a victim in a certain case does not mean there's not something in their background that could cause them to be a removable alien. Just because they're a witness doesn't mean they might not pose a security threat for other reasons." Devlin Barrett, *DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, Wash. Post, Apr. 4, 2017, https://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html.

36. The next day, during an April 5, 2017, hearing before the Senate Committee on Homeland Security, Senator Kamala Harris asked then-Secretary Kelly whether he was aware of the DHS spokesman's comment confirming that immigration agents may arrest crime victims and witnesses at courthouses. He replied, "Yes," and then rejected Senator Harris's suggestion that DHS initiate a different policy that would exempt from courthouse arrests those crime victims and witnesses who do not have a serious criminal backgrounds.

37. In September 2017, an ICE spokesperson affirmed that, "ICE plans to continue arresting individuals in courthouse environments." Linley Sanders, *Federal Immigration Officials Will Continue Nabbing Suspects at New York Courthouses to Subvert Sanctuary City Status*, Newsweek, Sept. 15, 2017, https://www.newsweek.com/new-york-immigration-courthouse-arrests-continue-sanctuary-city-665797.

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In 2018, DHS confirms the Courthouse Arrest Policy in writing

38. On January 10, 2018, DHS issued Directive Number 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018) (the Directive), which sets forth ICE's policy to make civil arrests in any courthouse location when ICE deems the arrest "necessary." The Directive explicitly recognizes the advantage in relying on state court systems for federal immigration enforcement purposes, i.e., "[i]ndividuals entering courthouses are typically screened by law enforcement personnel," and it can "reduce safety risks to the public, targeted alien[s], and ICE officers and agents."

39. While the Directive appears to acknowledge that the Courthouse Arrest Policy interferes with state court systems, it imposes no meaningful controls to prevent those harms. For example, the Directive suggests that ICE officers and agents should "conduct enforcement actions discreetly to minimize their impact on court proceedings," but says that they should do so only "[w]hen practicable." *Id.* Later, the Directive states simply that ICE officers and agents should "exercise sound judgment . . . and make substantial efforts to avoid unnecessarily alarming the public." *Id.*

40. The Directive also authorizes the arrest of any noncitizen at the courthouse. The Directive states that ICE's courthouse arrests will "include" actions against "specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed but have failed to depart, and aliens who have re-entered the country illegally after being removed[,]" but it nowhere limits its arrests to those "targeted aliens." *Id.*

41. Although the Directive suggests those "encountered during a civil immigration enforcement action inside a courthouse" who are not "targeted aliens" will not be subject to enforcement "absent special circumstances," the Directive provides no information as to what ICE considers "special circumstances." *Id.* Instead, the Directive states only that "ICE officers and agents will make enforcement determinations on a case-by-case basis in accordance with federal law and consistent with [DHS] policy." *Id.* The "DHS policy" referred to consists of two

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DHS memoranda from 2017—neither of which says anything about courthouse arrests. *Id.* Instead, the memoranda reiterate Executive Order 13,768 and DHS's position that it will "no longer will exempt classes or categories of removable aliens from potential enforcement." *See* Memorandum from John Kelly, Sec'y of Homeland Sec., to DHS Component Heads, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017). Together, the Directive and cited memoranda clearly suggest that anyone who is potentially removable may be subject to a courthouse arrest.

42. On September 25, 2018, ICE published answers to "Frequently Asked Questions" regarding "Sensitive Locations and Courthouse Arrests." In the FAQ, ICE confirmed that courthouse arrests were occurring "more frequently" while also confirming that, by September 2018, the Policy had been in place "for some time." ICE responded to the question of whether there is "any place in a courthouse where enforcement will not occur" by stating, in effect, no. Although the FAQ answers that "ICE officers and agents will *generally* avoid enforcement actions in courthouses, or areas within courthouses, that are dedicated to non-criminal . . . proceedings," it affirms that enforcement actions in non-criminal areas of courthouses may be conducted when "operationally necessary." (emphasis added).

43. Although the Directive and FAQ specifically state that courthouse arrests are "necessitated by the unwillingness of jurisdictions to cooperate with ICE," Washington's experience is that local jurisdictions *do* cooperate with the "transfer . . . of aliens from their prisons and jails" when doing so is consistent with federal and state law.

44. Regardless, DHS's stated motive for directing courthouse arrests raises federalism and constitutional concerns. Defendants' given rationales for the Courthouse Arrest Policy appear to be to retaliate against states and localities for their constitutionally protected decisions regarding their use of police resources, and a desire by DHS to coopt the state's judicial system to simplify immigration enforcement.

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45. Contrary to DHS's public statements, the Directive, and the FAQs' suggestions that DHS focuses its arrests on only dangerous noncitizens, courthouse arrests in Washington are frequently conducted even where immigrants have no criminal history, are not "gang members" or "national security or public safety threats," and where there is no evidence that the noncitizen is a "fugitive" who has previously evaded immigration enforcement.

46. In an April 2018 email, for example, a Spokane-based supervisory CBP agent e-mailed several Grant County employees requesting misdemeanor court dockets in Moses Lake and Ephrata because CBP was "looking to make a run out there tomorrow and wanted to have some time [] to find quality targets." The email suggests that CBP had no particular target in mind and was using the court docket as the starting place for the next day's enforcement action. In another email to Grant County prosecutors, the same CBP supervisory agent indicated that CBP had "developed several targets off criminal aliens that have skipped their court dates," further confirming that DHS uses the state's judicial system to generate targets in the first place—and not to simply locate noncitizens it had unsuccessfully attempted to locate elsewhere.

47. On November 21, 2019, Attorney General William Barr and Acting DHS Secretary Chad Wolf again confirmed the Courthouse Arrest Policy. In a letter to Washington Supreme Court Chief Justice Mary Fairhurst and Oregon Supreme Court Chief Justice Martha Walters, the Attorney General and Acting Secretary criticize the Justices for considering court rules that might limit "ICE . . . and . . . CBP . . . from making administrative arrests in and around courthouses in your respective states." Letter from William P. Barr, U.S. Attorney Gen., & Chad F. Wolf, Acting Sec'y of Homeland Sec., to Martha Walters, Chief Justice, Or. Supreme Court, & Mary E. Fairhurst, Chief Justice, Wash. Supreme Court (Nov. 21, 2019), https://www.justice.gov/ag/page/file/1219556/download. The letter states that no state court rules will alter DHS's ongoing practice of "making administrative arrests on property that is otherwise open to the public," including courthouses. *Id.*

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48. Under the terms of the Courthouse Arrest Policy, both as publicly disclosed and as applied in Washington, DHS uses state court systems to both identify and catch anyone suspected of a civil immigration violation whether they are criminal defendants, victims, witnesses, parties to civil proceedings, or individuals merely present at the courthouse to conduct civic business.

DHS's arrests in state courthouses dramatically increase starting in 2017 and continue today

49. DHS agents in Washington typically enter courtrooms to identify possible targets, watch while cases are called, identify a target through their appearance on the record, wait for the person to leave the courtroom or courthouse, and then apprehend them in the hallway, lobby, or outside the courthouse.

50. Confusion often reigns during the arrests because DHS agents are in plain clothes, making it difficult for both courthouse officials and the public to discern the authority of the person(s) conducting the arrest. A public defender in Grant County called the police, not knowing that the plain-clothed man lurking in the courthouse parking lot was actually a federal immigration agent. Another time, a public defender called courthouse security when his client got into an argument with a plain-clothed man in the courtroom, only to later discover that the plain-clothed man was a federal immigration agent surveilling the courtroom.

51. The fact that the DHS agents are in plain clothes makes it all the more disturbing and dangerous when noncitizens are chased and tackled during the course of the arrest. Some bystanders who witness the arrest at first wonder whether the noncitizen is being kidnapped. One noncitizen reports that DHS agents in plain clothes pulled him so hard that they tore his pants and that the DHS agents taunted him as they told him they were "going to make America great again." Upon seeing plain-clothes individuals they suspect of being DHS agents, noncitizens have locked themselves in courthouse bathrooms for hours for fear of arrest.

52. Beginning in early 2017, DHS's presence in Washington state courthouses has spiked dramatically and is now routine. According to a compilation of statements of federal officials,

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public records, court records, news articles, data gathered by the University of Washington's Center for Human Rights, witness statements, and other sources, DHS has made hundreds of courthouse arrests in Washington since 2017. ICE and CBP courthouse arrests have been documented in or around superior, district, and municipal courthouses in 20 of 39 Washington counties: Adams, Benton, Clark, Cowlitz, Franklin, Grant, Grays Harbor, King, Kitsap, Kittitas, Mason, Okanogan, Pacific, Pierce, Skagit, Spokane, Thurston, Walla Walla, Whatcom, and Yakima. This list includes four of the five largest counties in Washington, all of which have a significant percentage of noncitizen residents and families of mixed immigration status.

53. Though DHS's Policy suggests it only targets noncitizens charged with the most serious crimes, DHS agents routinely surveille courthouses and arrest noncitizens at both municipal and district court, where misdemeanors and non-criminal ordinance violations are heard and where a variety of other civic business is conducted. Many of the individuals DHS targeted for civil courthouse arrests have no criminal history at all, or are charged with a non-violent misdemeanor such as driving with no valid operator's license. The following is a list of illustrative, but hardly exclusive, examples.

54. In October 2017, a man went to pay a traffic ticket at the Auburn Justice Center in King County. After paying the ticket, he went back to his car that was parked in a lot across the street. ICE officers surrounded his car and arrested him.

55. In March 2018, ICE arrested a man at a Grant County courthouse after he attended a hearing for driving without a license. His wife, who waited in the car for him while their child was sleeping, was left without any information about where to find him.

56. In October 2018, a single mother went to an Adams County courthouse in Othello regarding a car accident. She never came home to her children ranging in ages from 10 months to 10 years old. Only after two weeks did her oldest child receive a call reporting that DHS had arrested her as she was leaving the courthouse and that she was detained at the Northwest Detention Center, a facility in Tacoma that detains federal immigration detainees.

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57. In October 2018, a man with no prior criminal history was arrested outside the Spokane County District Court after attending a pretrial hearing on a misdemeanor charge. DHS agents attended and observed the pretrial hearing and then followed him as he entered his car. He was detained for several months before being released, which delayed the resolution of the criminal case for all parties and the court.

58. In December 2018, ICE agents arrested a man outside of the Seattle Municipal Court before his court appearance on a misdemeanor charge related to alleged shoplifting at Goodwill. ICE agents did this despite Seattle Municipal Court's rule discouraging immigration arrests at its courthouse. Not knowing the reason for his absence, the Seattle Municipal Court issued a warrant for his failure to appear and the case was delayed.

59. In January 2019, a Washington resident accompanied his nephew to the Othello District Court in Adams County so that the nephew could pay a ticket related to a car accident. The man was arrested by immigration agents while he accompanied his nephew on this errand.

60. In February 2019, a woman accompanied her uncle to the Adams County District Court in Ritzville because the uncle needed to post bond for another relative who had been arrested. Neither the woman nor her uncle were involved in the matter that led to the relative's arrest. The woman and her uncle were both arrested by immigration agents in the courthouse parking lot after posting the bond.

61. In March 2019, at the Ephrata courthouse in Grant County, ICE arrested a father who was handling a ticket related to not having proper car insurance. ICE arrested him in the parking lot with his paperwork related to his ticket in-hand. The father is married to a U.S. citizen, with U.S. citizen children, and had a pending application for permanent residency at the time of his arrest.

62. In April 2019, a Washington resident went to the Grant County courthouse in Ephrata to pay a traffic ticket. When he did not return home, his family sought the advice of immigrant

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advocates, who only then confirmed through DHS's detainee-locator system that he had been arrested by immigration officials.

63. In August 2019, a man was arrested by DHS at the Moses Lake District Court in Grant County when he went to the courthouse to pay a traffic ticket. He had no criminal history and was not charged with any crime at the time of the arrest; he was there just to pay the ticket.

64. Also in August 2019 at the same courthouse, a man was arrested by DHS after completing his final court appearance and having his driver's license reinstated following a misdemeanor charge for driving with a suspended license. His license had been suspended for non-payment of a 2018 traffic ticket.

65. In November 2019, a man was arrested by DHS in Grant County after transferring a vehicle title to his name at the Department of Licensing window inside the Ephrata courthouse. Plain-clothes men were listening to conversations that patrons were having with the licensing clerk. After the man finished his transaction, agents followed him outside and questioned him on the courthouse steps. They did not know his name and apparently only became interested in him after overhearing his Spanish-language conversation with the clerk.

66. In November 2019, a man was arrested at the Kitsap County Courthouse after appearing in court on a charge of driving without a license. His wife and 4-year old child were left waiting in the car outside for more than an hour, not knowing what happened. The man owns a restaurant in East Bremerton and is the father of three children, including one with significant disabilities.

67. Civil immigration enforcement occurring at Washington courthouses targets a broad swath of noncitizens, often individuals with no criminal history or who are charged with non-violent offenses.

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DHS's Courthouse Arrest Policy sends a deep chilling effect through Washington's immigrant community

68. DHS's Policy of arresting noncitizens at or near state courthouses is well-known throughout the immigrant community. As a result, many Washington residents refuse to attend Washington state courts for fear of civil arrest and detention.

69. In at least 23 of Washington's 39 counties, prosecutors, public defenders, legal aid providers, domestic violence advocates, and others report a noticeable chilling effect on courthouse attendance because of the Courthouse Arrest Policy. Those counties are: Adams, Benton, Chelan, Clark, Cowlitz, Franklin, Grant, Grays Harbor, King, Kitsap, Kittitas, Lewis, Mason, Okanogan, Pacific, Pierce, Skagit, Snohomish, Spokane, Thurston, Walla Walla, Whatcom, and Yakima.

70. The chilling effect of even one courthouse arrest can spread wide and fast in that community, a damaging ripple effect that DHS either fails to understand or fails to appreciate. In June 2019, for example, a Washington resident was leaving the Thurston County courthouse when three ICE agents arrested him. Onlookers at first believed it was a kidnapping or a civilian fight. None of the ICE agents wore any uniform or obvious identification and the resident struggled against them. The disruption was sufficiently violent that state court officers went running to the scene. Eventually, the ICE agents handcuffed him and put him in the back of an unmarked Dodge truck.

71. Several community advocates report their clients express fear stemming from the June 2019 arrest in Thurston County. A board member of the Washington Commission on Hispanic Affairs, for example, reports that a noncitizen was scheduled for a hearing in the Thurston County courthouse shortly after the June 2019 arrest, but as soon as he heard that DHS had arrested a noncitizen at the courthouse, he left and missed the hearing. Based on his failure to appear, the court had to issue a warrant for his arrest.

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72. Another noncitizen is currently fighting for his parental rights in Thurston County. After learning that his son was placed in dependency proceedings, the noncitizen moved from another state, found a place to live in Washington, and is attempting to reunify with his son. However, while the noncitizen would like to attend every hearing to show the court how much he wants to be with his son, especially an upcoming hearing over whether his parental rights should be terminated, the June 2019 DHS arrest at the Thurston County courthouse may prevent him from attending. The father now must balance the need to protect his parental rights with the risk of being arrested. If the noncitizen were arrested and deported by DHS, it would mean he could no longer pursue reunification or any relationship with his son, and he would be likely to lose his parental rights permanently.

73. Similar stories of the ripple effects of courthouse arrests come from across the state. For example, in April 2017, in Clark County, a man was arrested for driving an unregistered vehicle. When the man went to the Clark County District Court for his misdemeanor hearing, he observed what appeared to be ICE agents at the courthouse and, due to fear of arrest, left before his hearing. Clark County issued a warrant because of his failure to appear for the misdemeanor permit infraction.

74. The Northwest Justice Project, the largest legal aid provider in Washington with 120 attorneys working in 19 statewide offices, now must repeatedly counsel individuals who refuse to move forward with civil legal claims for fear that filing cases and appearing in court would expose those individuals to immigration arrest and possible deportation. Attorneys in the Northwest Justice Project's Wenatchee, Omak, Yakima, Thurston, and Pierce County offices, as well as attorneys in Seattle who staff the statewide legal-help hotline, all report situations in the last ninth months where a client was hesitant or unwilling to go to court for fear of immigration consequences. Clients now frequently decline to access the family law system—a legal framework exclusively available in state court—due to fear of immigration arrest. Examples from the Seattle and Wenatchee offices include: a domestic violence victim who declined to seek

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a modified a parenting plan, a domestic violence victim who declined to file for divorce from an opposing party incarcerated for sexual abuse, a parent whose minor child was sexually assaulted by the opposing party, and a client whose children were taken by the opposing party while under the influence.

75. The Washington Immigrant Solidarity Network (WAISN), a coalition of 150 immigrant and refugee-rights organizations and individuals in Washington, receives routine calls from noncitizens concerned about appearing in court to attend civil matters or obtain court services. For example, the network received an April 2019 call from a domestic violence survivor who was scared to appear at divorce proceedings at the Ephrata courthouse in Grant County. The same month, a caller expressed fear about going to the same courthouse to obtain her U.S.-citizen child's passport. Also in April 2019, a DACA recipient, called with concerns about going to the Franklin County Courthouse in Pasco to attend a court hearing for driving without a valid license. In August 2019, a crime victim from Quincy requested accompaniment to the Yakima County Courthouse so that she could participate in the case with an advocate alongside her in case she was arrested.

76. The chilling effect reaches beyond counties where DHS is known routinely to arrest noncitizens at courthouses. Although few courthouse arrests are known to have occurred in Walla Walla County, a local bilingual legal advocate reports that she is aware of at least 15 individuals who contacted the YWCA for assistance navigating domestic violence protection orders or parenting plans, but who declined to take legal action because it would require them to appear in court.

77. In Snohomish County, a juvenile sought home release from state custody pending additional proceedings on a criminal charge; however, his older brother, who was the juvenile's legal guardian and only family member in Washington, feared DHS's Courthouse Arrest Policy and did not appear at a court hearing to attest that he could support his little brother. As a result, the juvenile was transferred into the custody of the Washington Department of Children, Youth,

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and Families and placed at a youth shelter. This is despite no reported arrests of noncitizens at the Snohomish County courthouse.

78. DHS's Policy also makes noncitizens vulnerable to others who would take advantage of their immigration status by enabling opposing parties to threaten them with courthouse arrest. In Snohomish County, for example, a noncitizen reported a second degree assault to the police, only to have the defendant's investigator threaten to have him arrested by immigration officials at the courthouse. When the noncitizen was later arrested by DHS, he sought to drop the criminal charges so that everything could go back to the way it was before he had reported the assault. The noncitizen had no reason to draw the attention of DHS officials other than the defense investigator's knowledge of his noncitizen status. In Wenatchee, an opposing party in a child custody case threatened to call ICE and direct them to appear at the courthouse to arrest a Northwest Justice Project client who was a victim of domestic violence. In another case, a domestic violence perpetrator threatened to get a victim deported if she filed for divorce.

79. The chilling effect of the Courthouse Arrest Policy also undermines Washington's ability to administer basic services. For example, the Thurston County courthouse shares its facilities with the county auditor, county treasurer, and the Community Planning and Economic Development Department. The June 2019 arrest at the Thurston County courthouse not only discouraged those needing to attend court hearings, but also residents who seek to access the auditor's office for their families' passports or vehicle licenses, the treasurer's office to pay their taxes; and the Community Planning and Economic Development Department for building and environmental health permits.

80. In addition to foregoing local government services, Washington residents have become fearful of accessing state-provided resources. At the Washington State Law Library, for example, reference librarians help individuals find legal materials and understand critical legal issues affecting their lives. Particularly for those who cannot afford an attorney, such services are an essential resource to access justice. Yet, in September 2019, a law librarian reports that she

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learned that a Spanish-speaking couple was afraid to enter the Temple of Justice, where both the Washington Supreme Court and the Washington State Law Library are co-located. Although the library is meant to be a refuge where all are welcome, courthouse arrests made the couple fearful of entering.

81. The fear of courthouse arrest is so great that noncitizens are discouraged from reporting crimes to state law enforcement. A Washington resident who paid cash to rent a home, for example, was assaulted and robbed of cash, some jewelry, and personal documents by his would-be landlord. When a Commissioner of the Washington State Commission on Hispanic Affairs learned of the incident and encouraged the victim to report the crime to the police, the victim refused because he was afraid of DHS's Policy, stating that immigration officials had been "arresting people in the Courts."

82. These examples demonstrate the broad-reaching harms that DHS's arrests at or near courthouses cause Washingtonians and their communities by making individuals afraid to cooperate with law enforcement and the court system. When noncitizens are afraid to seek police help or participate in the justice system, the entire community is made less safe.

DHS's Policy disrupts Washington's ability to administer a fair and orderly system of justice and impacts stakeholders from across the justice system

83. DHS's Policy of arresting noncitizens at or near state courthouses has fundamentally interfered with Washington's judicial system. Civil plaintiffs, criminal defendants, crime victims, prosecutors, defense attorneys, civil legal aid providers, court staff, interpreters, and domestic violence advocates all suffer the negative effects of the chill on the immigrant community's willingness to engage with courts. In deterring victims, witnesses, and defendants from accessing state courts, DHS's Policy has deeply disrupted Washington state courts' ability to provide access to justice.

84. For example, DHS agents arrested a domestic violence survivor outside of the Grant County courthouse as the domestic violence survivor was attempting to seek a protection order.

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DHS's arrest only further deters domestic violence survivors from seeking the state's protection from abuse.

85. Prosecutors, such as Thurston County Prosecutor Jon Tunheim, can no longer give assurances to witnesses or victims that DHS does not engage in enforcement efforts at courthouses. King County Prosecutor Dan Satterberg observes that his office is able to hold violent offenders accountable precisely because of the brave cooperation from undocumented residents who are witnesses or victims of crime. But prosecutors across Washington now must develop and give advice to victims and witnesses about the risks and impact of filing cases and attending required court appearances. As the Criminal Advocate Supervisor and the Program Manager for the Domestic Violence Unit of the King County Prosecutor's office confirm, victims and witnesses frequently decline or fail to appear in court for fear that their immigration status or their partner's immigration status will be made public—resulting in charges being reduced, cases not going to trial, and/or cases being dismissed.

86. Similarly, defense attorneys have questioned whether they should be advising their clients to attend court hearings when they might be walking them into a trap. Many defendants, including those with no prior criminal convictions, are caught in a Catch-22. Although they are entitled to their day in court and a bench warrant will issue if they do not appear, they also risk arrest by DHS when they do appear. There is little incentive for noncitizens to cooperate with their defense attorney, attend court, or resolve their case if an immigration arrest is the likely outcome of doing so. Some defense attorneys have tried to negotiate with the court for waivers of appearance to avoid risking an immigration arrest, but that option is not available in all counties or cases.

87. Defense attorneys report that they themselves are on edge now that the specter of immigration enforcement looms in or near state courthouses. A Spokane public defender reports that he now offers to accompany noncitizen clients to and from their car when arriving or leaving the courthouse and that he is extremely vigilant when he sees unknown persons observing

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courtroom proceedings. The misdemeanor public defenders in Grant County came to a similar decision and agreed to an office-wide policy of advising their clients to wait in the courthouse until the end of the day and then the defenders would walk the clients to their cars.

88. In some instances, DHS has tried to intimidate the attorneys who represent noncitizens in state court. One defense attorney witnessed plain-clothes CBP agents physically manhandle and arrest his Spanish-speaking client as they left the courthouse. When the defense attorney asked to see a warrant, the CBP agent claimed he did not need a warrant. When the CBP agents became unnecessarily physical, the defense attorney requested the Spanish-speaking CBP agent interpret for him so that he could tell the client what was happening. The Spanish-speaking CBP agent refused and threatened to arrest the defense attorney for obstruction of justice.

89. Attorneys for the Northwest Justice Project have also changed their practice in response to DHS's Policy. Northwest Justice Project attorneys now regularly advise clients in Spanish-speaking communities about the risks and impact of filing cases and required court appearances. Increasingly, legal-aid attorneys are having to advise clients about whether particular cases can be filed without the client having to make any court appearance, and to seek court consent for the client not to appear in person.

90. Court interpreters, who generally contract with state courthouses to provide language interpretation in court proceedings, are similarly impacted. Court interpreters in Washington have reported that DHS agents seek to coopt interpreters and use them to transmit questions and effect arrests. DHS agents, for example, have requested court interpreters, who are easily identifiable and wear state-issued interpreter badges, to interpret for them and noncitizens in court hallways and have requested interpreters to ask noncitizens to come out of courtrooms to speak with them. When DHS agents ask for assistance, interpreters are made complicit in federal immigration enforcement actions, though they are not paid by the federal government. In fact, court interpreters are ethically required to serve limited English proficient residents in communicating with their attorneys, prosecutors, and court staff—not assist in their arrest.

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91. Government agencies and non-profits that serve crime victims are also impacted by the Courthouse Arrest Policy. The Washington Department of Commerce Office of Crime Victim Advocacy (OCVA), for example, is a government office tasked with advocating for and helping crime victims obtain needed services and resources. Based on his experience coordinating crime victim services, the Managing Director of OCVA believes federal immigration enforcement in courthouses discourages victims from reporting crimes, making it all the harder for OCVA to provide the necessary services to crime victims. In Whatcom County, the danger for those accessing victim services is also well known. Advocates report DHS officials using services created for victim safety, such as the victim notification service called VINELink, to track and arrest noncitizens. Similarly, the Executive Director of the Office of Civil Legal Aid (OCLA), an independent Washington judicial branch agency that monitors the capacity of the civil legal aid system to address ongoing needs of low-income residents, reports that the effectiveness of legal aid is diminished by the current and threatened federal immigration enforcement activities at or near courthouses. As reported to OCLA, the Latinx community is reticent to seek recourse through the civil justice system, to seek help from court system-related service providers, or even to seek information and advice about their legal rights for fear of courthouse-based immigration enforcement activity.

92. The Courthouse Arrest Policy forced WAISN to develop an entirely new service program. In fall 2018, following the increase in arrests at courthouses and the immigrant community's corresponding fear of being apprehended, WAISN began offering "accompaniment" to people who need to continue with civil court matters, access services, appear as a witness, or file for a protection order. Accompaniment is a service where network volunteers arrange to meet the individual before court and walk side-by-side with them during their attendance. When the noncitizen is arrested by immigration officials during the accompaniment, which has happened, the volunteer is there to remind the immigrant of their constitutional rights, document the arrest through photos or video, ask to see any warrant that

officers may possess, and notify the person's family and friends of what happened. WAISN now routinely receives requests for accompaniment to courthouses in many counties.

93. Judges likewise express concern about the impact DHS's arrests have on their courts. Presiding Judge Brett Buckley of Thurston County's District Court, for example, worries deeply about the serious chilling effects on the ability and willingness of targeted populations to access justice. From a judicial administration standpoint, Judge Buckley observes that cases cannot move forward and courthouse resources are wasted when participants do not show up. Although the Court may issue bench warrants for failure to appear, that tool is useless when a party's appearance results in a DHS arrest that makes the individual unable to attend future court proceedings. Further, issuing bench warrants for failing to appear only creates more criminal cases for judges, prosecutors, and defenders to handle, and sends more people to jail if they are released from immigration detention and then arrested on the bench warrant. All of this exacerbates the waste of state resources.

94. Stakeholders at all levels also recognize that trust in Washington's court system by immigrant communities is being lost. Judges, prosecutors, domestic violence advocates, defense attorneys, immigrant-rights advocates, and immigrants who have experienced courthouse arrest all report that, even though it is federal officers who are conducting the arrests, the arrests cause distrust in county and local officials and courts. The loss of trust in Washington's justice system is a devastating harm for the state court system, and one that will likely take time and dedication by state and local officials to repair, even if the Courthouse Arrest Policy stops operating.

95. In sum, the Courthouse Arrest Policy interferes with Washington's ability to administer justice. Many victims and witnesses will no longer participate at all. For crimes in which the immigrant victims or witness is critical to the case, the prosecution is almost impossible. Where victims still consider participation, victim advocates must spend additional time finding ways for them to feel comfortable attending court, diverting their resources from their other responsibilities. When defendants are detained in the middle of their case or refuse to appear for

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fear of courthouse arrest, victims never get justice and the resources of judges, court staff, prosecutors, defense attorneys, and police are wasted in investigating cases, charging crimes, and preparing for hearings and trials that do not occur. Agencies and non-profits large and small are forced to divert staff and resources to respond to courthouse arrests instead of focusing on other duties. Order, decorum, and public safety at the courthouse are threatened. And, at a fundamental level, trust in state courts is lost.

Washington officials repeatedly attempt to address DHS's Courthouse Arrest Policy

96. Stakeholders participating in every facet of Washington's justice system have recognized the pervasive and destabilizing effect that the Courthouse Arrest Policy has had on the proper functioning of this core state institution. Beginning in early 2017, Washington was one of the first states to respond to the significant increase in federal immigration enforcement actions, including enforcement actions taken at or near state courthouses.

97. On February 23, 2017, Governor Jay Inslee issued Executive Order No. 17-01, prohibiting executive agencies from using state agency or department resources to apprehend or arrests persons for violation of federal civil immigration laws, except as otherwise required by federal or state law.

98. On March 22, 2017, the Chief Justice of the Washington Supreme Court and co-chair of the Board for Judicial Administration Mary Fairhurst wrote to then-DHS Secretary Kelly expressing concern that ICE's immigration actions at or near courthouses "impede the fundamental mission of [Washington's] courts, which is to ensure due process and access to justice for everyone." *See* Letter from Mary E. Fairhurst, Chief Justice, Wash. Supreme Court, to John F. Kelly, Sec'y of Homeland Sec. (Mar. 22, 2017), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf. Chief Justice Fairhurst's letter requested that DHS designate courthouses as "sensitive locations" where immigration enforcement would be limited. *Id.* DHS never responded to Chief Justice Fairhurst's letter.

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99. On June 1, 2017, the Washington State Bar Association became the first statewide bar association to raise concerns about the Courthouse Arrest Policy and request that then-Secretary Kelly reconsider it.

100. Nearly two years later, in response to CBP's courthouse arrest practices, Chief Justice Fairhurst wrote to then-CBP Commissioner Kevin McAleenan. Letter from Mary Fairhurst, Chief Justice, Wash. Supreme Court, to Kevin K. McAleenan, Comm'r, CBP (Apr. 15, 2019), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KevinMcAleenanUSCustomsBorderProtection041519.pdf. In her April 15, 2019, letter, Chief Justice Fairhurst reiterated her concern that enforcement actions at or near courthouses impact the courts' mission and the communities they serve. She invited Commissioner McAleenan or his staff, including local CBP officials, to meet in person to discuss these concerns and again reiterated her request that courthouses be designated as "sensitive locations" so that Washington courts can be "the safe and neutral public forum all Washington residents deserve." *Id.*

101. On October 8, 2019, Chief Justice Fairhurst joined the Chief Justice of the Oregon Supreme Court, Martha Walters, and met with U.S. Attorneys for the Western District of Washington, Eastern District of Washington, and District of Oregon as well as local ICE and CBP representatives to express their concerns that courthouse arrests in Washington and Oregon are negatively impacting the administration of justice.

102. On October 15, 2019, Chief Justices Fairhurst and Walters followed up on their meeting and wrote to the U.S. Attorneys indicating that both Washington and Oregon would be considering court rules to offer protection where necessary to individuals coming to and leaving courthouses. Letter from Martha L. Walters, Chief Justice, Or. Supreme Court, & Mary Fairhurst, Chief Justice, Wash. Supreme Court, to Brian T. Moran, U.S. Attorney for the W. Dist. of Wash., William D. Hyslop, U.S. Attorney for the E. Dist. of Wash., & Billy J. Williams, U.S. Attorney for the Dist. of Or. (Oct. 15, 2019). The Chief Justices further requested

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information as to the degree of "dangerousness" that the federal government believes noncitizens pose and that justifies the frequency of courthouse arrests. *Id.*

103. Individual courthouses have also sought to counteract the direct harms of DHS's civil Courthouse Arrest Policy. The Seattle Municipal Court, for example, issued a policy on April 7, 2017, modeled after King County Superior Court's policy that prohibits the execution of arrest warrants based on immigration status within any courtroom unless directly ordered by presiding judicial officer or when public safety is at immediate risk. In November 2019, Thurston County Superior Court and Thurston County District Court adopted an interim policy providing county security officers and court staff with guidelines on handling armed law enforcement officers who enter any courthouse facility.

104. On November 13, 2019, the Washington Attorney General Bob Ferguson met with the U.S. Attorneys for the Western and Eastern Districts of Washington, along with legal counsel for ICE and CBP. Attorney General Ferguson specifically requested ICE and CBP stop their practice of arresting noncitizens in or around state courthouses. Federal officials declined to do so.

105. The Washington Administrative Office of the Courts houses several Supreme Court Commissions. One of the commissions is the Minority and Justice Commission, which seeks to foster and support a fair and bias-free system of justice. The Administrative Manager for the Minority and Justice Commission reports that, since last spring, it has had to devote almost $19,000 to organizing and preparing several stakeholder meetings to address the community's concerns about DHS arrests and to consider ways in which to reduce the impacts of increased federal immigration activity at Washington courthouses.

106. Other statewide organizations have likewise had to organize and respond to DHS's civil Courthouse Arrest Policy. The Washington Defender Association (WDA), for example, provides training and technical assistance to public defenders across Washington. In response to DHS's Policy, WDA has had to address the issue of immigration arrests at or near courthouses when

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providing individual case consultations, developing practice advisories, and training public defenders. WDA estimates that it has devoted more than 1,000 hours to the specific issue of courthouse arrests, equivalent to over $92,000 of its state and local funding.

107. Despite all of these efforts by the Governor, Chief Justice, individual courthouses, prosecutors, defenders, court administrators, state and local organizations, and the Attorney General, DHS arrests in and around Washington courthouses have continued at a high rate and the impact on the state judicial system remains constant.

108. On November 21, 2019, U.S. Attorney General William Barr and Acting DHS Secretary Chad Wolf responded to the October 15, 2019, letter from the Chief Justices of Washington and Oregon. Attorney General Barr and Acting Secretary Wolf did not deny the existence or impact of the DHS Courthouse Arrest Policy and did not address the Justices' concerns about the impact of the Policy on the administration of state court systems. Instead, Attorney General Barr and Acting Secretary Chad Wolf admonished the Justices for considering court rules that would clarify the circumstances under which a civil arrests at courthouses may appropriately be carried out. Letter from William P. Barr, U.S. Attorney Gen., & Chad F. Wolf, Acting Sec'y of Homeland Sec., to Martha Walters, Chief Justice, Or. Supreme Court, & Mary E. Fairhurst, Chief Justice, Wash. Supreme Court (Nov. 21, 2019), https://www.justice.gov/ag/page/file/1219556/download.

109. Despite Washington's efforts to persuade DHS to limit its arrests at Washington state courthouses, DHS's ongoing, publicly affirmed Courthouse Arrest Policy continues to deter noncitizens from participating in the judicial process. Washington courts, like all courts, rely on parties and witnesses to file and attend proceedings. When parties and witnesses fail to come forward, meritorious cases are never filed or result in continued or abandoned proceedings. This all results in uncertainty, wasted resources, and delayed or denied justice for litigants, victims, witnesses, and family members. Courthouse arrests have, and continue to, significantly interfere

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with Washington courts' basic functioning. Washington now brings suit to vindicate its sovereign right to operate its court system free from unlawful and unconstitutional interference.

V. CAUSES OF ACTION

FIRST CLAIM
(Administrative Procedure Act – Federal Common Law Privilege)

110. Washington realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

111. Administrative agencies may only exercise authority validly conferred by statute. Under the APA, courts must hold unlawful and set aside federal agency action that is in excess of statutory jurisdiction, authority, or limitations. 5 U.S.C. § 706(2)(C).

112. A long-established federal common-law privilege forbids civil arrests in or near courthouses. This privilege extends to parties, witnesses, and all people attending the courts on business.

113. Congress did not displace the federal common-law privilege when it enacted the INA, and the privilege was incorporated as a limit on DHS's civil arrest authority. DHS's Courthouse Arrest Policy thus exceeds DHS's statutory authority and violates the APA.

114. Defendants' violation causes ongoing harm to Washington and its residents.

SECOND CLAIM
(Administrative Procedure Act – State Common Law Privilege)

115. Washington realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

116. Administrative agencies may only exercise authority validly conferred by statute. Under the APA, courts must hold unlawful and set aside federal agency action that is in excess of statutory jurisdiction, authority, or limitations. 5 U.S.C. § 706(2)(C).

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117. A long-established state common-law privilege forbids civil arrests in or near courthouses. This privilege to parties, witnesses, and all people attending the courts on business.

118. Congress did not displace the state common-law privilege when it enacted the INA, and the privilege was incorporated as a limit on DHS's civil arrest authority. DHS's Courthouse Arrest Policy thus exceeds DHS's statutory authority and violates the APA.

119. Defendants' violation causes ongoing harm to Washington and its residents.

THIRD CLAIM
(Administrative Procedure Act – Arbitrary and Capricious)

120. Washington realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

121. Under the APA, courts must hold unlawful and set aside federal agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

122. DHS's Courthouse Arrest Policy is arbitrary and capricious because Defendants do not sufficiently explain to whom the Policy applies, do not explain how the Policy complies with congressional statutes requiring certain non-citizens to appear in state courts to qualify for immigration relief, fail fully to consider the foreseeable harms and/or costs of the Policy, do not adequately explain its prioritizing of civil arrests in or near courthouses over the harms triggered by those arrests, and do not adequately justify the change from Defendants' prior policies on courthouse arrests.

123. Defendants' violation causes ongoing harm to Washington and its residents.

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FOURTH CLAIM
(Tenth Amendment of the U.S. Constitution)

124. Washington realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

125. The Tenth Amendment preserves the states' historic, sovereign, and fundamental autonomy to control the operation of their judiciaries and to pursue criminal prosecutions.

126. The states' judicial and police powers are among the most important powers that the Constitution reserves to the states.

127. DHS's Courthouse Arrest Policy commandeers Washington's judicial system and unduly interferes with Washington's core sovereign judicial and police functions in violation of the Tenth Amendment.

128. Defendants' violation causes ongoing harm to Washington and its residents.

FIFTH CLAIM
(Right of Access to the Courts)

129. Washington realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

130. The constitutional right of access to the courts prohibits systemic official action that bans or obstructs access to the courts, including the filing or presenting of suits.

131. DHS's Courthouse Arrest Policy impermissibly obstructs access to the courts by Washington (including its criminal prosecutors) and its residents. *See* Wash. Rev. Code 9A.08 (criminal violations); Wash. Rev. Code 7.69 (victim, survivor, and witness rights); Wash. Rev. Code 7.80 (civil infractions); Wash. Rev. Code 7.90 (sexual assault protection orders); Wash. Rev. Code 7.92 (stalking protection orders); Wash. Rev. Code 11.12 (wills, estates, probates, and trusts); Wash. Rev. Code 13.36 (guardianship); Wash. Rev. Code 19.86 (consumer protection); Wash. Rev. Code 19.144 (mortgage lending); Wash. Rev. Code 26.04 (marriage); Wash. Rev. Code 26.09 (dissolution); Wash. Rev. Code § 26.09.184 (parenting plans); Wash.

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Rev. Code 26.18 (child support); Wash. Rev. Code 28A.155 (special education); Wash. Rev. Code 26.50 (domestic violence); Wash. Rev. Code 31.04 (consumer loans); Wash. Rev. Code 34.05 (administrative agency decisions); Wash. Rev. Code 36.70B (land use permits and project reviews); Wash. Rev. Code 49.46 (minimum wage); Wash. Rev. Code 49.60 (discrimination); Wash. Rev. Code 59.12 (unlawful detainer); Wash. Rev. Code 59.18, 59.20 (landlord-tenant laws); Wash. Rev. Code 61.12 (mortgages and foreclosures); Wash. Rev. Code 74.34 (abuse of vulnerable adults).

132. Defendants' actions deprive Washington and its residents of meaningful access to the courts in violation of rights under the First, Fifth, Sixth, and Fourteenth Amendments.

133. Defendants' violation causes ongoing harm to Washington and its residents.

VI. PRAYER FOR RELIEF

Wherefore, Washington respectfully requests that this Court:

134. Declare that DHS's Courthouse Arrest Policy in excess of Defendants' statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of 5 U.S.C. § 706(2)(C);

135. Declare that DHS's Courthouse Arrest Policy is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

136. Declare that DHS's Courthouse Arrest Policy is unconstitutional;

137. Issue an order holding unlawful, vacating, and setting aside Directive Number 11072.1 (Jan. 10, 2018), that formalizes, in part, Defendants' unlawful Policy;

138. Enjoin Defendants and all of their officers, employees, agents, and anyone acting in concert with them, from civilly arresting parties, witnesses, and any other individual coming to, attending, or returning from state courthouses or court-related proceedings;

139. Award Washington its reasonable fees, costs, and expenses, including attorneys' fees; and

140. Grant such other and further relief as the Court deems just and proper.

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DATED this 17th day of December 2019.

Respectfully Submitted,

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ATTACHMENT B

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY et al., Defendants.	NO. 2:19-cv-02043-TSZ MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: January 10, 2020 Oral Argument Requested

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I. INTRODUCTION

One of Washington State's most solemn responsibilities is to operate a judicial system that is impartial, just, and open to all. In 2017, the U.S. Department of Homeland Security (DHS) adopted a policy of making routine civil immigration arrests at state and local courthouses. Since its adoption, the policy has resulted in hundreds of courthouse arrests across Washington, including of individuals applying for a domestic-violence protection order, transferring a vehicle title, paying a traffic ticket, or accompanying relatives with business at the courthouse. DHS implemented this policy despite centuries-old privileges that are incorporated into DHS's governing statutes and that prohibit courthouse arrests. DHS also adopted its policy without considering any of the wide-ranging and predictable harms it would trigger for the states' sovereign justice systems, including harming states' ability to prosecute crime, guarantee the constitutional rights of their residents, and administer fair and orderly systems of justice.

In Washington, damage from the courthouse arrest policy is now widespread, witnessed regularly by stakeholders in every corner of the state and representing every facet of the justice system. Our courts do not work when victims and witnesses are too afraid to report crime or attend court, when criminal defendants skip their hearings rather than risk civil arrest, or when residents with ordinary civic business view the courthouse as a trap. Washington's court system relies on community trust in order to function. DHS's unlawful courthouse arrest policy strikes at the core of that community trust, and it should be enjoined.

II. FACTS

For more than 15 years under both the Bush and Obama Administrations, published policies governed the federal government's immigration enforcement priorities and exercise of prosecutorial discretion. Compl. ¶¶ 20-37; Exs. A-J. These policies set forth factors to consider when deciding who to prioritize for deportation, with the highest priority generally being noncitizens who endangered national security or public safety because of terrorism or espionage, conviction for felony or aggravated felony crimes, criminal gang activity, or status as a fugitive

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who had evaded immigration controls. *Id.* These became known as "Priority 1" noncitizens. Exs. D, H, I, J.

In recognition of the significant disruption that often results when civil immigration arrests are made in public, DHS also specified locations where, in the absence of exigent circumstances, immigration arrests were not permitted. These included schools, hospitals, places of worship, weddings, and funerals. Exs. F, G. Federal policies likewise limited immigration operations at state and local courthouses. Exs. H, J. Under the courthouse policies, arrests could "only be undertaken against Priority 1 aliens" and could not be used to target "individuals who may be 'collaterally' present" at the courthouse, including family members, friends, or persons other than the "specific, targeted" individual. *Id.*

On January 25, 2017, President Trump issued Executive Order 13,768 and repealed the immigration enforcement priorities in effect under previous Administrations. Ex. K. Rather than prioritize the removal of Priority 1 noncitizens, the Executive Order directs that immigration laws be fully executed "against all removable aliens." *Id.* Pursuant to the Executive Order, then-DHS Secretary John Kelly rescinded all but two[1] of DHS's directives, memoranda, and field guidance governing immigration enforcement, including the DHS policies limiting immigration enforcement actions at courthouses. *See* Ex. L.

Shortly thereafter, DHS implemented a new policy of regularly conducting civil immigration arrests at state and local courthouses (Courthouse Arrest Policy or Policy). On March 29, 2017, in response to concerns raised by the Chief Justice of the California Supreme Court about the newly increased presence of federal immigration agents at California courthouses, Secretary Kelly and then-Attorney General Jeff Sessions acknowledged DHS's

[1] DHS separately rescinded the two remaining policies, known as Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA). *See* John F. Kelly, Sec'y of Homeland Security, to DHS Component Heads, *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")* (June 15, 2017); Elaine C. Duke, Acting Sec'y of Homeland Sec., to DHS Component Heads, *Rescission of the June 15,2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Sept. 5, 2017).

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Courthouse Arrest Policy and stated adamantly that it would "continue." Ex. M. On April 4, 2017, a DHS spokesperson defended the Courthouse Arrest Policy, even as applied to victims and witnesses. *See* Ex. N. The next day, Secretary Kelly confirmed at a Senate hearing that he was aware of the spokesperson's comments and rejected any suggestion that DHS exempt from courthouse arrest those without serious criminal backgrounds. *See* Ex. O.

Almost a year into the Courthouse Arrest Policy, DHS "felt it was appropriate to more formally codify its practices." Ex. P. Accordingly, on January 10, 2018, U.S. Immigration and Customs Enforcement (ICE) issued Directive Number 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses* (the Directive), which permits civil immigration arrests in any courthouse location where ICE deems an arrest "necessary." Ex. Q. The Directive states that courthouse arrests will "include" actions against "specific, targeted aliens," i.e., national security and public safety threats, gang members, individuals with criminal convictions, and those who have been ordered removed but either failed to depart or have re-entered. *Id.* But the Directive does not limit courthouse arrests to those "targeted aliens," instead providing that noncitizens encountered at courthouses who are not "targeted aliens" may also be subject to arrest under "special circumstances." *Id.* The Directive does not define "special circumstances," but instructs ICE officers to act "consistent with [DHS] policy," citing two DHS memoranda. *Id.* Those two documents reiterate the Executive Order's requirement that DHS "will no longer exempt classes or categories of removable aliens from potential enforcement" and state that all potentially removable noncitizens are subject to arrest and detention. Exs. L, R. Together, the Directive and its cited policies confirm that under the Courthouse Arrest Policy, anyone who is potentially removable may be subject to courthouse arrest.[2]

Since implementing the Policy in early 2017, the frequency of immigration arrests at Washington courthouses has spiked dramatically, with ICE and U.S. Customs and Border

[2] DHS's practices in Washington confirm this. During a November 2019 raid at the Kitsap County Courthouse, for example, two of the individuals arrested had no prior contact with the criminal justice system, and a government spokesperson confirmed that their arrests were "incidental" to the targeted operation. Ex. S.

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Protection (CBP) making hundreds of civil arrests at Washington courthouses. *See* Compl. ¶¶ 52-67; Godoy ¶ 8; Godoy Ex. A at 19-21; Hedman ¶ 7; Hill ¶ 8; Gutierrez ¶¶ 4, 7. Arrests have been documented in 20 of 39 counties, including four of the five largest counties in Washington: Adams, Benton, Clark, Cowlitz, Franklin, Grant, Grays Harbor, King, Kitsap, Kittitas, Mason, Okanogan, Pacific, Pierce, Skagit, Spokane, Thurston, Walla Walla, Whatcom, and Yakima. Compl. ¶ 52; Godoy ¶ 8; Hedman ¶ 8; Murphy ¶ 5; Moss ¶ 3.

Though DHS suggests its Courthouse Arrest Policy only targets noncitizens who have committed serious, violent crimes, its practices in Washington show otherwise. DHS has arrested individuals at the courthouse to apply for a domestic-violence protection order, Gutierrez ¶ 8; renew license plates, Restrepo ¶ 8; transfer a vehicle title, C.G.R. ¶ 2; pay traffic tickets, Restrepo ¶ 8, Moss ¶ 11; or accompany relatives with business at the courthouse, Moss ¶ 10, M.R.V. ¶ 2. DHS agents are also routinely seen surveilling courtrooms and arresting people at both municipal and district courts, where only misdemeanors and ordinance violations are heard. Tatischeff ¶¶ 3-5; Gwinn ¶¶ 4-5, 10. Many of the defendants DHS targets for civil courthouse arrest have no prior criminal history and are at court related to a non-violent misdemeanor charge, such as driving without a license. Gwinn ¶ 13; Cassel ¶ 5; Restrepo ¶ 8; Garrido ¶ 7.

DHS's courthouse arrests frequently involve the use of force, sometimes significant force. *See* Tunheim ¶ 8 ("Several witnesses were shocked to see this struggle and the amount of force used"); Chadwick ¶¶ 5-13 (attorney and former police officer witnessed arrest that used "unreasonable force" and "escalated physical tactics" that created a "public disturbance"). The arrests cause confusion and alarm because DHS agents almost always wear plain clothes and lack obvious identification, making it difficult for bystanders to understand what is happening. *See* Buckley ¶ 5 ("Three men in plain clothes taking down another man in front of the courthouse and putting him in an unmarked vehicle has all the hallmarks of a kidnapping."); Tatistcheff ¶ 5 ("[I]t was obvious to me from their surprised reactions and looks of confusion that many people in the hallway did not understand what was happening"). Agents have chased, tackled, dragged

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and used force against immigrants during courthouse arrests. Salazar ¶¶ 4-5; Chadwick ¶¶ 5-13; Gwinn ¶ 7, 12; Restrepo ¶ 13; S.G. ¶¶ 5-6; Rodriguez ¶ 6; Rodriguez Ex. A.

The Courthouse Arrest Policy sends the message that immigrants must avoid state courthouses. As described in detail below, immigrants are now fearful to seek protective orders, Ault ¶ 3; Hernandez ¶¶ 12-14; file for divorce, Hernandez ¶ 14; seek parenting plans, *id.*; and appear at child welfare hearings, Tatistcheff ¶¶ 12-13; Martin ¶¶ 5-6. Crime victims and other witnesses are fearful of reporting crimes. Torrance ¶ 5; Sima ¶ 14. In numerous cases, the absence of parties and witnesses has forced prosecutors to reduce charges, pull cases from the trial calendar, or dismiss cases altogether. Satterberg ¶ 14; Ross ¶ 4. Criminal defendants are discouraged from attending their court hearings, which in turn results in the issuance of bench warrants, delayed case resolutions, and new criminal charges that judges, prosecutors, and defense attorneys all must handle. Cassel ¶¶ 9-13; Tunheim ¶ 18; Gwinn ¶ 11; Lee ¶ 18.

These harms are widespread. Stakeholders representing every part of Washington's justice system—including judges, prosecutors, defense attorneys, civil legal aid providers, court interpreters, domestic violence advocates, and statewide agency staff—attest to the Policy's pervasive and destabilizing effect on state courts. *See, e.g.*, Buckley ¶ 5 (judge); Tunheim ¶¶ 8-9 (county prosecutor); Satterberg ¶ 8 (county prosecutor); Hill ¶ 11 (supervising public defender); Tatischeff ¶ 15 (public defender); Calderari-Waldron ¶ 17 (interpreter); Ross ¶ 4 (victim advocate); Sima ¶ 16 (victim advocate); Delostrinos ¶ 11 (Washington State Supreme Court Minority & Justice Commission); Bamberger ¶ 13 (Washington State Office of Civil Legal Aid); Torrance ¶ 6 (Washington State Office of Crime Victims Advocacy); Hedman ¶ 13 (Washington Defender Association). The harms state officials recount are many, and share one common thread: the loss of trust in state and local courts. *See* Satterberg ¶ 16; Gutierrez ¶ 12; Tunheim ¶ 16; Cassel ¶ 21.

Washington's leadership has been clear and consistent about the Courthouse Arrest Policy's effect on the State's sovereign justice system. As early as March 2017, Washington

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Supreme Court Chief Justice Mary Fairhurst expressed to DHS her concern that immigration actions at courthouses impede the fundamental mission of Washington's courts. Ex. T. And as recently as October and November 2019, both Chief Justice Fairhurst and Washington Attorney General Ferguson separately met with DHS officials to convey the state's concerns that courthouse arrests undermine the state's core judicial institutions. Melody ¶ 3; Ex. U.[3] Following those meetings, on November 21, 2019, U.S. Attorney General William Barr and Acting DHS Secretary Chad Wolf responded with a letter again confirming the practice of courthouse arrests, arguing that it only targets "criminal aliens who present dangers to communities[,]" and declining to adopt any limit on "ICE . . . and CBP . . . making administrative arrests in and around courthouses[.]" Ex. V.

III. ARGUMENT

A preliminary injunction is appropriate where the moving party establishes that 1) it is likely to succeed on the merits; 2) irreparable harm is likely in the absence of preliminary relief; 3) the balance of equities tips in the movant's favor; and 4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). All factors strongly favor Washington here.

A. Washington Is Likely to Succeed on the Merits of Its Claims that the Courthouse Arrest Policy Violates the APA

Washington is highly likely to prevail on the merits of its claims that the Courthouse Arrest Policy violates the Administrative Procedure Act (APA) in two ways 1) it exceeds DHS's

[3] The Washington Supreme Court is currently accepting comments on a proposed rule that would restrict civil arrests of individuals attending court in Washington. *See* Proposed New General Rule 38 (Dec. 3, 2019), https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2718. New York and Oregon have adopted similar court rules in response to DHS's Courthouse Arrest Policy. *See* Office of the Chief Administrative Judge, N.Y. Unified Court Sys., *Protocol Governing Activities in Courthouses by Law Enforcement* (Apr. 17, 2019), http://www.nycourts.gov/IP/Immigration-in-FamilyCourt/PDFs/OCA%20Directive%201-2019.pdf; Press Release, State of Or. Judicial Dep't, Oregon Chief Justice Issues Rules Limiting Courthouse Arrests (Nov. 14, 2019), http://www.nycourts.gov/IP/Immigration-in-FamilyCourt/PDFs/OCA%20Directive%201-2019.pdf. Federal Administration officials have pledged to disregard any court rule the Washington Supreme Court may adopt. Ex. V at 2 ("ICE and CBP officers are not subject to state rules that purport to restrict ICE and CBP from making administrative arrests").

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statutory authority and ignores applicable limitations on its civil arrest power in violation of 5 U.S.C. § 706(2)(B), and 2) it is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A). A Massachusetts district court enjoined operation of the Courthouse Arrest Policy on the first ground. *Ryan v. ICE*, 382 F. Supp. 3d 142, 161 (D. Mass. 2019). Either basis fully supports injunctive relief here.

1. The Courthouse Arrest Policy Exceeds DHS's Civil Arrest Authority

DHS's civil arrest authority is subject to constitutional, statutory, and common law limits. *See Arizona v. United States*, 567 U.S. 387, 413 (2012); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) (where an agency is "entirely a creature of Congress," the "determinative question is not what the [agency] thinks it should do but what Congress has said it can do"). For centuries, the common laws of both the United States and Washington State have prohibited civil arrests at courthouses. Congress has never abrogated or preempted those privileges, instead incorporating them into the provisions of the Immigration and Nationality Act (INA) that authorize civil immigration arrests. The Courthouse Arrest Policy therefore exceeds DHS's statutory authority in violation of the APA.

a. The U.S. Supreme Court recognizes a longstanding federal common law privilege against civil arrest while attending court

Before the United States was founded, civil suits were initiated in England through the arrest, or *capias ad respondendum*, of the defendant by a government official in order to secure the defendant's appearance. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *Ryan*, 382 F. Supp. 3d at 155 ("In England, for many centuries prior to the founding of the United States, civil litigants commenced their suits by having a civil defendant arrested."). This practice deterred parties from "com[ing] forward voluntarily" for fear they would be seized at the courthouse and held on an unrelated matter. *The King v. Inhabitants of the Holy Trinity in Wareham*, (1782) 99 Eng. Rep. 530, 531. Courthouse arrests also risked "perpetual tumults" that

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were "altogether inconsistent with the decorum which ought to prevail in a high tribunal." *Orchard's Case*, (1828) 38 Eng. Rep. 987, 987.

In response to these problems, and in order to protect "the purposes of justice," English courts adopted a privilege barring government officers from making civil arrests at court. *Holy Trinity in Wareham*, 99 Eng. Rep. at 530. The freedom from arrest extended beyond the courtroom and the courthouse grounds, covering parties and witnesses traveling to and from court. *See, e.g.*, William Tidd, *The Practice of Superior Courts of Law in Personal Actions and Ejectment, Etc.* 88 (9th ed. 1833) ("The parties to a suit, and their attorneys and witnesses, are, for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the courts, or, as it is usually termed eundo, morando, et redeundo."); 3 William Blackstone, *Commentaries on the Laws of England* 289 (1768) ("Suitors, witnesses, and other persons, necessarily attending *any* courts of record upon business, are not to be arrested during their actual attendance, which necessarily includes their coming and returning."). The privilege applied equally to individuals residing inside and outside the court's jurisdiction. *Holy Trinity in Wareham*, 99 Eng. Rep. at 531 ("protection is extended to witnesses coming from abroad, as well as to those who are resident in this country"); *Meekins v. Smith*, (1791) 126 Eng. Rep. 363, 363 (privilege protects "*all* persons who were coming or returning from [court]") (emphasis added).

"The United States imported [the] procedure of civil arrest and [the] common law privilege against civil arrest at courthouses into its judicial system." *Ryan*, 382 F. Supp. 3d at 156. When service of process eventually replaced arrest as the method for commencing civil suits, the privilege "was extended" to prohibit service of process at or near court. *Hale v. Wharton*, 73 F. 739, 740-41 (W.D. Mo. 1896). And by the early twentieth century, the privilege against both arrest and service at court was so uniformly recognized in American jurisprudence that the U.S. Supreme Court characterized it as a "necessit[y] of judicial administration" that is "inflexib[le]" and "absolute." *Page Co. v. MacDonald*, 261 U.S. 446, 448 (1923); *see also*

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Stewart v. Ramsay, 242 U.S. 128, 130 (1916) ("judicial administration . . . would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court"); *Hale*, 73 F. at 740 ("It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of the 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."). Under well-established Supreme Court precedent, the federal privilege exists so that courts may remain "open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them." *Ramsay*, 242 U.S. at 129 (quoting *Halsey v. Stewart*, 4 N.J.L. 366, 367 (1817)).

b. The privilege against civil courthouse arrest is also firmly entrenched in Washington common law

Like its federal counterpart, Washington's common law grants to those attending court a privilege from civil arrest. The Washington Supreme Court recognizes that the privilege originated "for the purpose of preventing inconvenience to the courts and to facilitate the orderly and unhampered trial of causes." *State ex rel. Gunn v. Superior Court of King Cty.*, 189 P. 1016, 1017 (Wash. 1920); *see also id.* ("[W]itnesses and parties should be free to attend and to leave court without the work of the court embarrassed and interfered with."). "The privilege of the immunity is, therefore, primarily a privilege of the courts rather than a privilege of the individual, resting, as it does, upon the foundation of judicial convenience and the furtherance of the orderly and unfettered administration of justice." *Anderson v. Ivarsson*, 462 P.2d 914, 915 (Wash. 1969).

In *Gunn*, the Washington Supreme Court explained that the purpose of the privilege is to facilitate orderly case resolution. 189 P.2d at 1017. In light of that goal, Washington's civil arrest privilege "can and should be extended or withheld only as judicial necessities dictate." *Ivarsson*, 462 P.2d at 915. When applying the privilege, state courts consider whether commencement of new civil litigation (either by arrest or service of process) "*in fact* interrupt[s] and interfere[s]" with the ongoing case. *Id.* at 916-17 (emphasis added).

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The reach of Washington's privilege is "in conformity" with the privileges conferred by federal common law and sister states. *Gunn*, 189 P. at 1017-18. Those privileges extend to all attending court, covering state residents and non-residents alike. *Id.* (citing *Ramsay*, 242 U.S. at 129 (explaining concerns about administration of justice are "especially" triggered by a *capias* upon "citizens of neighboring states," but nowhere limiting the privilege to non-residents); *Sanford v. Chase*, 3 Cow. 381, 382 (N.Y. 1824) ("The privilege of a witness should be absolute."); *Andrews v. Lembeck*, 18 N.E. 483, 484 (Ohio 1888) (privilege extends to in-state resident from neighboring county)).[4] In short, Washington's privilege is longstanding and protects the integrity of the court system by requiring that everyone be free to attend court without fear or threat of civil arrest.

c. The INA incorporated the privileges against civil courthouse arrest, so the Courthouse Arrest Policy exceeds DHS's statutory arrest authority

Washington anticipates that DHS will rely on two provisions of the INA, 8 U.S.C. §§ 1226(a) and 1357(a)(2), to justify its Courthouse Arrest Policy. Neither provision abrogates the federal common law privilege or preempts the state common law privilege against courthouse arrest. The Courthouse Arrest Policy therefore exceeds agency authority in violation of the APA.

"A deportation proceeding is a purely civil legal action[.]" *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The INA authorizes civil arrests of noncitizens whom DHS has probable cause to believe are removable from the United States. *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980). Specifically, section 1226(a) provides that "[o]n 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." Section 1357(a)(2) authorizes warrantless civil

[4] The proper administration of justice is harmed equally when any party or witness, regardless of state residency, is civilly arrested and the original state-court matter is prevented from concluding. *See e.g.*, Buckley ¶ 5; Gwinn ¶ 8; Tunheim ¶ 18. Although Washington courts have sometimes permitted service of a civil *summons* at court based on the equities of a particular case, those cases are limited to circumstances where service in no way "interfered or hampered" with "the progress" of the original action. *See Ivarsson*, 462 P.2d at 915, 916-17. As distinct from a summons, the Attorney General is aware of no case holding that a civil courthouse *arrest* of a party or witness—whether a Washington resident or not—is ever permissible under state law.

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arrests where an agent has probable cause to believe a noncitizen is removable and "is likely to escape before a warrant can be obtained for his arrest." Neither provision mentions courthouses or references the federal or state privileges restricting civil courthouse arrest.

"Congress is understood to legislate against a backdrop of common law . . . principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Congress may, of course, displace the federal common law through legislation, but only where it makes its "statutory purpose" to do so "evident." *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("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."). "In such cases, Congress does not write upon a clean slate[,]" so "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quoting *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

The requirement of clear congressional purpose is likewise necessary before a federal statute will preempt longstanding state common law. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (2002) (refusing to find preemption of state common law). In fields that the states have traditionally occupied, courts apply an "assumption that [state law is] not to be superseded." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 281, 230 (1947). The presumption applies with particular force here, because the Constitution reserves to the states "the maintenance of state judicial systems for the decision of legal controversies." *Atl. Coast Line R.R. v. Bhd. of Locmotive Eng'rs*, 398 U.S. 281, 285 (1970); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991) (state law governing court-officer qualifications will not be displaced unless Congress's intent is "absolutely certain" and "unmistakably clear") (citation omitted).

In this case, far from "speak[ing] directly" about immigration arrests at courthouses, the INA's civil arrest provisions are silent about where arrests may occur. 8 U.S.C. §§ 1226(a), 1357(a)(2). And the legislative history of those two provisions—one passed in 1952, the other

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in 1996, and together amended a total of three times with non-substantive changes—entirely omits any reference to courthouse arrests.[5] Accordingly, this Court should "take it as a given that Congress has legislated with an expectation that the common law principle will apply" as a limit on DHS's civil arrest authority.[6] *Texas*, 507 U.S. at 534; *see also City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (agencies have only those powers "authoritatively prescribed by Congress"). The Courthouse Arrest Policy ignores the INA's incorporation of longstanding common law limits, resulting in routine and disruptive violations of courthouse arrest privileges. Compl. ¶¶ 52-67 (hundreds of arrests statewide, many disruptive); Moss ¶ 3 (single lawyer with 20-30 clients arrested at Washington courthouses since spring 2017); Chadwick ¶ 10 ("In my lengthy years in law enforcement, the conduct and procedures displayed by the CBP officers [were] some of the worst I have encountered").

The District of Massachusetts recently enjoined operation of the Courthouse Arrest Policy in that state. *Ryan*, 382 F. Supp. 3d at 157-59. After reviewing many of the same common law and statutory authorities cited here, the court determined that the INA does not "provide any basis for finding that Congress abrogated the common law privilege against civil arrests in courthouses." *Id.* at 157-58. In "the absence of any clearly stated intent to abrogate that privilege[,]" the court found that the plaintiffs had "a strong likelihood of success on the merits of their claim that the [Courthouse Arrest Policy] exceeds the authority granted to [immigration officials] in the civil arrest provisions of the INA and should be invalidated[.]" *Id.* at 159.

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[5] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[6] The conclusion that the INA's civil arrest authority is limited by the common law avoids a myriad of serious constitutional concerns that would arise if the INA were read to permit civil immigration arrests anytime, anywhere, and by any means. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (courts interpreting federal statutes apply "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); Compl. ¶¶ 124-28 (Tenth Amendment claim); *id.* ¶¶ 129-33 (constitutional access to court claim); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (defendant's fundamental Sixth Amendment trial rights include the right to be present at trial, to testify, and to confront witnesses).

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The same reasoning applies here. Washington has a strong likelihood of succeeding on its claim that the Courthouse Arrest Policy exceeds DHS's statutory authority and should be invalidated pursuant to 5 U.S.C. § 706(2)(C).

2. The Courthouse Arrest Policy Is Arbitrary and Capricious

In addition to requiring that agencies act within their authority, the APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). To ensure that agency action is lawful and properly reasoned, reviewing courts conduct a "thorough, probing, in-depth review" of the agency's reasoning along with a "searching and careful" inquiry into the facts supporting it. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). Following that review, a court "shall" set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Agency policy, and not just formal rulemaking, is subject to arbitrary-and-capricious review. *See, e.g.*, *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 931-35 (D.C. Cir. 2008) (agency policy that was not subject to notice-and-comment rulemaking nonetheless held arbitrary and capricious); *Bechtel v. FCC*, 10 F.3d 875, 878, 887 (D.C. Cir. 1993) (same). And agency policy need not be reduced to writing fully (or at all) in order to trigger judicial review. *Venetian Casino Resort*, 530 F.3d at 929-30 (although the finer details of agency's unwritten policy remained "unclear," "the record leaves no doubt the Commission has a policy of disclosing confidential information"); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Agency action . . . need not be in writing to be final and judicially reviewable.").

Agency policy may be found arbitrary and capricious for many reasons, including if the agency fails adequately to explain the basis for its decision, fails to consider all relevant factors, or departs from prior policies without a "reasoned explanation." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Courthouse Arrest Policy violates the APA in each of these ways.

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a. The Courthouse Arrest Policy is insufficiently explained and does not account for the agency's change in prior position

To be valid, agency action "must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947). If an agency wants its policy upheld, courts must not "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 196-97; *see also SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94 (1943) ("The administrative process will best be vindicated by clarity in its exercise.") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)). Where an agency changes its previous position, the agency must additionally 1) "display awareness that it is changing position," 2) "show that there are good reasons for the new policy," and (3) balance those good reasons against "engendered serious reliance interests." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016). *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (alteration to prior agency position requires "more detailed justification than what would suffice for a new policy created on a blank slate"). The Courthouse Arrest Policy fails all of these requirements.

First, DHS has not set forth the Policy in a way that it can be understood by those affected by it. Although DHS repeatedly has confirmed that the policy exists, Exs. M, N, O, Q, V, it has given conflicting statements about whether and when it will be employed against victims, witnesses, and other noncitizens who pose no threat to public safety. *Compare* Ex. Q at 1 (Policy applies to "specific, targeted aliens"), *with* Ex. N at 1 (DHS statement that victims and witnesses are subject to courthouse arrest); Moss ¶¶ 8-11 (arrests of individuals at courthouse purely on civic business); C.G.R. ¶ 2 (same); Restrepo ¶¶ 8, 12 (same); M.R.V. ¶ 3 (same). DHS also fails meaningfully to explain how the Courthouse Arrest Policy can operate without contravening Congress's directives *requiring* that certain noncitizens participate in state legal proceedings in order to be eligible for federally authorized immigration programs. *See* 8 U.S.C. § 1101(a)(15)(U) (encouraging victims and witnesses to help with local criminal investigations

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and prosecutions, including by testifying in court); 8 U.S.C. § 1101(a)(27)(J) (requiring state court findings about immigrant youth's familial status).

Even worse for understandability, the portions of the Courthouse Arrest Policy that DHS *has* explained conflict with its actual implementation on the ground. For example, while the Directive addresses arrests "inside" courthouses or at "non-public entrances and exits," Ex. Q at 1-2, arrests in Washington also occur at many other courthouse locations. *See, e.g.*, Buckley ¶ 4 (front courtyard); C.G.R. ¶ 3 (courthouse steps); Cassel ¶ 11 (parking lot); Lee ¶¶ 12-13 (courthouse steps and parking lot); Salazar ¶¶ 4-5 (sidewalk). Likewise, DHS's official statements about the circumstances that will justify a courthouse arrest differ significantly from agents' day-to-day operations. *Compare* Ex. W (DHS FAQ stating courthouse arrests focus on "priority targets"), *and* Ex. M at 1 ("ICE does not engage in . . . indiscriminate arrest practices" at courthouses), *with* Ex. X (CBP email asking for misdemeanor docket for purposes of pre-planned "run out there tomorrow" for which agent lacked any current "targets"), *and* Ex. S (confirming multiple arrests that were "incidental" to ICE's original operation at the courthouse). Where the publicly announced policy is not even the policy the agency implements, DHS can hardly argue that "the grounds on which [it] acted [are] clearly disclosed." *Chenery I*, 318 U.S. at 94; *see also U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 744 (D.C. Cir. 2015) ("inconsistent application" of a policy "proves the point" of its arbitrariness and capriciousness).

Second, the Courthouse Arrest Policy fails all three requirements that an agency must follow when it reverses prior policy. DHS's public statements, written Directive, and FAQ documents nowhere "display awareness" of the preceding 15 years of published immigration enforcement priorities, Exs. A-J, two of which applied specifically to courthouse arrests, Exs. H, J. *Encino Motorcars*, 136 S. Ct. at 2126; *Washington v. U.S. Dep't of State*, No. C18-1115RSL, 2019 WL 5892505, at *8 (W.D. Wash. Nov. 12, 2019) ("[G]iven the agency's prior position . . . it must do more than simply announce a contrary position."). DHS likewise provides no "good

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reasons for the new policy," *Encino Motorcars*, 136 S. Ct. at 2126, instead relying on an alleged "unwillingness of jurisdictions to cooperate" with DHS—a claim which is factually inaccurate with respect to Washington, Compl. ¶ 43, and which implies that the Policy is an improper effort to retaliate against states that make the constitutionally protected choice not to "enforce federal law" using state resources, *Printz v. United States*, 521 U.S. 898, 925 (1997). Last, DHS has not balanced the reasons for its new policy against serious reliance interests engendered by its prior courthouse policies, which led individual litigants and court officials to expect that noncitizens could appear in court without risk of civil arrest. *See* Tunheim ¶¶ 13-15; Hernandez ¶ 13; McIngalls ¶ 8. The new Policy does not even acknowledge these "serious reliance interests," let alone take them "into account." *Fox Television Stations, Inc.*, 556 U.S. at 515. Because the Courthouse Arrest Policy is not clear and entirely fails to explain its departure from prior policy, it fails APA review.

b. The Courthouse Arrest Policy fails to consider the serious and predictable harms to the sovereign states' judicial systems and to individual constitutional rights

Even where an agency explains the basis for its action, it will still flunk APA review if the agency fails to consider all relevant factors and articulate a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. In order to be "reasoned decisionmaking," agencies must "look at the costs as well as the benefits" that will flow from their actions. *Id*. at 52. Where an agency "entirely failed to consider an important aspect of the problem," its action is arbitrary and capricious. *Id.* at 43.

The Courthouse Arrest Policy fails here, too, because it inflicts system-level harm to Washington's court system and impacts the constitutional rights of thousands of state residents without even mentioning (let alone balancing) those harms. Indeed, the Directive's instruction to "generally" avoid arrests at "family court" and "small claims court," Ex. Q at 2, imply DHS's understanding that courthouse arrests are disruptive and will chill participation in areas where arrests occur. Aside from these few restrictions (which themselves may be disregarded whenever

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"operationally necessary"), DHS engages in no analysis whatsoever of how, on balance, the merits of the Courthouse Arrest Policy outweigh the harms to, for example, the day-to-day administration of state courts, *see* Compl. ¶¶ 79, 83-95, criminal prosecution and case resolution, *id.* ¶¶ 81, 85, 91, 93, the rights of criminal defendants, *id.* ¶¶ 86-88, access to courts by civil litigants including domestic violence victims, *id.* ¶¶ 74-76, 78, 84-85, or individuals at the courthouse to complete ordinary errands, *id.* ¶¶ 59-63, 65. DHS offers "no findings and no analysis . . . to justify the choice" to adopt a policy with such significant implications for the orderly administration of justice. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). In light of this failure, the APA "will not permit" the Courthouse Arrest Policy to remain in place. *Id.*

In sum, the Courthouse Arrest Policy violates the APA in a number of ways—it exceeds agency authority by directing violations of federal and state privileges that Congress preserved, and it is arbitrary and capricious for failing to set out the basis for DHS's position, explain the agency's change in position, or consider the impacts of its new Policy. Washington is highly likely to prevail on the merits of its APA claims.

B. DHS's Courthouse Arrest Policy Is Causing Irreparable Harm to Washington's Sovereign Justice System

Washington's operation of a just, open, and efficient court system lies at the essential core of its interests as a sovereign state. The Washington Constitution establishes the Supreme Court, Courts of Appeals, and Superior Courts. Wash. Const. art. IV, § 1-2, 5, 30. The Legislature has established courts of limited jurisdiction, including district and municipal courts. Wash. Rev. Code 3.30; 3.50. The mission of all Washington courts is "to protect the liberties guaranteed by the constitution and laws of the state of Washington and the United States; impartially uphold and interpret the law; and provide open, just and timely resolution of all matters." Ex. Y. The Courthouse Arrest Policy interferes with this mission and irreparably harms the state justice system, meriting preliminary injunctive relief.

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1. Victims, Witnesses, and People with Ordinary Civic Business Cannot Safely Approach the Courthouse

As DHS officials openly admit, victims and witnesses are subject to the Courthouse Arrest Policy. *See* Exs. N, O; *accord* Gutierrez ¶ 8. As a result, Washington prosecutors, legal-aid providers, and victim advocates are now unable to assure victims and witnesses that they will be safe from courthouse arrest. Tunheim ¶¶ 13-15 ("Since the implementation of the ICE policy, our office can no longer give assurances that ICE does not engage in enforcement efforts at the courthouse"); Hernandez ¶ 13 (domestic-violence advocates now "must regularly advise clients in [Spanish-speaking] communities about the risks . . . [of] required court appearances").

The result is that many victims and survivors weigh the risks and decline to appear in court, even when they have experienced severe violence or harm. Ault ¶¶ 4-5 ("significant effect of discouraging individuals from going to court to seek protection from domestic violence" in Walla Walla County); Gregory ¶¶ 3-10 (domestic violence and sexual assault survivors "increasing[ly] . . . decline seeking assistance near any of the [Thurston County Courthouse] facilities"); Bamberger ¶ 13 (chilling effect deters crime victims from seeking legal help even following "heinous crimes" including "severe domestic violence, rape and other sexual violence, and human trafficking"). When this happens, victims forego justice and remain vulnerable to future violence. Tunheim ¶ 10; Ault ¶ 4; McIngalls ¶ 10; Hernandez ¶ 14 ("For many people" served by statewide legal aid provider, "the potential public harms they face in going to court are so untenable that they simply decline to participate in the legal process and thus expose themselves to the risk of future violence.").

And, of course, the courthouse is more than a forum for criminal cases and protection orders. Particularly in smaller counties, it is also the place to register a vehicle, renew license-plate tabs, pay taxes, record property transactions, celebrate marriages, seek child custody orders, pay utilities, attend housing court, record wills, pursue small claims, use the law library, and access other county services. Chavez ¶¶ 4-6; Buckley ¶ 5; Edmonston ¶ 2; Bamberger ¶ 7.

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Residents are chilled by the Courthouse Arrest Policy from attending to ordinary civic business. *See* Baker ¶ 5 ("Not only are they fearful of going to court, but they are fearful of getting other non-court related services because they are afraid of encountering ICE.")

2. Persons Accused of Crimes Cannot Defend Themselves in Court

The rights of criminal defendants are also routinely impaired by the Courthouse Arrest Policy. Most obviously, when noncitizens are arrested before their criminal proceedings conclude, they are unable to have their day in court and contest the charges against them. Buckley ¶ 5; Cassel ¶ 21; Lee ¶ 17 ("My goal is to assist defendants and make sure that they have a fair trial. The actions of federal immigration agents [in Cowlitz County] disrupt criminal cases and prevent me from ensuring that fair process."); Hedman ¶ 14 (courthouse arrest prevents accused persons statewide from "defend[ing] against criminal charges by effectively preventing them from appearing in court"). Once DHS places a noncitizen in immigration detention, it does not produce the person for future court dates, resulting in the issuance of a bench warrant. Restrepo ¶ 14; Tunheim ¶ 18. These bench warrants, which must issue in order to stop the speedy-trial clock, are a "procedural nightmare" resulting in cases "never get[ting] resolved." Gwinn ¶ 8. They also frequently "expose [accused persons] to additional criminal charges for failing to appear . . . which carry grave immigration consequences." Hedman ¶ 14. Because the Courthouse Arrest Policy results in bench warrants and failure-to-appear charges "for clients who were not missing court voluntarily," Tatistcheff ¶ 9, it deeply interferes with the right to a fair trial.

3. The Orderly and Safe Administration of Justice is Jeopardized

The Courthouse Arrest Policy likewise frustrates the orderly, efficient, and safe administration of justice. When witnesses or parties are too afraid to appear, the canceled hearings result in stalled cases that waste the resources of courts and parties. "Courts cannot move forward and court resources are wasted when participants do not show up." Buckley ¶ 5. Cycles of bench warrants "cause burdens for all of us in the court system," including "judges, court staff, prosecutors, and defenders" who must process and respond to them. Tatischeff ¶ 9;

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see also Buckley ¶ 5 (DHS's practices render court's bench-warrant procedures "useless"). And the delay caused by civil immigration arrests "negatively impacts [prosecutors'] ability to successfully prosecute our cases as witnesses move or disappear and their memory of events fades." Tunheim ¶ 18.

Even more significant are the confusion, disorder, and public-safety risks inherent in DHS's courthouse arrest practices. Bystanders—and even the targets themselves—often have no idea what is happening. Restrepo ¶ 13 (non-profit's clients report "men in plain clothes follow[] the targeted person, call their name, and as soon as the targeted person turns around they are surrounded and arrested by unidentified men, often times forcing and dragging them into unmarked vehicles. Witnesses have referred to these apprehensions as 'kidnaps.'"); Tatischeff ¶ 5 ("[I]t was obvious to me from their surprised reactions and looks of confusion that many people in the hallway did not understand what was happening"); Rodriguez Ex. A (during day of multiple courthouse arrests, "[t]he scene at the courthouse was absolute chaos"). These arrests frequently involve the use of force. Chadwick ¶¶ 5-13 (attorney and former police officer witnessed client arrested with "escalated physical tactics" that caused a "public disturbance"); Delostrinos ¶ 11 (reports of courthouse arrests "have grown in frequency . . . [and] increased severity, including violent arrests that alarm courthouse staff and members of the public").

Based on DHS's tactics, it is little surprise that stakeholders worry that courthouse arrests could produce a physical response by local police, court security staff, or a bystander who believes they are witnessing a crime. Buckley ¶ 5 (during Thurston County courthouse arrest "violence easily could have resulted if a bystander or court staff member had tried to intervene in what appeared to be a kidnapping or assault"). As one Grant County supervising public defender puts it, "I also fear for the general safety and security of the courthouse because plain-clothed immigration agents are chasing people down without those witnessing the incident knowing that they are immigration agents. I myself called the police on an immigration agent because [I did not know who he was and] he was lurking in between cars in the parking lot. I

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worry that someone will fight back or intervene and the situation could become dangerous or violent." Gwinn ¶¶ 3, 12.

4. State and Local Programs See Their Missions Frustrated and Funds Diverted

State and local programs are also injured. As a result of the Courthouse Arrest Policy and the hundreds of arrests it has produced, government agencies, state-funded organizations, and non-profits—both at the state and local levels—increasingly are forced to pick up the pieces. *See* Delostrinos ¶ 11 (Washington State Minority & Justice Commission); Ahumada ¶ 5 (Washington State Commission on Hispanic Affairs); Torrance ¶ 4 (Washington State Department of Commerce Office of Crime Victims Advocacy); Hedman ¶¶ 7-10 (Washington Defender Association); Hernandez ¶¶ 12-18 (Northwest Justice Project); Gutierrez ¶¶ 7-10 (Northwest Immigrant Rights Project); Edmonston ¶¶ 11-12 (Washington State Law Library); Restrepo ¶¶ 4-20 (Washington Immigrant Solidarity Network); Menser ¶¶ 4-5 (Thurston County Board of County Commissioners); Murphy ¶¶ 2-5 (Bellingham–Whatcom County Commission on Sexual & Domestic Violence).

For organizations whose charge is to improve access to justice, the Policy frustrates their core mission. *See, e.g.*, Bamberber ¶ 2 ("Courthouse-based immigration enforcement . . . frustrates [Washington State Office of Civil Legal Aid's] ability to carry out is mission."); Torrance ¶ 4 (courthouse arrests will "significantly impact the quality and accessibility of [the Office of Crime Victims Advocacy's] services and undermine OCVA's policies"). Organizations divert state dollars to deal with the impact of courthouse arrests rather than attend to other critical work. *See, e.g.*, Hedman ¶ 10 (since January 2017, Washington Defender Association spent 1,298 staff hours and $92,532 directly on addressing courthouse arrests); Delostrinos ¶ 13 (Minority & Justice Commission spent $18,127 in just four months to respond to spike in arrests). At least one statewide non-profit was forced to launch an entirely new, multi-county program to provide "accompaniment" to noncitizens attending court, so that the

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individual has support, information about their rights, and a witness in the event they are arrested at the courthouse. Restrepo ¶¶ 17-20; Carnell ¶ 3; Mildon ¶ 3.

5. Trust in State and Local Courts Evaporates and Public Safety Suffers

While the sweeping harms described above are on their own sufficient to merit preliminary relief, the most devastating impacts of the Policy—and the ones that will take time and sustained effort to repair—are the destruction of trust in state courts and the related impact on public safety. *See* Satterberg ¶ 16 ("My office and others have spent decades building trust with immigrant communities. Courthouse arrests threaten to undo that careful work by teaching immigrants that courthouses are a trap[.]"); Gutierrez ¶ 12 ("arrests of NWIRP clients and community members and their families increasingly erodes the trust immigrant communities have in the judicial process in Washington State"); Tunheim ¶ 16 ("[V]ictims and witnesses will be more distrustful of government in general and will view [the county prosecutor's office] under the same umbrella and therefore as part of the same government that is seeking to deport them."); Cassel ¶ 21 ("ICE arrests break trust that the criminal justice system will treat defendants fairly and allow them their day in court.").

The effects of the Policy have now rippled so broadly that victims and witnesses commonly refuse to attend court even in counties where courthouse arrests have been relatively rare. In Walla Walla County, for example, despite evidence of relatively few courthouse arrests, a domestic violence advocate reports that "at least 15 individuals who contacted YWCA Walla Walla for assistance have told me that they do not want to take legal action that would require them to appear in court because they are fearful that they could be detained or arrested by ICE officers at or near the courthouse." Ault ¶ 4. The story is similar in Thurston County, where news of a June 2019 arrest spread quickly and sparked fear of the courthouses in neighboring Mason, Lewis, and Grays Harbor Counties. Ahumada ¶¶ 4-7.

The Policy's impacts extend even beyond the courthouse, discouraging immigrants from calling the police to report crime. Ahumada ¶ 6; Tunheim ¶¶ 10-11; Torrance ¶ 5. This threatens

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public safety, because when immigrants are too scared to report crime, "the only winners are violent people who capitalize on that silence to commit additional crime." Satterberg ¶ 9; *see also* Garrido ¶ 17 ("The arrest of noncitizens in local courthouses . . . puts our entire community in danger because it gives the impression that local law enforcement cannot be trusted[.]"). "No one is safer when crime victims fear being deported if they call 911," and by linking police and courts with deportation, the Courthouse Arrest Policy "jeopardizes public safety." Satterberg ¶ 16.

The Courthouse Arrest Policy causes broad and irreparable harm to Washington's justice system. A preliminary injunction is warranted.

C. The Balance of Equities and Public Interest Tip Sharply in Favor of Preliminary Injunctive Relief

The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. In a case involving the federal government, the balance of equities merges with the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"The public interest is served by compliance with the APA[.]" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). *See also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'") (quoting *Washington v. Reno*, 35 F.3d 1093, 1069 (6th Cir. 1994)). Where a challenged policy implicates constitutional rights, the balance of equities and public interest are both served by "preventing the violation" of such rights. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (quoting *Melendres v. Arpaio,* 695 F.3d 990, 1002 (9th Cir. 2012)).

Here, the equities and public interest decidedly favor injunctive relief. Each day while the Courthouse Arrest Policy remains in place, thousands of Washingtonians will have to decide whether to risk civil arrest by approaching the courthouse to litigate as parties, testify as

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witnesses, seek protection orders, or even pay parking tickets. *See Ryan*, 382 F. Supp. 3d at 161 ("[T]he public in general will suffer harm each day that witnesses and victims refuse to participate in proceedings[.]"). And decorum and public safety unquestionably benefit from a court environment that is orderly and free from sudden disturbances and violent altercations.

On the government's side of the scale, there can be no credible argument that the Courthouse Arrest Policy is necessary to equity or the public interest. After all, the privileges prohibiting courthouse arrests have existed for hundreds of years, yet until 2017, the federal government never claimed that routine courthouse arrests were necessary to effective law enforcement. So, while DHS certainly has important interests in public safety and law enforcement, those general interests cannot justify a policy that exceeds the agency's authority. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available."). That rule applies with particular force here, in light of DHS's own (unavoidable) admission that courthouse arrests "alarm[] the public." Ex. Z. Of course, DHS retains broad powers to locate and arrest noncitizens in accordance with the law. Simply put, the courthouse is special. The balance of equities and public interest unambiguously favor preliminary injunctive relief.

IV. CONCLUSION

For the reasons above, the Court should grant a preliminary injunction barring DHS from conducting civil immigration arrests at or near Washington courthouses.

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DATED this 18th day of December, 2019.

s/ Colleen M. Melody
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I hereby certify that service of the foregoing document and the declarations and exhibits filed in support will be accomplished by hand delivery to the following:

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ATTACHMENT C

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON ,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendant.

CASE NO. 19-CV-2043-TSZ

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

With the Immigration and Nationality Act ("INA"), Congress granted the Executive Branch authority to investigate, arrest, and detain aliens who are suspected of being, or found to be, unlawfully present in the United States and to effectuate their removal. *See* 8 U.S.C. §§ 1182, 1225, 1226, 1231, 1357. The INA gives the Executive Branch authority to arrest aliens with or without a warrant pending a decision on whether they are to be removed from the United States. *See* 8 U.S.C. §§ 1226(a), 1357(a)(2).

Plaintiff Washington State alleges that the Department of Homeland Security ("DHS") has adopted a "Courthouse Arrest Policy" of "coopting Washington state courts to carry out federal civil immigration arrests" and "patrolling Washington courthouses" to arrest "noncitizen parties, victims, witnesses, and others." Dkt. 1 at 1, 2, 3, 4, 18, 22. The State seeks to challenge this "Courthouse Arrest Policy" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, claiming this "policy" is contrary to law because a federal and state common-law privilege forbids civil arrests in or near courthouses. *Id.* at 31-32. The State also argues that the "policy" is arbitrary and capricious because it is not sufficiently explained. *Id.* at 32. The State seeks a preliminary injunction prohibiting DHS from civilly

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arresting "parties, witnesses, and any other individual coming to, attending, or returning from state courthouses or court-related proceedings," Dkt. 1 at 34, and "barring DHS from conducting civil immigration arrests at or near Washington courthouses." Dkt. 6 at 24.

The motion should be denied. First, there has been no recent agency action that is subject to an APA challenge. DHS has not taken any agency action resembling the "Courthouse Arrest Policy" the State has manufactured. Immigration and Customs Enforcement ("ICE") has issued policies regarding courthouse arrests, but they are much narrower than the State's so-called "Courthouse Arrest Policy." ICE's policies regarding courthouse arrests are carefully tailored to balance the interests of enforcing immigration law; protecting public safety; and minimizing interference with judicial proceedings. Customs and Border Protection ("CBP"), a separate DHS agency not bound by ICE policies, has not issued any relevant policy statements regarding courthouse arrests.

Moreover, the State's motion fails to raise serious questions going to the merits of its APA claim because: (1) the State is not an aggrieved party under ICE policy; (2) the relevant ICE policy is not final agency action; (3) immigration arrests are committed to agency discretion; and (4) the relevant ICE policy is authorized by the INA, consistent with law, and is not arbitrary or capricious. The State also fails to demonstrate that the balance of equities tip in its favor, or that an injunction is in the public interest. The harms the State alleges are speculative and/or based on second-hand reports. These harms pale in comparison to the danger posed to Washingtonians when DHS is unable to arrest fugitive criminal aliens where they might be safely and reliably found. Washington's non-cooperation policies and sanctuary laws now forbid state officials from cooperating with federal immigration officials and specifically preclude them from honoring immigration detainers issued for dangerous criminal aliens upon their release from state custody. Therefore, criminal aliens with convictions for serious and violent offenses are now released back into the community instead of being removed. Given the dangers inherent in that practice and DHS's interest in enforcing the immigration laws, the equities weigh in favor of denying the injunction.

BACKGROUND

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The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012); U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish a uniform Rule of Naturalization"). The Executive Branch is tasked with enforcing the immigration laws within the United States, which it generally accomplishes through immigration removal proceedings initiated after arrest, and through the issuance of a notice to appear filed with the immigration court. 8 C.F.R. §§ 1239.1(a), 1003.14, 1003.18.

In the INA, Congress made arrest the critical component for initiating removal proceedings before an immigration judge, and provided DHS officials with broad arrest powers. The INA provides that "[o]n 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."[1] 8 U.S.C. § 1226(a). It further provides that "[t]he Attorney General shall take into custody any alien who [is inadmissible or deportable based on convictions for certain offenses] when the alien is released without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1). And "without [a] warrant," the statute provides that a federal officer may "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 [] law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). Finally, in 2006, Congress specifically addressed the issue of courthouse arrests in 8 U.S.C. § 1229(e)(1) and (e)(2).

I. ICE Policies Pertaining to Courthouse Arrests

DHS has long exercised these broad statutory arrest authorities at and near courthouses. To guide the use of these authorities, ICE, and only ICE, has issued several policy statements regarding conducting courthouse arrests. On January 22, 2007, ICE issued a Memorandum entitled: Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005. *See* Declaration of Kristin B. Johnson ("Johnson Decl.") Ex. A. The 2007 interim guidance requires a certification when an enforcement action

[1] Congress has transferred immigration enforcement functions from the Attorney General to the Secretary of Homeland Security. 6 U.S.C. § 251; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

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leading to a removal proceeding is taken against an alien appearing in certain protected locations, including a courthouse, in connection with a specified activity, such as protection orders, child custody, 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 8 U.S.C. § 1101(a)(15). *Id.* at 3-5.

On June 17, 2011, ICE issued ICE Policy 10076.1: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs. Dkt. 7, Ex. E. Policy 10076.1 provides that "[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime," or "to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties." *Id.* at 1-2.

On March 19, 2014, ICE issued guidance regarding Enforcement Actions at or Near Courthouses. *Id.*, Ex. H. This guidance provides that enforcement actions at or near courthouses will only be undertaken against specific, targeted aliens including aliens convicted of crimes, gang members (16 years or older), aliens with outstanding criminal warrants, and aliens presenting national security or serious public safety risks. *Id.* The policy restricts enforcement actions against "family members or friends" of the target and directs that "wherever practicable," enforcement actions should "take place outside public areas of the courthouse," "be conducted in collaboration with court security and staff," and "utilize the court building's non-public entrances and exits." *Id.*

On January 10, 2018, ICE promulgated Directive 11072.1, revising ICE's policy regarding civil immigration enforcement actions inside courthouses. Dkt. 7, Ex. Q. It did not, however, abrogate the 2007, 2011, or 2014 guidance described above. Rather, the 2018 ICE Directive indicates that courthouse arrests may be necessary when local jurisdictions decline "to cooperate with ICE in the transfer of custody of aliens from" secure locations like "their prisons and jails." *Id.* at 1. Because persons who enter 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.*

The Directive differs from the 2014 guidance in three main ways. First, it focuses solely on civil immigration enforcement actions inside courthouses. *Id.* at 1-2. Second, it adds two categories of targeted

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aliens: "aliens who have re-entered the country illegally after being removed" and "aliens who have been ordered removed from the United States but have failed to depart." *Id.* at 1. Third, it provides that ICE may arrest non-target aliens, including family members or friends accompanying the target alien or aliens serving as a witness in a proceeding, only in special circumstances such as "where the individual poses a threat to public safety or interferes with ICE's enforcement actions." *Id.* Policies regarding witnesses and victims of crimes otherwise remain unchanged.

The 2018 Directive instructs ICE officers "generally [to] avoid enforcement actions in courthouses," and proscribes enforcement in areas dedicated to non-criminal proceedings. *Id.* at 2. When an enforcement action is deemed "operationally necessary" at such a location, it may be conducted only with the approval of a high-level officer. *Id.* The Directive mandates that, "when practicable," ICE officers "conduct enforcement actions discreetly to minimize their impact on court proceedings." *Id.* at 1.

The Directive prioritizes non-public arrests and states that enforcement actions inside courthouses "should, to the extent practicable, continue to take place in non-public areas of the courthouse, be conducted in collaboration with court security staff," and use non-public entrances and exits. *Id.* at 2. It directs ICE officers to "exercise sound judgment" and "make substantial efforts to avoid unnecessarily alarming the public," and it requires them to "make every effort to limit their time at courthouses while conducting civil immigration enforcement actions." *Id.*

ICE has explained its policy on enforcement inside courthouses in a Frequently Asked Questions ("FAQ") Memorandum. *See* Johnson Decl., Ex. E. Among other things, that document assures the public that ICE "will not make civil immigration arrests inside courthouses indiscriminately" and that ICE "make[s] every effort to take the person into custody in a secured location out of public view." *Id.* at 3. ICE also "makes every effort to ensure that the arrest occurs after the matter for which the alien was appearing in court has concluded." *Id.* at 4.

II. Washington's Non-Cooperation and Sanctuary Laws

Before 2017, Washington generally cooperated with federal immigration enforcement efforts, including ICE's courthouse enforcement policies. Washington typically honored DHS detainers seeking

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direct transfer of the alien once state criminal proceedings and detention had concluded. Since 2017, however, Washington has adopted several policies limiting State cooperation with, and/or actively impeding, federal enforcement of immigration laws. In February 2017, Washington's Governor signed Executive Order 17-01, providing that:

> No executive or small cabinet agency may use agency or department monies, facilities, property, equipment, or personnel for the purpose of targeting or apprehending persons for violation of federal civil immigration laws, except as required by federal or state law or otherwise authorized by the Governor.

Johnson Decl., Ex. B, at 3.

In February 2018, the Metropolitan King County Council passed Ordinance No. 18665, codified in King County Code § 2.15, that limits King County agents, departments and employees from expending time or money on facilitating the civil enforcement of federal immigration law, and from honoring immigration detainer requests or administrative warrants issued by DHS, or holding any person upon the basis of a DHS detainer request or administrative warrant unless such request is accompanied by a criminal warrant. *Id.,* Ex. C at 4-5. It also limits the information that can be provided to federal immigration authorities for purpose of civil immigration enforcement. *Id.* at 6.

Finally, in May 2019, the Washington legislature passed Engrossed Second Substitute Senate Bill ("ESSSB") 5497, declaring Washington to be a sanctuary state and precluding state and local law enforcement officials from cooperating with federal immigration officials on immigration matters. *Id.,* Ex. D, at 6-10. This statute also prohibits or impedes numerous Washington state non-law enforcement agencies from providing information to federal immigration officials. *Id.*

Based on these laws, most county jails in Washington now refuse to provide any information to DHS. Aliens who local, county, and state law enforcement officials believe are dangerous and who have been charged or convicted of crimes are nevertheless given bond or released into the communities. Dangerous aliens involved in criminal activity who were previously transferred to DHS custody at secure locations like jails or prisons, are now released to Washington streets, often immediately following state proceedings. This has, and will continue to have, significant negative effects on officer and public safety.

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III. DHS Enforcement Activities at Washington Courthouses

The State grossly misrepresents DHS's enforcement activities in Washington asserting that DHS patrols Washington courthouses and indiscriminately arrests aliens, including witnesses and victims, resulting in hundreds of arrests at Washington courts; that DHS routinely arrests aliens convicted only of misdemeanor violations; and that DHS uses excessive force during arrests. Dkt. 1, 8-14. This is not true.

Neither ICE nor CBP tracks apprehensions based on whether an arrest took place at or near a courthouse. *See* Declaration of Nathalie Asher ("Asher Decl."), ¶7; Declaration of Thomas D. Watts ("Watts Decl.), ¶8. Both agencies, however, expended considerable resources to conduct a diligent search of their records, including individual file reviews, to provide the Court with an accurate representation of DHS's enforcement activities at Washington courthouses. *Id.*

Following a manual review of each specific case narrative for all at-large apprehensions in 2017, 2018, and 2019, ICE identified 17 arrests at or near courthouses in 2017, 25 arrests in 2018, and 23 arrests in 2019. Asher Decl., ¶7-8. During the last three years, an average of 3% of ICE at-large apprehensions were conducted at or near Washington courthouses. *Id.*, ¶8. CBP also conducted a manual file review and identified 55 arrests that took place at or around courthouses in Fiscal Year ("FY") 2018, and 96 arrests in FY 2019. Watts Decl., ¶8. Although not nearly as dramatically as the State represents, the number of courthouse arrests in Washington has increased since 2017. The rise in courthouse arrests, however, is a direct result of the State's non-cooperation and sanctuary laws. ICE's "courthouse arrests have risen slightly in the past few years as cooperation with ICE from the local jails and prisons has steadily declined." Asher Decl., ¶6. CBP's courthouse arrests increased in FY 2019 because: (1) Washington's non-cooperation policies and sanctuary laws forbid state officials from cooperating with CBP, and the United States Border Patrol, a sub-agency of CBP, and precludes them from honoring immigration detainers issued for criminal aliens upon release from state custody, and thus criminal aliens are released back into the community instead of being removed; and (2) the Spokane Sector also received additional staffing and resources for its enforcement mission. Watts Decl., ¶9; *see also* Declaration of Tom Jones, Grant County Sheriff, 2, ¶5 (affirming that Grant County Sheriff's Office has not unlawfully facilitated

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federal border patrol agents or immigration authorities in the arrest/detention of illegal aliens at the courthouse).

The State provides the Court with vague, largely second-hand accounts of DHS enforcement activities to support its claim that DHS indiscriminately arrests aliens at courthouses, including friends, family, and victims, many of whom have been convicted of only misdemeanor violations. The accounts contain limited information and no personal identifiers. This lack of identifying information posed considerable difficulty for DHS to completely and adequately respond to the allegations. Nevertheless, DHS undertook a diligent search of their records to locate and identify the specific activity referenced. DHS believes that it was able to identify 32 of the events described in the pleadings. Details of these events show that the State has misrepresented DHS's immigration enforcement activities to this Court. DHS is not "patrolling" courthouses to indiscriminately arrest aliens. Rather, with rare exception, DHS is conducting targeted arrests of criminal and/or fugitive aliens.

More than half of the apprehensions CBP identified (14 of 25) involved aliens identified by local law enforcement personnel. Watts Decl., ¶17-19, 21-25. Following identification, CBP conducted records checks to confirm the aliens were removable before investigating further. The remaining apprehensions were targeted CBP apprehensions for fugitive and/or criminal aliens. *Id.*, ¶12-16, 20, 26-28. Targeted apprehensions at or near courthouses are based on a review of *criminal* dockets to locate and identify removable aliens. *Id.*, ¶7. In these instances, CBP conducts a thorough investigation and records checks to determine if the alien is illegally present in the United Sates, and is therefore removable, before arriving to investigate. *Id.* The majority of the targeted apprehensions CBP identified involved aliens who had been removed from the United States on multiple occasions and/or had multiple criminal convictions while in the United States. Only 6 of the 26 aliens CBP identified had no prior removals or criminal arrests, but 5 of those were identified by local law enforcement personnel,[2] and only 1 was a targeted apprehension who had overstayed a Border Crossing Card and had two prior arrests for driving offenses.

[2] Notably, 3 of the 6 aliens that had not been previously removed and did not have criminal convictions were not courthouse arrests; they were apprehended at the Sheriff's Office while seeking to post bail for a relative. *Id.*, ¶19.

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Id. at ¶20. The courthouse arrests CBP identified independent of the State's declarations also verify that CBP is limiting its enforcement activity at Washington courthouses to conducting targeted arrests of criminal and/or fugitive aliens.[3]

The apprehensions ICE was able to identify based on the limited information in the declarations were also limited to targeted fugitive and/or criminal aliens. The majority of the aliens (4 of 7), had previously been removed from the United States *and* had been convicted of multiple criminal convictions while in the United States. *See* Asher Decl., ¶13, 14, 16, 17. One alien had not previously been removed, but he had multiple criminal convictions. *Id.*, ¶15. One alien had previously been ordered removed and had two prior arrests for Driving Under the Influence and Negligent Driving Second Degree. *Id.*, ¶18. The one alien that had not been convicted of any crimes had been previously removed and had two prior arrests for Driving Under the Influence. *Id.*, ¶17. The courthouse arrests ICE identified independent of the declarations confirm that ICE is limiting its enforcement activity at Washington courthouses to targeted arrests of criminal and/or fugitive aliens.[4]

The specific incidents DHS was able to identify also show that DHS is not typically arresting aliens it knows to be crime victims or witnesses. Only 1 of the 32 apprehensions identified by CBP and ICE had a pending petition for a U-Visa. Watts Decl., ¶14; Asher Decl., ¶11 (none of the apprehensions identified by ICE had pending T-visa, U-visa, or VAWA applications). Nor is DHS arresting friends or family members who accompany the targeted alien to court. For example, on one occasion, CBP Agents saw family members accompany a targeted alien to court, and saw him ignoring them as they were sitting on a nearby bench as he was leaving the courthouse and approaching his vehicle. Watts Decl., ¶26. After he was placed under arrest, the alien was given an opportunity to talk with his girlfriend and child, and there is no indication the CBP Agents questioned the girlfriend. *Id.* On another occasion, CBP Agents

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[3] Of the 55 arrests CBP identified for Fiscal Year 2018, approximately 48 of the aliens had criminal convictions, and 14 had previously been ordered removed from the United States. *Id.*, ¶8. Of the 96 cases in Fiscal Year 2019, approximately 80 had criminal convictions and 29 had previously been removed. "Removed" in these statistics indicates an order of removal or Expedited Removals, not a grant of Voluntary Removal or Voluntary Departures.

[4] Of 65 apprehensions identified, 24 had prior orders of removal that had previously been executed and those orders were subsequently reinstated, 9 had final orders of removal that had never been executed and were processed for removal, and 54 had criminal convictions. *Id.* ¶10.

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saw a female and two children who accompanied an alien to court, and who were with him when CBP Agents encountered him leaving the courthouse. *Id.*, ¶27. Again, there is no indication the alien's companion was questioned.[5] *Id.*

The specific incidents DHS identified also show that, contrary to the State's representations, DHS is not apprehending aliens inside courtrooms, and does not routinely arrest aliens inside courthouses. Rather, the majority of the 25 apprehensions identified by CBP took place near a courthouse (8), while leaving a courthouse (2), outside a courthouse in the parking lot (6), or at county jails (5). *See* Watts Decl. Only two CBP apprehensions occurred inside the courthouse, and both were outside the courtroom following conclusion of court proceedings. *Id.*, ¶15, 28. None of the apprehensions ICE identified occurred inside a courtroom or inside a courthouse.[6] Asher Decl., ¶13-18. One alien was released to ICE custody directly from state custody, and two aliens were apprehended immediately after being released from jail near the County Commissioner's Office and the County Assessor's Office. *Id.*, ¶14, 17. The remaining four were arrested outside the courthouse, one as a vehicle stop after leaving the courthouse, another after he left the courthouse and crossed the street, and another walking down the street to a parking lot. *Id.*, ¶13, 15, 16, 17.

Finally, contrary to the State's allegations, DHS is not using excessive force during apprehensions at Washington courthouses. Nearly all (24 of 26) apprehensions identified by CBP occurred without incident, and only two involved aliens who resisted arrest. One alien actively resisted CBP Agents and was verbally abusive, although his behavior appears to have occurred following his arrest during processing not at the courthouse. Watts Decl., ¶21. Another alien was combative when CBP Agents attempted to detain him, spinning away and balling his fists into his body in an effort to resist arrest while moving away from the Agents. *Id.*, ¶22. CBP Agents secured the alien in a corner and forced his hands behind his back for handcuffing. *Id.* There is no evidence of excessive force in either incident.

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[5] The only incident where friends and family members were questioned and apprehended was not a courthouse arrest. *Id.*, ¶19. Border Patrol was notified by local law enforcement personnel of the aliens' presence at the Sheriff's Office to bail out a relative who had been arrested for Driving While Under the Influence.

[6] Only 3 of the 65 apprehensions independently identified by ICE were identified as occurring inside a building housing a court. *Id.* ¶10.

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Three of the seven ICE apprehensions involved combative aliens during apprehensions outside courthouses. The alien apprehended in front of the Thurston County Courthouse who is the subject of many of the State's declarations, had a history of eluding law enforcement and assaultive behaviors. Asher Decl., ¶13. He aggressively resisted arrest despite repeated orders to stop resisting. *Id.* Another alien also had an extensive history of assaultive behavior and a prior conviction for threatening to kill a Border Patrol Agent with a rock. *Id.*, ¶16. He ran from ICE Officers and actively resisted when he was caught. *Id.* A third alien ran from ICE Officers into what appears to be a county building near the jail, but there appears to have been little or no resistance when he was caught. *Id.*, ¶17. There is no indication of excessive force in these three instances.

Thus, the State has not only fabricated a DHS policy that does not exist, but it is promoting a narrative of rampant, unfettered enforcement activities by DHS that is aimed at all who access a courthouse that simply does not exist in Washington. To rebut this narrative, DHS has provided specific examples demonstrating that DHS's enforcement activities at Washington courthouses are narrow and limited to target criminal and/or fugitive aliens who present a serious public safety risk. By perpetuating the myth of an inaccurate policy and practice, the State, not DHS, is instilling fear in the immigration community.

IV. Impact of Enforcement Activities at Washington Courthouses

The State asserts sweeping allegations of widespread fear among the immigrant community paralyzing them from using court services and disrupting court business because of the so-called DHS policy and alleged enforcement activities. Dkt. 1. The testimony of Garth Dano, Elected Grant County Prosecuting Attorney, paints a very different picture.[7] *See* Declaration of Garth Dano ("Dano Decl."). Mr. Dano can attest to the impact, or lack thereof, his office has witnessed in Grant County. He attests that there are estimates that as many as 20,000 unlawful immigrants are located in Grant County from a total population of less than 100,000. *Id.*, ¶22. Arrests by federal agents at the Grant County Courthouse

[7] The majority of the courthouse enforcement activity and impacts on the courts the State alleges are in the Eastern District of Washington. Dkt. 1.

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have occurred over the years for numerous reasons, and the business of Grant County courts has never been disrupted by these arrests. *Id.*, ¶23. According to Mr. Dano, the testimony of Grant Co. public defender Brian Gwinn (Dkt. 26, pg. 4), that "immigration arrests at our county court house impedes the judicial process and the administration of justice" "is simply inaccurate and not true." *Id.* at ¶38.

The Grant County Prosecutor's Office ("GCPO") routinely reviews and signs U-Visa requests for undocumented victims of crimes who have cooperated with law enforcement.[8] *Id.*, ¶24. The GCPO has obtained the return of defendants and material witnesses from federal immigration custody in order to proceed to trial with criminal cases, and has had no problems transporting these past defendants or witnesses as needed from federal custody. *Id.*, ¶25. Mr. Dano estimates that the GCPO sees at least 50 criminal defendants each week who require the services of Spanish speaking interpreters, and "the vast majority of these individuals have never [had] any contact with immigration authorities in the courthouse." *Id.*, ¶26.

Mr. Dano states that the biggest difficulty his office has with witnesses who are illegal or undocumented is not fear of immigration enforcement, but rather the victims' and witnesses' fear of retribution from the charged criminal defendants. *Id.*, 30. Many, if not most, of the victims of illegal aliens' criminal actions, who are removed by immigration enforcement, are unlawful residents themselves. *Id.* By allowing these illegal perpetrators to remain in the community, they are free to continue to disregard the law, at both the state and federal level, and continue to victimize others. *Id.* "This pattern of alien abuse and victim intimidation is a major crisis to our criminal justice system." *Id.*

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). To prevail, the State must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[8] Notably, in the past three years, GCPO has reviewed and approved 187 requests. *Id.* In 2019, Grant County approved 51 requests. *Id.* Interestingly in viewing the statistics from King County regarding U-visa requests, in a population of 2.2 million, only 66 U-Visas were approved. *Id.*

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Under the *Winter* test, a plaintiff bears the burden of proof and must satisfy each element for injunctive relief. Alternatively, the Ninth Circuit permits a "sliding scale" approach under which an injunction may issue if there are "serious questions going to the merits" and "the balance of hardships tips sharply in the plaintiff's favor," assuming the plaintiff carries its burden to satisfy the two other *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("[A] stronger showing of one element may offset a weaker showing of another."); *see also Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012).

I. The So-Called "Courthouse Arrest Policy" is Not Agency Action Under the APA

The State attacks their strawman, not agency action within the meaning of the APA. Instead of identifying a specific agency action taken by a DHS agency, the State has completely fabricated a policy, which it dubs the "Courthouse Arrest Policy," of patrolling and "making routine arrests at courthouses" of "any" alien with "no exemptions," and asks this court to enjoin this "policy" as a violation of the APA.

An APA complaint must challenge an actual, discrete, and circumscribed agency action. The APA defines agency action to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §§ 551(13) and 702. The State's free-floating allegations about DHS conduct does not identify agency action reviewable under the APA. Rather, the State relies on unsubstantiated, un-verified, second-hand reports of enforcement activities. These are claims about agency conduct, not allegations of final agency action reviewable under the APA. A party cannot set out allegations about agency conduct, call that conduct a "policy," and then challenge the so-called policy under the APA. As then Judge (now Chief Justice) Roberts has explained, the "term [agency action] is not so all-encompassing as to authorize [courts] to exercise judicial review over everything done by an administrative agency." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (internal quotation marks and alteration omitted).

Only one component of the so-called policy actually has a form similar in some sense to typical agency action - the 2018 ICE Directive. That Directive is not final agency action for the reasons explained below. But even if it were, the Directive is narrower than the so-called "Courthouse Arrest Policy" the State has manufactured. The Directive applies only to ICE arrests *inside* courthouses, referring to

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enforcement activities "inside courthouses" and "in courthouses" at least 13 times. Dkt. 7, Ex. Q. The Directive does not call for ICE officers to "patrol courthouses" and make "routine arrests at courthouses" of "any" alien with "no exemptions." Rather, it instructs ICE officers "generally [to] avoid enforcement actions in courthouses," and proscribes enforcement in areas "that are dedicated to non-criminal (e.g. family court, small claims court) proceedings." *Id.* at 2. Significantly, it also does not apply to CBP.

As noted above, the Directive also mandates that, "when practicable," ICE officers "conduct enforcement actions discreetly to minimize their impact on court proceedings" and states that enforcement actions inside courthouses "should, to the extent practicable, continue to 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." *Id.* at 1-2. ICE officers and agents are directed to "make substantial efforts to avoid unnecessarily alarming the public;" and it requires them to "make every effort to limit their time at courthouses while conducting civil immigration enforcement actions." *Id.*

The State cannot use the APA to invalidate conduct by different agencies within DHS that is significantly broader than the only agency action that might conceivably be subject to APA review. Because there is a fundamental mismatch between the policy the State has concocted and the much-narrower agency action that might arguably be reviewable under the APA, this Court should limit its consideration of the State's APA claim and request for injunctive relief to the 2018 ICE Directive.

II. The State Fails to Show a Serious Question that the ICE Directive Is Unlawful or Arbitrary and Capricious.

Before the ICE Directive is reviewable under the APA, it must also be "final" and one for which there is no adequate remedy in court. 5 U.S.C. § 704; *see also Bennett v. Spear*, 520 U.S. 154, 175 (1997). As noted above, final agency action may be shielded from judicial review if it is committed to "agency discretion." 5 U.S.C. § 701(a)(2). And assuming the challenged final agency action is within these limitations, a reviewing court should set aside final agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. The State is not within the zone of interests protected by INA Sections 1226 or 1357.

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The State lacks standing to challenge the ICE Directive under the APA because the interests it seeks to vindicate do not "fall within the zone of interest protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). The zone-of-interests test is "a gloss on the meaning of [5 U.S.C.] § 702," which limits review to persons adversely affected or aggrieved by agency action. *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 400 n.16 (1987). To be "aggrieved" under the APA, the interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 396; *Match-E-Be-Nash v. Patchak*, 567 U.S. 209, 224 (2012).

The relevant statutes here, 8 U.S.C. §§ 1226 and 1357, govern immigration officers' arrest authorities with respect to aliens and aliens' rights with respect to DHS arrests. Section 1226 generally authorizes arrests of aliens "on a warrant," but also precludes judicial review of the "discretionary judgment regarding the application of this section." 8 U.S.C. §§ 1226(a) and (e). Section 1357(a) gives immigration officers broad authority "to arrest any alien in the United States" without a warrant, and provides for only limited restrictions on that authority with respect to "dwellings" within twenty-five miles of the border, but not at other locations. 8 U.S.C. § 1357(a)(3).

Importantly, the INA provides individual aliens with a means to challenge their arrest and the initiation of removal proceedings, including a means to challenge the propriety of their arrest under the statute and to obtain review exclusively in the courts of appeals. *See* 8 U.S.C. §§ 1252(a)(5) and (b)(9). But the INA does not provide the State with any right of action. Indeed, nothing in these provisions governs the State's conduct or actions in any way, is targeted towards the State, or creates any entitlement or interest that the State may invoke. As Justice O'Connor observed when confronted a similar challenge brought by "organizations that provide legal help to immigrants," the relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993) (O'Connor, J., in chambers); s*ee also Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996).

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Thus, the INA provides a means for individual aliens to challenge their arrest and the initiation of removal proceedings, including a means to obtain judicial review, but it does not provide the State with any rights or regulate the State directly. Accordingly, "it cannot reasonably be assumed that Congress intended to permit" the State's APA claim.[9] *Clarke*, 479 U.S. at 399.

B. The agency policy is not a final agency action.

The State's claim also fails the APA's requirement that the action challenged constitute "final agency action" for which no other relief is available. 5 U.S.C. § 704. An agency action is "final" only if it marks the consummation of the agency's decision-making process and if it is action that determines rights or obligations or from which legal consequences flow. *Bennett*, 520 U.S. at 177-78.

The ICE Directive does not compel any action, determine any rights or obligations, or create legal consequences. Instead, it is a general statement of ICE policy, and general policy statements are not final agency action for APA purposes. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805-06 (D.C. Cir. 2006). They "are binding on neither the public nor the agency," and the agency "retains the discretion and the authority to change its position . . . in any specific case." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). The ICE Directive merely explains certain considerations guiding the exercise of discretion by ICE officers in deciding whether and when to conduct civil immigration enforcement actions inside courthouses. It does not require officers to exercise discretion in any particular way and expressly "provides only internal ICE policy guidance," "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural," and places "no limitations . . . on the otherwise lawful enforcement or litigative prerogatives of ICE." Dkt. 7, Ex. Q, ¶9. Because the Directive "merely provides guidance to agency officials in exercising their discretionary power while preserving their flexibility and their opportunity to make individualized determinations, it constitutes a

[9] The State argues that the ICE Directive burdens it by making is less likely that witnesses and defendant will appear at state court proceedings. But the fear of being subject to lawful immigration enforcement and alleged harms to third-party criminal defendants' defense are not cognizable harms and are not traceable to the 2018 Directive. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2019). And to the extent that the Directive affects the State at all, it does so only through the independent decisions of aliens, not directly. The State lacks standing to assert the interests as a third-party. *Id.*

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general statement of policy."[10] *Colwell v. Department of Health and Human Services*, 558 F.3d 1112, 1124 (9th Cir. 2009) (internal quotation marks and insertion omitted).

D. The challenged action is committed to agency discretion.

Under Section § 701(a) of the APA, which governs when courts may review the actions or inactions of agencies, there is no 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 v. Chaney*, 470 U.S. 821, 830 (1985). As noted, §§ 1226(a) and 1357(a)(2) grant ICE broad discretion to determine the location of a civil enforcement action against an alien present in the United States and provide no meaningful standards by which a court could assess its exercise of that discretion. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

General statements of policy, like the Directive, advising "the public prospectively of the manner in which the agency proposes to exercise a discretionary power"' are not reviewable. *Lincoln v. Vigil*, 508 U.S. 182, 196-97 (1993) (*quoting Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)); *see also Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Courts have likewise held that agency decisions to take - as opposed to refrain from taking - enforcement actions are unreviewable under the APA when there are no judicially manageable standards for reviewing the agency's exercise of discretion. *See, e.g., Speed Mining, Inc. v. Fed. Mine Safety & Health Rev. Comm'n*, 528 F.3d 310, 316-19 (4th Cir. 2008); *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157-58 (D.C. Cir. 2006); *Cf. Wayte v. United States*, 470 U.S. 598, 607 (1985).

Further, the "initiation or prosecution of various stages in the deportation process," including the choice of when to "commence" a proceeding or "execute removal orders," is a "regular" and longstanding example of an action that is committed to agency discretion. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483 (*citing* 8 U.S.C. § 1252(g)). Even where prosecutorial-discretion decisions are formalized in

[10] Moreover, the Directive was not published in the federal register, a factor that makes it less like final agency action. Because the Directive merely explains what ICE may do generally, and does not create substantive rules or rights, or "bind" ICE officers to a mandatory course of conduct, it is not subject to APA review. *See Perez v. Mort. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

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guidance documents, they are not subject to review if the ultimate decision is discretionary. *See, e.g., Morales de Soto v. Lynch*, 824 F.3d 822, 828 (9th Cir. 2016). ICE's decisions concerning what categories of aliens to arrest, and in what circumstances or locations, inherently involve the exercise of prosecutorial discretion peculiarly within DHS's expertise, including an assessment of safety risks to the public, the individual alien, and ICE officers.

E. The Directive is not contrary to federal common law.

1. The common-law privilege against courthouse arrest was much narrower than the State suggests.

The State argues that federal law incorporates a common-law privilege against arrest at courthouses. The State fails to acknowledge that federal law, not state law, controls the application of any privilege here, and further significantly overstates the scope of any common-law privilege.[11]

The Supreme Court's cases recognize a narrow privilege against *service of process* in a private civil suit based on transient jurisdiction when a person enters a jurisdiction solely to attend a court proceeding as a witness or party, not a broad privilege against all courthouse arrests. *See Lamb v. Schmitt*, 285 U.S. 222, 225 (1932); *Page Co. v. MacDonald*, 261 U.S. 446, 446-47 (1923); *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916). The privilege protected only individuals coming from out of state or out of district. *Id.;* Wright and Miller, 4A *Fed. Prac. & Proc. Civ.* § 1076 (4th Ed.).

Although early decisions referred to this privilege as an immunity from arrest, that language reflects a time when personal jurisdiction required physical presence in the relevant forum and the mode of process to commence civil actions was an arrest of the person. 4A *Fed. Prac. & Proc. Civ.* § 1076. The immunity was a process-immunity privilege, not a privilege against arrest. And by 1952, when Congress enacted the current civil immigration arrest statute, 8 U.S.C. § 1231, the process-immunity privilege had

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[11] Federal law controls because any challenge to an arrest by immigration officials 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). Moreover, there is no basis for concluding that Congress incorporated state-law privileges into the INA and regardless, the INA preempts any contrary state law. A state common law privilege that would allow a state to alter or interfere with the comprehensive removal scheme in the INA - which governs the relief available to aliens otherwise subject to removal - is preempted by the INA and the federal authority to control immigration. *Arizona v. United States*, 567 U.S. 387, 409 (2012). 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)).

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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 In re Arthur Treacher's Franchise Litigation*, 92 F.R.D. 398, 405 (E.D. Pa. 1981); *Pavlo v. James*, 437 F. Supp. 125, 127 (S.D.N.Y. 1977); *United States v. Green*, 305 F. Supp. 125, 128 (S.D.N.Y. 1969).

For that reason, even assuming that the privilege retains some vitality, it would not apply to aliens arrested by ICE because there is "no jurisdiction in which [aliens] could have avoided service of process." *Green*, 305 F. Supp. at 128. The federal immigration scheme is a "comprehensive and unified system" maintained by a "single sovereign," "vested solely in the Federal Government." *Arizona*, 567 U.S. at 407, 409-10. The federal government has the sole authority over immigration, and Congress provided DHS with regulatory authority over all aliens within the United States regardless of where they are located. Those subject to immigration enforcement may be arrested *anywhere* in the country. *See* 8 U.S.C. § 1226(a), § 1357; 8 C.F.R. § 287.5(c). Once ICE arrests an alien and initiates removal proceedings through a Notice to Appear, those proceedings may also occur anywhere in the country, such that an out-of-state alien does not "giv[e] up the 'safety' of one jurisdiction" when he attends a Washington court proceeding. *Green*, 305 F. Supp. at 128; *see* 8 C.F.R. § 1003.14(a).

Finally, the privilege against civil arrest only came into play if asserted by the defendant in the relevant proceedings; it did not bar a process ever from acting. And it applied only in private suits, not enforcement or arrest actions brought by the federal government. The Supreme Court has concluded that the public interest in law enforcement outweighs one's objections to arrest - even allowing criminal cases to go forward when a person is brought to a jurisdiction through kidnapping. *Ex Parte Johnson*, 167 U.S. 120, 126 (1897); *see also Frisbie v. Collins*, 342 U.S. 519, 522 (1952).

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2. Congress did not incorporate any common-law privilege in the INA.

To hold that Congress incorporated a common-law principle into a statute, the principle must be so well-established that a court may assume Congress considered the rule when legislating. *See United States v. Craft*, 535 U.S. 274, 288 (2002). The Supreme Court has rejected incorporation arguments when the "traditional rationales" for the common law rule "d[id] not plainly suggest that it swept so broadly" as to cover a federal statute. *Pasquantino v. United States*, 544 U.S. 349, 360 (2005). Moreover, a common law rule cannot restrict the federal government's enforcement of a law when no case at the time of the statute's enactment "held or clearly implied" that the rule "barred the United States" from enforcing that law. *Id.*

As explained, when Congress established a comprehensive immigration-arrest statutory scheme, any privilege against extra-jurisdictional service of process was already an historical artifact. It would accordingly make little sense to conclude that the INA implicitly incorporated a federal common-privilege against service of process. *Craft*, 535 U.S. at 288. Because the INA subjects aliens to arrest anywhere within the United States (and thus there is no forum where aliens can avoid service of process), and the courthouse-arrest privilege was: (1) applied only to bar serving process while people were out of their jurisdiction of residence; (2) applied only in private civil suits, not in an immigration enforcement context; and (3) had been replaced by a privilege against service of process, there is no basis for concluding that the INA incorporated any limitation on courthouse arrests.

3. Even if the INA incorporated a common-law privilege, it has been displaced.

Even if the State could prove that the INA originally incorporated a federal common-law privilege against civil arrest, the statutory immigration scheme now speaks comprehensively to how Congress intends the federal government to enforce federal immigration law and supplants any federal common-law privilege. A federal common-law rule applies only until the "field has been made the subject of comprehensive legislation or authorized administrative standards." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313-14 (1981) (quotation marks and citation omitted). Displacement is different from preemption; no "clear and manifest congressional purpose" is required. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011).

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As the Supreme Court has stressed, "[t]he federal statutory structure instructs when it is appropriate to arrest an alien during the removal process." *Arizona*, 567 U.S. *Id.* at 407. Indeed, a 2006 amendment to the INA expressly contemplates that immigration officials will undertake enforcement actions in courthouses. In so doing, Congress clearly displaced any common law privilege that might otherwise apply. *See* 8 U.S.C. § 1229(e). Section 1229(e)(2) describes what information can be used from "an enforcement action . . . taken against an alien . . . [a]t a courthouse (or in connection with that appearance of the 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 subject to extreme cruelty or if the alien is described" in the U- and T-visa statutory provisions. 8 U.S.C. § 1229(e)(2). It requires the arresting officer to certify that he or she did not rely on confidential information that was part of that case in determining the alien's admissibility or deportability. *See* 8 U.S.C. § 1367. If Congress believed that DHS were not allowed to make arrests at courthouses, there would be no reason to include § 1229(e) in the INA. The provision makes clear that Congress understood that DHS has the authority to make courthouse arrests in immigration matters and determined to require certifications of compliance for some of those arrests.

The conclusion that Congress contemplated, and authorized, immigration officers to arrest aliens at courthouses is reinforced by the only explicit limitation on arrest the INA, that is, the exception for aliens who are in state custody serving a criminal sentence which requires DHS to await the completion of the alien's term of criminal imprisonment. 8 U.S.C. §§ 1226(c); 1231. In all other circumstances, Congress has authorized DHS to detain removable aliens whenever they are released from state imprisonment "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c). When DHS arrests an alien on a warrant, the statute imposes no limitations on that authority. *Id.* § 1226(a) and (e); 8 U.S.C. §§ 1231(a)(2) and (a)(6). So too, Congress gave DHS broad warrantless-arrest authority. 8 U.S.C. § 1357(a)(2). Congress provided even broader arrest authority within a "reasonable distance from any external boundary of the United States" to "board and search for

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aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle." 8 U.S.C. § 1357(a)(3). When Congress wanted to restrict immigration officers' powers, it did so explicitly, authorizing "access to private lands" within "twenty-five miles" of the border, but limiting access to "dwellings" and restricting warrantless entry to "the premises of a farm or other outdoor agricultural operation." 8 U.S.C. §§ 1357(a)(3), (e).

Taken together, these provisions show Congress knew how to limit DHS's arrest authority and made conscious, limited, choices about when to do so. Because Congress specifically delineated DHS's immigration-arrest authority and authorized arrests by warrant without limitation, it has overridden any common-law privilege. *See, e.g., Am. Elec. Power Co.*, 564 U.S. at 424.

F. The 2018 ICE Directive is Not Arbitrary and Capricious.

Because its request for relief is directed at the so-called "Courthouse Arrest Policy," not the 2018 ICE Directive, the State has not actually argued that the 2018 ICE Directive is arbitrary and capricious. Any such argument would lack merit. The 2018 Directive is not only *not* final agency action, it is also not an unexplained departure from past practice. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Agency action is not arbitrary and capricious if there is a rational connection between the facts found and the choice made); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (an agency is generally empowered to change its policy). Instead, the Directive explains how the agency will apply previously existing courthouse arrest policy in states that refuse to cooperate with immigration enforcement. It also explains the need to continue courthouse-enforcement policies and the public dangers created by noncooperation. And it explains how the public interests favor enforcement of the immigration laws, including through courthouse arrests. The State's argument that DHS failed to adequately consider that its policy would deter aliens from participating in state court proceedings or accessing other state services is undermined by the 2011, 2014, and 2018 Directives, which reflect consideration of the consequences of courthouse arrest policy on state courts, victims, witnesses, and family members of target aliens.

III. The Balance of Equities and Public Interest Favor Enforcing the Directive.

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The State fails to demonstrate the balance of equities favor it or that an injunction is in the public interest. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (*citing Nken v. Holder*, 556 U.S. 418, 435 (2009)) (when the government is a party, the balance of equities and public interest factors merge). The Directive serves a public-safety interest and absent a showing that raises serious questions about whether it violates the APA, the balance of equities and public interest favor its enforcement.

The harms the States alleges are outweighed by the harms that the public and the federal government would suffer if DHS was unable to arrest fugitive aliens at the one place at which it can safely and reliably find them in Washington. Attorney General William P. Barr and Acting Secretary Chad F. Wolf addressed the public dangers Washington's non-cooperation policies and sanctuary laws have created for the citizens of Washington in a letter to Chief Justices Walters and Fairhurst. Dkt. 7, Ex. V. It is undisputed that Washington officials are now prohibited from honoring immigration detainers and regularly release criminal aliens with convictions for serious and violent offenses - including domestic violence assaults, firearm offenses, drug trafficking offenses, and violation of protection orders - back into the community. *Id.* at 1. That practice creates significant risks.

Civil immigration enforcement actions can minimize some of this public danger. Arresting aliens at courthouses minimizes risk because individuals entering courthouses are typically screened by law enforcement personnel and searched for weapons and other contraband. Taking a civil immigration-enforcement action inside a courthouse can accordingly reduce safety risks to the public, target aliens, and ICE officers and personnel. Johnson Decl., Ex. E. When ICE has to go out into the community to locate an alien, it puts personnel and bystanders at risk. *Id.* Moreover, tracking down priority targets is highly resource-intensive, and it is not uncommon for criminal aliens and fugitives to evade ICE. *Id.* As such, a courthouse may afford the most likely opportunity to locate a target and take him or her into custody safely. *Id.*

The federal government and the public have a strong interest in "law enforcement and public safety." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *see Nken v. Holder*, 556 U.S. 418, 435 (2009). Indeed, both have a "pressing" interest in the enforcement of federal law. *United States*

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v. Ven-Fuel, Inc., 758 F.2d 741, 761 (1st Cir. 1985). The interests favor allowing DHS to proceed under the 2018 ICE Directive.

III. The Scope of the Injunction Sought is Overbroad.

Even if the State could satisfy the *Winter* or *Cottrell* preliminary injunctive factors, it would not be entitled to the broad injunctive relief it seeks. The normal remedy in an APA case is to "set aside" the agency action - here, the 2018 Directive pertaining to ICE arrests *inside* courthouses - which would mean reverting back to the 2014 policy. But the State asks for much more: an injunction preventing DHS from arresting "parties, witnesses, and any other individual coming to, attending, or returning from state courthouses or court-related proceedings," and "barring DHS from conducting civil immigration arrests at or near Washington courthouses." That is far beyond any relief warranted under the APA.

Further, such an injunction would prohibit DHS from arresting aliens released from jail, in conflict with the statutory duty of DHS to take such aliens into custody. *See* INA § 236(c), 8 U.S.C. § 1226(c); *see also Nielsen v. Preap*, _ U.S. _, 139 S. Ct. 954, 969 (2019). Most county jails in Washington are located in the same building with county courthouses.[12] If DHS were enjoined from arresting removable aliens coming to, attending, or returning from a courthouse, DHS would be barred from arresting aliens being released from jail in 80% of counties in Washington. Such an injunction would conflict with federal law because the INA specifies that DHS "shall take into custody any alien" removable on certain criminal or national security grounds "when the alien is released." *See* INA § 236(c), 8 U.S.C. § 1226(c).

The requested injunction is also overbroad because if the alleged privilege against arrest applies at all, it only applies to individuals conducting court business in specific litigation. *See Lamb*, 285 U.S. at 225-26. The privilege, like any privilege, does not exist as an abstract legal right that a state can invoke on behalf of non-litigants. This court should not fashion a broad, per se rule barring arrests at or near courthouses on the basis of a personal privilege.

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[12] Research conducted by the U.S. Attorney's Office on Google Maps reveals that virtually all of the 39 counties in Washington have county jail facilities that are either attached to or immediately adjacent to (across a street but with no buildings in between the courthouse and the jail), the Superior Court. Only 8 of the 39 counties have jails that are not attached or immediately adjacent to the Superior Court.

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CONCLUSION

The request for a preliminary injunction should be denied.

DATED this 23rd day of January, 2020.

Respectfully submitted,

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From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Comment on Proposed GR 38 -- William D. Hyslop, U.S. Attorney for Eastern District of Washington
Date:	Monday, February 3, 2020 3:58:36 PM
Attachments:	image001.png USAO Comment re Proposed GR 38 FINAL.pdf
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From: Drake, John (USAWAE) [mailto:John.Drake2@usdoj.gov]
Sent: Monday, February 3, 2020 3:55 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Hyslop, Bill (USAWAE) <Bill.Hyslop@usdoj.gov>
Subject: Comment on Proposed GR 38 -- William D. Hyslop, U.S. Attorney for Eastern District of Washington
Importance: High

Hello,

Attached please find a comment in opposition to Proposed GR 38 submitted by William D. Hyslop, United States Attorney for the Eastern District of Washington.

Please confirm receipt.

John

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